

**OPINION NO. 2012-002****Syllabus:**

2012-002

1. A prosecuting attorney is required to file and advocate a post-dispositional motion to transfer legal custody of an abused, neglected, or dependent child in the temporary custody of a county department of job and family services that serves as a public children services agency to a person who seeks legal custody of the child when the county department of job and family services directs the prosecuting attorney to do so on its behalf.
2. A prosecuting attorney may not serve as legal counsel for a person who seeks legal custody of an abused, neglected, or dependent child in the temporary custody of a county department of job and family services that serves as a public children services agency during dispositional or post-dispositional proceedings concerning the child.
3. A prosecuting attorney must decline to serve as legal counsel for a person who seeks legal custody of an abused, neglected, or dependent child in the temporary custody of a county department of job and family services that serves as a public children services agency when the county department of job and family services requests the prosecuting attorney to do so.

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**To: Ramona Francesconi Rogers, Ashland County Prosecuting Attorney, Ashland, Ohio**

**By: Michael DeWine, Ohio Attorney General, February 1, 2012**

You have requested an opinion regarding the duties of a prosecuting attorney when a person seeks legal custody of a child that is in the temporary custody

of a county department of job and family services (CDJFS) that serves as a public children services agency.<sup>1</sup> Specifically, you ask:

1. Is a prosecuting attorney required to file and advocate a post-dispositional motion to transfer legal custody of an abused, neglected, or dependent child in the temporary custody of a CDJFS that serves as a public children services agency to a person who seeks legal custody of the child when so requested by the CDJFS?
2. Is a prosecuting attorney required to serve as legal counsel for a person who seeks legal custody of an abused, neglected, or dependent child in the temporary custody of a CDJFS that serves as a public children services agency during dispositional or post-dispositional proceedings concerning the child when the person has not retained private legal counsel?
3. May a prosecuting attorney decline to serve as legal counsel for a person who seeks legal custody of an abused, neglected, or dependent child in the temporary custody of a CDJFS that serves as a public children services agency when the CDJFS requests the prosecuting attorney to do so?

**Duty of a Prosecuting Attorney to Serve as Legal Counsel for a CDJFS that Serves as a Public Children Services Agency**

Your first question concerns the duty of a prosecuting attorney to provide legal advice and representation to a CDJFS that serves as a public children services agency.<sup>2</sup> R.C. 309.09(A) provides:

The prosecuting attorney shall be the legal adviser of the board of

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<sup>1</sup> This opinion does not consider whether you may serve as private legal counsel for a person seeking legal custody of a child, as you have elected not to engage in the private practice of law while serving as prosecuting attorney. *See* R.C. 325.11(B) (“[a] prosecuting attorney shall not engage in the private practice of law unless before taking office the prosecuting attorney notifies the board of county commissioners of the intention to engage in the private practice of law”). Instead, we will address whether the duties of the office of prosecuting attorney include providing legal representation and counsel to a person seeking legal custody of a child that is in the temporary custody of a county department of job and family services (CDJFS) that serves as a public children services agency.

<sup>2</sup> R.C. 5153.02 requires each county to have a public children services agency. This function may be performed by the county children services board, CDFJS, or a private or government entity designated under R.C. 307.981. R.C. 5153.02; *see also* R.C. 5153.15. You are concerned with the duty of a prosecuting attorney to provide legal representation to a CDJFS that serves as a public children services agency. Our analysis, therefore, is limited to determining whether a prosecuting attorney is required to file and advocate a post-dispositional motion to transfer legal custody of an abused, neglected, or dependent child in the temporary custody of a CDJFS that

county commissioners, board of elections, all other county officers and boards, and all tax-supported public libraries, and any of them may require written opinions or instructions from the prosecuting attorney in matters connected with their official duties. The prosecuting attorney shall prosecute and defend all suits and actions that any such officer, board, or tax-supported public library 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 [R.C. 305.14].<sup>3</sup> (Footnote added.)

\_\_\_\_\_ serves as a public children services agency to a person who seeks legal custody of the child when so requested by the CDJFS.

<sup>3</sup> R.C. 305.14 sets forth the instances in which a CDJFS that serves as a public children services agency may employ legal counsel other than the prosecuting attorney:

(A) 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.

. . . .

