Note from the Attorney General's Office:

1980 Op. Att'y Gen. No. 80-076 was overruled in part by 1988 Op. Att'y Gen. No. 88-055.

OPINION NO. 80-076

Syllabus:

1. A deputy sheriff is an officer for purposes of R.C. 309.09. Hence, pursuant to R.C. 309.09, a county prosecutor has a duty to represent a deputy sheriff who has been charged with criminal assault if the facts and circumstances on which the action is based show that the suit arose out of a well-intended attempt on the part of the deputy to perform duties attending his official position. (1933 Op. Att'y Gen. No. 1750, p. 1603 approved and followed.)

2. A deputy sheriff who has been charged with a criminal offense and found innocent of such offense by a court of law is not entitled to representation at the expense of the county if the prosecutor determines, pursuant to R.C. 309.09, that no such entitlement exists.

3. R.C. 305.14 permits a court of common pleas to authorize the board of county commissioners to employ legal counsel to assist the prosecuting attorney "upon the application of the prosecuting attorney and board of county commissioners"; it does not specifically require application to be made before counsel has been hired and work has commenced. A determination as to whether to grant such an application rests in the discretion of the court.

4. No statute or rule in Ohio provides for the recovery of attorneys fees from a person who instigated a criminal action.

To: Thomas R. Spellerberg, Seneca County Pros. Atty., Tiffin, Ohio
By: William J. Brown, Attorney General, November 18, 1980

I have before me your request for an opinion concerning the obligation of a county to reimburse a deputy sheriff who has hired private counsel to defend him against a charge of criminal assault which allegedly occurred in connection with an arrest. You state that said deputy at no time prior to hiring counsel consulted with any county official with regard to the possibility of public representation, and you add that the deputy has been found not guilty in a municipal court action. Your specific questions are as follows:

> 1) Is a deputy sheriff, in this instance, a county employee or an officer as stated in Revised Code Section 309.09 (as held in 1933 OAG 1750)?
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> 2) [Is] the general holding that an officer is liable for his negligence in causing injury to prisoners (46 ALR 94) negated by the finding of innocence in a court of law, and does such finding make the superior

body, in this case either A) the Sheriff or B) the county commissioners, liable for defense of said officer?

3) What is the proper procedure for a deputy sheriff to follow when charged with a crime of this type? Should he first apply to the county commissioners so that they may appoint counsel, or should he retain counsel privately, and in the instant case since he did not first consult - does that preclude reimbursement from the county?

[4)] Could the county be reimbursed from [the victim of the alleged assault] since this was not a civil action?

Your first question asks whether a deputy sheriff is an officer within the meaning of R.C. 309.09. The duty of the prosecutor as legal adviser to the county and its representatives is set forth in R.C. 309.09, which reads in pertinent part:

> 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.)

The question of whether a deputy sheriff is an officer within the meaning of this section was answered in the affirmative in 1933 Op. Att'y Gen. No. 1750, p. 1603. It was concluded therein that although deputy sheriffs are not officers within the constitutional meaning of the term, they do come within the term "officers" as used in G.C. 2917 (now R.C. 309.09). The conclusion reached with respect to the prosecutor's duty to defend deputy sheriffs sued for false arrest was set forth in the syllabus as follows:

> It is the duty of a prosecuting attorney to defend a county sheriff and deputy sheriff in actions brought against them for false arrest if the facts and circumstances on which the actions are based show that the suits arise out of a well intended attempt on the part of such sheriff and deputy sheriff to perform duties attending their official positions.

I concur in the conclusion set forth in that opinion. Therefore, it is my opinion that a deputy sheriff is an officer for purposes of R.C. 309.09 and, as such, is entitled to representation by the county prosecutor under certain circumstances.

