OPINION NO. 85-014

Syllabus:

Pursuant to R.C. 309.09, a prosecuting attorney has the duty, upon request, to advise and represent a judge of the court of common pleas of his county as may be appropriate in connection with a situation in which an affidavit of bias and prejudice has been filed against the judge, and also has the duty to represent the bailiff of that judge, as may be appropriate, if the bailiff is deposed in connection with the affidavit of bias and prejudice.

To: Craig S. Albert, Geauga County Prosecuting Attorney, Chardon, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, April 9, 1985

You have requested an opinion concerning the question whether a county prosecutor has an obligation to represent a common pleas judge of his county when the judge has an affidavit of bias and prejudice filed against him. You have also asked whether the county prosecutor has the obligation to represent the bailiff of that common pleas judge when the bailiff is deposed by attorneys who are seeking to establish that the common pleas judge was biased against their law firm.

The general duties of a prosecuting attorney to provide representation for, and legal counsel to, county officials are set forth in R.C. 309.09(A), as follows:

> The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and boards, including all tax supported public libraries, and any of them may require written opinions or instructions from him in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code. (Emphasis added.)

Pursuant to this provision, the prosecuting attorney is responsible for acting as legal adviser to all county officers and boards, and for prosecuting and defending all suits and actions which they direct or to which they are parties. Further, "no county officer may employ any other counsel or attorney at the expense of the county," except as provided in R.C. 305.14.

R.C. 305.14 states, with respect to the employment of counsel other than the prosecuting attorney to represent a county officer:

> The court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county officer in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest, in its official capacity.

Thus, the prosecuting attorney and the board of county commissioners may ask the court of common pleas to authorize the employment of legal counsel other than the prosecuting attorney to represent a county officer in a particular instance.

The question whether the county prosecutor has a general duty under R.C. 309.09 to provide legal counsel to a common pleas judge turns on the question whether such a judge is a county officer for purposes of R.C. 309.09. As your letter of request notes, one of my predecessors concluded in 1955 Op. Att'y Gen. No. 5666, p. 366, that a county probate judge was a county officer for purposes of R.C. 309.09. At that time, the probate court was separate from the court of

common pleas. It is now a division of the court of common pleas. Ohio Const. art. IV, §4; R.C. 2101.01. I find that the conclusion reached in 1955 Op. No. 5666—that, for purposes of R.C. 309.09, a probate judge is a county officer—is persuasive, and that, under the existing scheme of organization of the judiciary, it may reasonably be extended to all judges of the court of common pleas. See generally 1964 Op. Att'y Gen. No. 760, p. 2-3 (finding that juvenile judge (then judge of independent juvenile court, court of domestic relations, or probate court) was county officer, deputy, or employee for purposes of R.C. 325.20); 1962 Op. Att'y Gen. No. 2919, p. 238 (finding that probate judge (then judge of independent probate court) was county officer under R.C. 325.27). Thus, for purposes of your questions, I consider the judge of a court of common pleas to be a county officer, as that term is used in R.C. 309.09.

I am aware that there may be some controversy concerning the classification of a common pleas judge as a county officer for purposes of R.C. 309.09, since the court of common pleas is, in some sense, an instrumentality of the state, and a common pleas judge is considered to be a state officer for certain other purposes. See Tymcio v. State, 52 Ohio App. 2d 298, 369 N.E.2d 1063 (Franklin County 1977); State ex rel. Justice v. Thomas, 35 Ohio App. 250, 256, 172 N.E. 397, 398-99 (Marion County 1930) (the common pleas court judge "is elected in the county in which he resides, and normally serves there, but is vested with state-wide jurisdiction. The state pays by far the greater part of his compensation; so that it is doubtful if he is, within the strict interpretation of the law, a county official"); 1971 Op. Att'y Gen. No. 71-075 (judges of the court of common pleas are "elected state officials" for purposes of R.C. 145.381, relating to membership in the public employees retirement system). A common pleas judge is paid in part by the state, R.C. 141.04; see R.C. 141.06, and in part by the county in which he resided when elected or appointed, R.C. 141.05. See also R.C. 141.07. A common pleas judge is, however, "elected by the electors" of the county in which his court is located, Ohio Const. art. IV, §6; see R.C. 2301.01, and it is the county which funds the operations of the common pleas court. See, e.g., R.C. 305.22; R.C. 307.01 (held unconstitutional, in part, in In re Furnishings for Courtroom Two, 66 Ohio St. 2d 427, 423 N.E.2d 86 (1981)); State ex rel. Slaby v. Summit County Council, 7 Ohio App. 3d 199, 454 N.E.2d 1379 (Summit County 1983). In light of the close connection between the court of common pleas and the county which it serves, I find that a common pleas judge is a county officer for purposes of obtaining legal representation under R.C. 309.09. See 1955 Op. No. 5666. Cf. State ex rel. Attorney General v. Brennan, 49 Ohio St. 33, 38-39, 29 N.E. 593, 594 (1892) ("where. . .duties are wholly performed within the limits of a county, and for the people of that county, the salary to be paid by the disbursing officer of the county, from the funds of the county, the office is a county office, and. . .the person lawfully filling such place is necessarily a county officer"); 1970 Op. Att'y Gen. No. 70-029 (a municipal judge and the clerk of a municipal court are municipal officers for purposes of representation by the city solicitor). See generally R.C. 109.36-.365 (providing for Attorney General to represent and defend officers and employees of the state in civil actions instituted against them); Tymcio v. State (the state's waiver of immunity under the Court of Claims Act does not extend to a court of common pleas).

Your questions concern the obligation of a county prosecutor to provide representation in connection with an affidavit of bias and prejudice filed against a common pleas judge. Such an affidavit is authorized by R.C. 2701.03. When the question with which you are concerned arose, R.C. 2701.03[1] read as follows:

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[1] R.C. 2701.03 has been amended by Am. Sub. H.B. 426, 115th Gen. A. (1984) (eff. April 4, 1985) so that, as of April 4, 1985, the initial portion of that section reads as follows:

> When a judge of the court of common pleas is interested in a cause or matter pending before the court, is related to, or has a bias or prejudice either for or against, a party to a matter or cause pending before the court or his counsel, or is otherwise disqualified to sit in a cause or matter pending

> When a judge of the court of common pleas is interested in a cause or matter pending before the court, is related to, or has a bias or prejudice either for or against, a party to a matter or cause pending before the court or his counsel, or is otherwise disqualified to sit in a cause or matter pending before the court, on the filing of an affidavit by any party to the cause or matter, or by the counsel of any party, setting forth the fact of the interest, bias, prejudice, or disqualification, the clerk of the court of common pleas shall enter the fact of the filing on the trial docket in the cause and forthwith notify the chief justice of the supreme court. The chief justice, or any judge of the supreme court designated by him, shall pass upon the disqualification of the judge pursuant to Section 5(C) of Article IV, Ohio Constitution. If the chief justice, or any judge of the supreme court designated by him, finds that the judge is disqualified, the court of common pleas of which the disqualified judge is a member, or the chief justice, or any judge of the supreme court designated by him, if the disqualified judge is the only judge of the court of common pleas, shall assign the cause or matter to another judge. The judge so assigned shall try the matter or cause. The affidavit shall be filed not less than three days prior to the time set for the hearing in the matter or cause. (Emphasis added.)

Pursuant to this provision, when any party or the counsel of any party files an affidavit setting forth the fact of interest, bias, prejudice, or disqualification of a common pleas judge, the chief justice of the Ohio Supreme Court, or any judge of the Ohio Supreme Court designated by him, shall pass upon the disqualification of the common pleas judge pursuant to Ohio Const. art. IV, §5(C).