Based upon telephone conversations between your office and members of my staff, I understand that in answer to your second question you would like a clarification of the circumstances under which a county is liable for the cost of defending an officer (either by providing him with the services of the county prosecutor or by compensating him for his expenses in retaining private counsel). The county is liable under R.C. 309.09 only where the prosecutor has a duty to defend the public official involved in the action. The pertinent language of R.C. 309.09, that the county prosecutor "shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party" (emphasis added), seems to give the prosecutor a mandatory duty to represent such officer or board in either of the two situations it describes—namely, whenever an officer or board so directs or is a party. If, however, the statute were given this meaning, the prosecutor could be called upon to represent an officer in a purely private suit to which the officer was a party. Such an interpretation would clearly violate the principle that public money may be used only for public purposes. See Kohler v. Powell, 115 Ohio St. 418, 154 N.E. 340 (1926). It is probable that the legislature, in using the terms "officer" and "board," meant for this section to apply only to situations which arose with regard to, or as a result of, the official duties of such officer or board. Since the meaning of R.C. 309.09 is ambiguous with regard to the

situations in which the prosecutor must represent an officer at a legal proceeding, further clarification is needed. To aid in the interpretation of statutes, R.C. 1.49 provides in part that, "[i]f a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: . . . (D) The common law or former statutory provisions, including laws upon the same or similar subjects."

The common law test used to determine the duty of a county prosecutor to defend actions brought against county officers was clarified in No. 40, Annual Report of the Attorney General for 1912, which at 1107-08 reads as follows:

> While there is no direct statutory authority for so holding I am of the opinion that it is the duty of the legal officer of a county. . .to defend some actions brought against other executive officers of the subdivision. . .for damages for the alleged wrongful use of their official powers. One instance of this sort that occurs to me is that in which the action which constitutes the alleged abuse of power is taken under the advice of the legal officer himself. In general, whenever the circumstances would indicate to the prosecutor. . .that the officer against whom the action has been brought in committing the official act complained of has proceeded with due caution and in good faith and has consulted with his official legal adviser under circumstances under which he ought to consult with him, he ought to serve the officer in his official capacity. In such cases public officers ought not to be subjected to suits by private individuals at the peril of being obligated to defend themselves.
>
> To hold otherwise would be to encourage captions [sic] or meaningless litigation and discourage the acceptance of public office on the part of those who might be apprehensive of such litigation.
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> The rule which I have mentioned is one which has been followed by this department within reasonable limits. It is generally advisable, in my judgment, for a public officer who is privately sued to have his own counsel; and if privately employed such counsel should, of course, be privately compensated. The facts of each case ought to determine the question as to whether a special assistant to a prosecuting attorney for example, employed for the purpose of defending such an action, should be paid out of the public treasury. For this reason I would rather not advise you categorically in this matter. (Emphasis added.)

This common law rule providing for a case by case analysis was adopted by 1933 Op. No. 1750 which, with respect to the statutory duty of a county prosecutor under R.C. 309.09, concluded as follows:

> It is the duty of a prosecuting attorney to defend a county sheriff and deputy sheriff in actions brought against them for false arrest if the facts and circumstances on which the actions are based show that the suits arise out of a well intended attempt on the part of such sheriff and deputy sheriff to perform duties attending their official positions.

See also 1977 Op. Att'y Gen. No. 77-039 (prosecutor's duty to defend hospital trustees in suit for mismanagement of funds); 1954 Op. Att'y Gen. No. 4567, p. 570 (prosecutor's duty to defend coroner in suit for damages for alleged illegal autopsy).

This test has also been used to determine the duty of a city solicitor pursuant to R.C. 705.11 and 733.53. See, e.g., 1970 Op. Att'y Gen. No. 70-028 (city solicitor's duty to defend judge in suit arising out of conduct of his official duties); 1965 Op. Att'y Gen. No. 65-205 (action for malicious prosecution brought against village mayor and chief of police).