Ohio Const. art. IV, §5(C) states:

> The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

Courts of common pleas are established by the Constitution. Ohio Const. art. IV, §§1, 4.

It is not clear precisely what type of representation of a common pleas judge would be appropriate in a situation in which an affidavit of bias and prejudice has been filed. The usual procedure in such a situation is for the judge simply to remove himself from the case. As was stated in Cuyahoga County Board of Mental Retardation v. Association of Cuyahoga County Teachers, 47 Ohio App. 2d 28, 35, 351 N.E.2d 777, 783 (Cuyahoga County 1975) (citations omitted): "[T]he Supreme

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> before the court, any party to the cause or matter, or the counsel of any party may file an affidavit with the clerk of the supreme court setting forth the fact of the interest, bias, prejudice, or disqualification. The clerk of the supreme court forthwith shall forward the affidavit to the chief justice of the supreme court and notify the clerk of the court of common pleas, and the clerk of the court of common pleas shall enter the fact of the filing on the trial docket in the cause.

The remainder of R.C. 2701.03 is unchanged. Pursuant to this amendment, an affidavit of bias and prejudice against a common pleas judge is to be filed with the clerk of the Ohio Supreme Court, and the responsibility for notifying the chief justice rests with that clerk, rather than with the clerk of the court of common pleas. The responsibility for passing upon the disqualification remains with the chief justice of the Ohio Supreme Court, or any judge of the Ohio Supreme Court designated by him. See Ohio Const. art. IV, §5.

Court has stated that it is ordinarily better for a judge to disqualify himself when an affidavit of bias and prejudice has been filed, even if he is entirely free of bias and prejudice,. . .and. . .we recognize that such is the usual practice in Ohio,. . .and favored by the law. . . ." See State ex rel. Pratt v. Weygandt, 164 Ohio St. 463, 132 N.E.2d 191 (1956); State v. Browning, 9 Ohio Misc. 228, 224 N.E.2d 398 (Ct. App. Lawrence County 1967). There are, however, instances in which a common pleas judge against whom an affidavit has been filed feels that disqualification is inappropriate. In such instances, the judge may, pursuant to R.C. 2701.03 and Ohio Const. art. IV, §5(C), await the determination of the chief justice, or the judge designated by him, on the question of disqualification. See generally State ex rel. Pratt v. Weygandt; Duncan v. State ex rel. Brown, 82 Ohio St. 351, 92 N.E. 481 (1910); City of Kettering v. Berger, 4 Ohio App. 3d 254, 448 N.E.2d 458 (Montgomery County 1982); State v. Cox, 21 Ohio Dec. 299 (C.P. Hamilton County 1911).

No specific procedure has been established by Constitution, statute, or rule to govern the determination of disqualification of a common pleas judge under R.C. 2701.03 and Ohio Const. art. IV, §5(C). It is, however, apparent that there may be a need for fact-finding on the part of the chief justice or other judge who passes upon the disqualification, and that the judge against whom the affidavit was filed may consider it appropriate to make a submission upon his own behalf. See R.C. 141.08 (providing for payment from the state treasury of expenses incurred by the chief justice "while performing his duties under the law and the constitution in determining the disqualification" of a common pleas judge); State ex rel. Pratt v. Weygandt (indicating that the chief justice, considering an affidavit of prejudice, held a hearing at which the judge named in the affidavit testified); State ex rel. Turner v. Marshall, 123 Ohio St. 586, 176 N.E. 454 (1931) (indicating that the judge named in an affidavit of prejudice filed a counter affidavit); State v. Browning (indicating that a hearing was held on an affidavit of prejudice and that the judge named therein testified). See generally Cuyahoga County Board of Mental Retardation v. Association of Cuyahoga County Teachers, 47 Ohio App. 2d at 32 n. 2, 351 N.E.2d at 782 n. 2. It is, further, apparent that a judge may consider it prudent to have legal counsel in such matter. See White v. Hicks, 118 Ohio App. 56, 193 N.E.2d 193 (Ashtabula County 1961), appeal dismissed, 174 Ohio St. 102, 186 N.E.2d 834 (1962).