R.C. 309.09, which sets forth the duty of the prosecutor to represent county

officers and boards, does not limit this duty to civil actions only; rather, the language of R.C. 309.09 provides in part that the prosecutor "shall prosecute and defend all suits and actions" (emphasis added). A recent opinion has concluded that the authority to defend an accused officer is the same whether the alleged violation is civil or criminal. 1971 Op. Att'y Gen. No. 71-080 (concerning solicitor's duty where police officers charged with violation of 18 U.S.C. 242).

The analysis set forth in the above opinions is slightly different from the one discussed in Annot., 46 A.L.R. 94 (1927), to which you have referred in your question. The annotation deals with common law principles of respondeat superior and the liability of the master for a third party's damages which have been caused by the acts of one under the master's control. Your particular inquiry, however, addresses itself not to liability in the form of damages to an injured party, but rather to the obligation of a county to provide counsel to an officer involved in a criminal case.

You have informed my staff that it is your opinion that the alleged action in this case did not occur during a well-intended attempt to perform an official duty and you therefore request a clarification of the extent of your power to reject a request for public representation. While 1933 Op. No. 1750 concludes that a prosecutor has the discretionary power under R.C. 309.09 to represent an officer who deserves the support of his employer, there is no fixed obligation on the part of the county which may be enforced by such officer in an action at law. See 1928 Op. Att'y Gen. No. 2835, p. 2541, 2548 (concerning municipal police). See also Op. No. 71-080 (finding that although there is no legal obligation on the part of a government entity (as represented by a city council or board of county commissioners) to defend an officer, such entity may choose to recognize a moral obligation if it appears that the solicitor (or prosecutor) has made a judgmental error).

The conclusion that a prosecutor has no legal obligation to represent an officer is based on the unusual use of the term "duty" with respect to this problem. It was stated in 1954 Op. No. 4567 at 574:

> It cannot be said, therefore, that there is ever found, in a case of this sort, 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. (Emphasis added.)

Op. No. 72-076 finds that this "duty" is actually little more than an authorization to defend if and when an evaluation indicates its desirability. That opinion discusses the risk to the attorney involved should a clearly wrongful determination be made. Op. No. 72-076 states: "The decision to defend involves some risk for the city [or] county. . .attorney involved. If the evidence at trial shows a clear lack of good faith, the attorney might run some risk of a civil action to recover public funds expended for a private purpose" (emphasis added).

Your second question asks, in essence, whether a deputy sheriff who has been charged with a criminal offense and found innocent of such offense by a court of law is entitled to reimbursement from the county for costs incurred in securing private representation regardless of the determination of the prosecuting attorney with regard to the issue of good faith. In 1928 Op. Att'y Gen. No. 2835, p. 2546 a former Attorney General answered this question in the negative, stating:

> I do not believe that a distinction should be drawn between those cases which result favorably to the officer and those in which a liability is imposed upon him, provided, however, that at the time of the commission of the injury he was in good faith attempting to perform certain duties incident to his office.

This analysis would apply equally to situations in which the prosecutor had determined that the officer was not acting in good faith, based on the fact that the issue to be determined by the prosecutor is not whether the officer in fact committed an offense, but rather whether the alleged action was a purely private act or whether it was a public act which occurred in the furtherance or performance of official duties. Since there is clearly no need to represent a public officer in his individual and purely private actions, a finding of innocence by the court in an action which had been determined by the prosecutor to be purely private would not affect the duty of the prosecutor to represent such officer.

Therefore, to summarize the answer to your second question, pursuant to R.C. 309.09, a county is liable for the cost of representing an officer or board and the county prosecutor has a concomitant duty to represent a deputy sheriff who has been charged with criminal assault which allegedly occurred in connection with an arrest if the prosecutor finds that the facts and circumstances on which the action is based show that the suit arose out of a well-intended attempt on the part of the deputy to perform duties attending his official position. Since the inquiry of the prosecutor relates to whether a deputy sheriff is engaged in a public or a private act, and not to the guilt or innocence of the deputy, a finding of innocence by a court of law subsequent to the prosecutor's determination that the act was a private one is not relevant to the prosecutor's determination of his duty to represent such deputy.

Your third question pertains to the procedure to be followed by a deputy sheriff when charged with a crime arising within the course of his official duties. This procedure is clearly set forth in R.C. 309.09 and 305.14. R.C. 309.09 states generally that the county prosecutor is the legal adviser to county officers, inter alia, and that "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). R.C. 305.14 states that the court of common pleas may authorize the board of county commissioners to employ private legal counsel. It reads in pertinent part as follows:

> 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. (Emphasis added.)

You ask whether the prosecuting attorney and board of county commissioners may apply, and whether the court may appoint, after private counsel has been hired, where the officer involved failed to consult with the prosecuting attorney beforehand and therefore received no prior determination as to whether or not he had been acting in good faith at the time of the incident. The language of R.C. 309.09 clearly states that no attorney may be hired at the expense of the county except as provided in section 305.14 of the Revised Code. The language of R.C. 305.14 states that the court may authorize the employment of private legal counsel "upon the application" of the prosecuting attorney and the board of commissioners, but it does not specifically state that the application must be made before counsel is, in fact, hired. The language of R.C. 305.14 that the court "may authorize the board to employ" seems to contemplate action occurring prior to hiring of counsel; it does not, however, clearly preclude an application made subsequent to the time counsel is hired.

By granting an application for the authority to hire counsel, the court is in effect authorizing an expenditure of funds for the defense of the officer involved, but it is the board of county commissioners which receives the authority to hire. Such board may decide upon the terms of the employment contract, such as whom to appoint and the amount of reasonable compensation. There appear to be no restrictions upon the board's power to hire and, in particular, there appears to be no

reason why the board may not adopt the officer's choice of attorney if it is satisfied with such selection. The situation would of course be different if the board had some objection to the choice of the officer.

It is clear that the submission of an application to the court by the prosecutor and the board of county commissioners indicates that the board of county commissioners agrees that the officer is entitled to representation at county expense and that it is satisfied with counsel named in the application (whether or not such counsel was also chosen by the person represented) and with the reasonableness and fairness of the employment contract. Of course, the decision as to whether the application will be granted is left to the discretion of the court. As I noted in Op. No. 77-039, it is not appropriate for this office to make use of the opinions function to attempt to interfere with the judgment of a court on such a matter.

Your final question asks whether a county that has paid for the services of private counsel to assist one of its officers is therefore entitled to reimbursement from the party who instigated a criminal action against such officer. The general rule, in the absence of statutory authorization to the contrary, is that the prevailing party in litigation is not entitled to recover any sum for his attorneys fees. See generally Olokele Sugar Co. v. McCabe, Hamilton and Renny Co., 53 Hawaii 69, 487 P.2d 769 (1971); U.S. Piping, Inc. v. Travelers Indem. Co., 9 N.C. App. 561, 176 S.E.2d 835 (1970). In City of Euclid v. Vogelin, 152 Ohio St. 538, 90 N.E.2d 593 (1950), the Supreme Court of Ohio held that a defendant must establish a statutory right to have his attorneys fees or any other expenses of the defense included in the costs taxed. R.C. 309.09, which grants the prosecutor the authority to represent an officer or board, does not provide for an award of attorneys fees to the county in cases where the officer or board represented by the prosecuting attorney prevails at trial. Moreover, I am not aware of any other Ohio statutes which authorize an award of attorneys fees to a defendant in a criminal action for assault or to a party who has provided counsel for the defendant, once the defendant has been found innocent of the charges. It does not appear to be relevant to a determination of the right to recover attorneys fees that the party providing counsel is a governmental entity. Therefore, since the recovery of attorneys fees is granted only by statute and I am not aware of any Ohio statute granting a recovery of attorneys fees in a criminal action, I conclude that the county is not entitled to direct reimbursement from the prosecuting witness.