It is not clear that a proceeding on an affidavit of bias and prejudice is a "suit" or "action" to which a common pleas judge is a "party" or which it is appropriate to "prosecute" or "defend" as those terms are used in R.C. 309.09. It has been stated that a judge against whom an affidavit is filed "is not a party and has no interest in the subject matter of the litigation in which the affidavit is filed, and hence has no right to appeal any order of disqualification." White v. Hicks, 118 Ohio App. at 58, 193 N.E.2d at 194. Judge Taft, in a dissent to State ex rel. Pratt v. Weygandt, quoted Berger v. United States, 255 U.S. 22, 35 (1921), as follows: "of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside?" 164 Ohio St. at 479, 132 N.E.2d at 201. It has, further, been stated that, in passing upon an affidavit of bias and prejudice, a judicial officer performs a duty which, "while judicial in character, is distinct and separate from the duties of such judge while presiding over the court," and which may be characterized as the action of "an inquisitor into the conduct and attitude" of the judicial officer named in the affidavit. State v. Lindsey, 77 Ohio App. 191, 66 N.E.2d 256 (Hamilton County 1945). It is, however, not necessary for me to determine precisely how a proceeding on an affidavit of bias and prejudice is to be categorized, for, in light of my determination that a common pleas judge is a county officer for purposes of R.C. 309.09, it is clear that the prosecuting attorney has a duty to provide whatever legal advice or representation is appropriate in a particular instance. This conclusion follows both from the language of R.C. 309.09 and from the fact that, if representation is not provided pursuant to R.C. 309.09, representation may be provided at county expense, pursuant to R.C. 305.14, "to assist. . .any. . .county officer in any matter of public business coming before such. . .officer, and in the prosecution or defense of any action or proceeding in which such. . .officer is a party or has an interest, in its official capacity."

The standard for determining whether a county officer is entitled to representation in a particular instance is whether he has an involvement in his

official capacity. In State ex rel. Corrigan v. Seminatore, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981), the Ohio Supreme Court considered a situation in which a prosecuting attorney brought an action against certain members of a county board of mental retardation. The prosecutor refused to represent those members or to request that other counsel be provided pursuant to R.C. 305.14. In fact, the prosecutor contended that the board members should not be allowed representation at public expense. The Ohio Supreme Court rejected that contention and concluded that the board members were entitled to representation at public expense because the action was brought against the board members in their official capacity, "to recover from them for actions which they performed in their official capacity as members of the board of mental retardation in furtherance of the public functions of said board, rather than personally for their own benefit." 66 Ohio St. 2d at 464, 423 N.E.2d at 110. The Seminatore case thus supports the proposition that a prosecuting attorney has a duty to provide representation to a county officer whenever that officer, in his official capacity, requires legal representation.[2] See generally Board of Education ex rel. Bettman v. Board of Education, 17 Ohio N.P. (n.s.) 439 (C.P. Hamilton County 1914), aff'd, 4 Ohio App. 165 (Hamilton County 1915) (public officers acting in good faith to carry out official duties are entitled to have legal representation provided at public expense).

In determining when a prosecuting attorney has a duty to represent a county officer, my predecessors have applied essentially the same standard as that applied in the Seminatore case—that the duty exists whenever the facts and circumstances show that the officer has engaged in a well-intended attempt to perform his official duties. E.g., 1980 Op. Att'y Gen. No. 80-076; 1977 Op. Att'y Gen. No. 77-039; 1954 Op. Att'y Gen. No. 4567, p. 570; 1933 Op. Att'y Gen. No. 1750, vol. II, p. 1603; 1912 Op. Att'y Gen. No. 40, vol. II, p. 1107. See generally 1972 Op. Att'y Gen. No. 72-076 (clarified and amplified by 1973 Op. Att'y Gen. No. 73-029). It has, thus, been recognized that the prosecuting attorney's duty to provide representation in a particular instance is conditioned upon his making the appropriate findings:

> It cannot be said, therefore, that there is ever found, in a case of this sort [a civil action against the county coroner], a duty to defend as we normally understand that term. It would be more appropriate to say that the prosecuting attorney in such a case is under a duty to make a careful evaluation of such facts and circumstances and is then authorized to defend the officer concerned if such evaluation indicates that there is involved a well intentioned attempt to perform an official duty on the part of the defendant.

1954 Op. No. 4567 at 574 (emphasis in original). The decision as to whether to provide representation in a particular instance may be a difficult one, see Op. No. 77-039, depending upon the facts involved. Further, there may be some risk of liability in an action to recover public funds expended for a private purpose if the prosecuting attorney provides representation where there is a clear lack of good faith on the part of the public official. See Op. No. 80-076. See generally Op. No. 72-076; 1971 Op. Att'y Gen. No. 71-080. Thus, the determination as to whether to provide representation in a particular instance must be made by the county prosecutor, in light of all the circumstances, rather than by this office. I can, however, advise you generally that, pursuant to R.C. 309.09, a prosecuting attorney has a duty, upon request, to advise and represent a judge of the court of common pleas of his county as may be appropriate in connection with a situation in which an affidavit of bias and prejudice has been filed against the judge.

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[2] It is apparent that a prosecuting attorney has no duty to advise a judge on matters that involve the exercise of judicial functions. See 1933 Op. Att'y Gen. No. 208, vol. I, p. 299 at 301 ("[t]he existence of a legal adviser for a judge to give advice upon questions of law and procedure involved in cases would be an anamoly in our judicial system, and I am of the opinion that [G.C. 2917, now R.C. 309.09] does not impose such duty upon the prosecuting attorney").

You have also asked whether the prosecuting attorney has a duty to represent the bailiff of the common pleas judge when the bailiff is deposed by attorneys who are seeking to establish that the common pleas judge was biased against their law firm. I believe that the duty of the prosecuting attorney to provide the common pleas judge with appropriate legal advice and representation in connection with an affidavit of bias and prejudice includes the duty to provide appropriate representation to any member of the judge's staff who may be involved in the matter, provided that the facts and circumstances show that the individual staff member has engaged in a well-intended attempt to perform his job. See R.C. 309.09; R.C. 305.14. I find that the prosecutor's duty to represent such a staff member exists as an adjunct to the prosecutor's duty to act as legal adviser for the common pleas judge and, thus, that the duty to represent exists regardless of whether the individual staff member may himself be considered a county officer who is entitled to representation under R.C. 309.09. Cf. R.C. 109.36-.365 (expressly authorizing the Attorney General to represent and defend both officers and employees of the state); Op. No. 80-076 and 1933 Op. No. 1750 (deputy sheriff is officer for purposes of representation by prosecuting attorney). See generally Op. No. 72-076; Op. No. 71-080 (concept of public purpose has been expanding); 1928 Op. Att'y Gen. No. 2835, vol. IV, p. 2541. I conclude, therefore, that in the situation which you have described, the prosecuting attorney has the duty to represent the bailiff of the common pleas judge as may be appropriate under the circumstances. See generally 1927 Op. Att'y Gen. No. 689, vol. II, p. 1175.

It is, therefore, my opinion, and you are hereby advised, that, pursuant to R.C. 309.09, a prosecuting attorney has the duty, upon request, to advise and represent a judge of the court of common pleas of his county as may be appropriate in connection with a situation in which an affidavit of bias and prejudice has been filed against the judge, and also has the duty to represent the bailiff of that judge, as may be appropriate, if the bailiff is deposed in connection with the affidavit of bias and prejudice.