There are, however, certain circumstances in which fees incurred in prior litigation as a result of a tort may be recovered as an item of damages. It is well recognized that in awarding compensatory damages to a successful plaintiff in a suit for malicious prosecution, a jury may consider the attorneys fees expended by the plaintiff in defending the proceedings which the defendant had brought against the plaintiff. See Davis v. Tunison, 168 Ohio St. 471, 155 N.E.2d 904 (1959); Barbish v. Ohio Finance Co., 60 Ohio L. Abs. 339, 101 N.E.2d 792 (1951). Thus, if the facts of the case so warrant, the officer could bring an action for malicious prosecution and recover attorneys fees as one item of compensatory damages.

Once the county has reimbursed the officer for attorneys fees, however, Ohio law is not clear as to whether the county itself may bring the action for malicious prosecution. Other jurisdictions have not answered this question specifically, but have held generally that an action for malicious prosecution is personal to the person directly aggrieved, Coverstone v. Davies, 48 Cal.2d 315, 239 P.2d (1952), cert. denied, 344 U.S. 840 (1952) (parents of victim of alleged malicious prosecution who have paid attorneys fees have no cause of action), and that the action cannot be maintained by one who was not a party to the alleged malicious prosecution. H. Eilerman & Sons v. Nestley, 285 Ky. 412, 148 S.W.2d 287 (1941) (father whose automobile was wrongfully attached as a result of the alleged malicious prosecution of his son has no cause of action for malicious prosecution; proper cause would be wrongful seizure).

Ohio courts have required that the plaintiff in an action for the malicious prosecution of a criminal case show that the prosecution was instituted against him and that he suffered damage, i.e., mental suffering, humiliation, injury to character

or credit, expense of trial, or lost business. Yeager v. Tomich, 45 Ohio L. Abs. 483, 68 N.E.2d 110 (1945). Thus, it does not appear that the county may maintain an action for the malicious prosecution of one of its deputy sheriffs. Whether the facts of your particular case would sustain a cause of action would, however, be a matter for judicial determination. Aside from the possibility of an action for malicious prosecution, I am not aware of any other basis upon which a county may obtain reimbursement of the cost of providing counsel to one of its officers from the person who originally filed a criminal complaint against such officer.

Therefore, since the recovery of attorneys fees, unless allowed as an item of compensatory damages, is granted only by statute, and I am aware of no Ohio statute charging attorneys fees against a person who swears out a criminal complaint, it is my opinion that no reimbursement for attorneys fees is directly available to the county in the case at hand. Since I am, similarly, unaware of any instance in which a county which has provided an officer with representation at the county's expense has been permitted to recover its attorneys fees through an action for malicious prosecution against the prosecuting witness, I am unable to advise that such a remedy is available to you.

In summary, it is my opinion, and you are advised, that:

1. A deputy sheriff is an officer for purposes of R.C. 309.09. Hence, pursuant to R.C. 309.09, a county prosecutor has a duty to represent a deputy sheriff who has been charged with criminal assault if the facts and circumstances on which the action is based show that the suit arose out of a well-intended attempt on the part of the deputy to perform duties attending his official position. (1933 Op. Att'y Gen. No. 1750, p. 1603 approved and followed.)

2. A deputy sheriff who has been charged with a criminal offense and found innocent of such offense by a court of law is not entitled to representation at the expense of the county if the prosecutor determines, pursuant to R.C. 309.09, that no such entitlement exists.

3. The language of R.C. 305.14 permits a court of common pleas to authorize the board of county commissioners to employ legal counsel to assist the prosecuting attorney "upon the application of the prosecuting attorney and board of county commissioners"; it does not specifically require application to be made before counsel has been hired and work has commenced. A determination as to whether to grant such an application rests in the discretion of the court.

4. No statute or rule in Ohio provides for the recovery of attorneys fees from a person who instigated a criminal action.