(C) Notwithstanding division (A) of this section and except as provided in division (D) of this section, . . . a public children services agency may, without the authorization of the court of common pleas, employ legal counsel to advise it or to represent it or any of its members or employees in any matter of public business coming before the . . . agency or in the prosecution or defense of any action or proceeding in which the . . . agency in its official capacity, or . . . [an] agency member or employee in the member's or employee's official capacity, is a party or has an interest.

(D)(1) In any legal proceeding in which the prosecuting attorney is fully able to perform the prosecuting attorney's statutory duty to represent the . . . public children services agency without conflict of interest, the . . . agency shall employ other counsel only with the written consent of the prosecuting attorney. In any legal proceeding in which the prosecuting attorney is unable, for any reason, to represent the . . . agency, the prosecuting attorney shall so notify the . . . agency, and, except as provided in division (D)(2) of this section, the . . . agency may then employ counsel for the proceeding without further permission from any authority.

(2) A public children services agency that receives money from the county general revenue fund must obtain the permission of the board

The duty imposed upon a prosecuting attorney by R.C. 309.09(A) includes preparing, filing, and advocating pleadings, motions, and other documents in a civil or criminal proceeding when a county officer or board directs him to do so or when a county officer or board is a party in the proceeding. *See* 2011 Op. Att’y Gen. No. 2011-006 at 2-45 (“[w]hen an attorney advises and represents a political subdivision, an attorney-client relationship exists between the attorney and the political subdivision. During the course of that relationship, the attorney provides legal advice and opinions to the political subdivision and advocates on behalf of the political subdivision in adversarial proceedings” (citation omitted)); 2004 Op. Att’y Gen. No. 2004-032 at 2-292 (“the statutory term ‘legal adviser’ has been construed generally to mean counselor and attorney and to carry with it the obligation or duty of providing all types of legal services that an officer or board needs for the performance of its statutory functions”); 1930 Op. Att’y Gen. No. 1814, vol. I, p. 679, at 682 (a prosecuting attorney, as the legal adviser to all township officers, “should act for the township trustees in the capacity of an attorney with respect to all matters where the trustees needed an attorney, whether to advise them, prepare legal documents for them, or to conduct litigation”); Ohio Prof. Cond. R. (second clause of the preamble) (“[i]n representing clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer asserts the client’s position under the rules of the adversary system”); *Black’s Law Dictionary* 1221 (6th ed. 1990) (the word “prosecute” means “[t]o follow up; to carry on an action or other judicial proceeding; to proceed against a person criminally. To ‘prosecute’ an action is not merely to commence it, but includes following it to an ultimate conclusion”).

However, a prosecuting attorney is not required to prepare, file, or advocate pleadings, motions, and other documents in a civil or criminal proceeding when a county officer or board directs him to do so unless a county officer or board has authority to participate in the proceeding. *See* 2004 Op. Att’y Gen. No. 2004-032 at 2-292 n.7 (“there can be no duty to provide legal services in a matter in which the officer or board is not authorized to act”); 1998 Op. Att’y Gen. No. 98-005 at 2-30 (R.C. 309.09 gives the prosecuting attorney the duty of providing county officers and boards “with legal advice and representation in matters connected with their duties”); 1989 Op. Att’y Gen. No. 89-083 at 2-391 (“[t]he duty of a county prosecuting attorney to represent a board of township trustees . . . is not absolute, but depends upon such board’s authority to participate in a legal proceeding or controversy”); 1959 Op. Att’y Gen. No. 172, p. 85, at 89-90 (a prosecuting attorney has a duty to prosecute any action in which a county officer or board “may lawfully initiate or direct”). Consequently, if a CDJFS that serves as a public children services agency is a county office for purposes of R.C. 309.09(A), a prosecuting attorney is required to prepare, file, and advocate on behalf of the CDJFS pleadings, motions, and other documents in a civil or criminal proceeding that is connected to the performance of the official duties of the CDJFS when the CDJFS directs the prosecuting attorney to do so.

of county commissioners of the county served by the agency before employing counsel under division (C) of this section.

Prior opinions of the Attorney General have determined that a CDJFS is a county board to which the provisions of R.C. 309.09(A) apply. 1989 Op. Att’y Gen. No. 89-015 at 2-69; 1988 Op. Att’y Gen. No. 88-094 at 2-454 and 2-455; 1987 Op. Att’y Gen. No. 87-090 at 2-598 and 2-599; *see* R.C. 329.01; R.C. 329.02; R.C. 329.04(B); *see also* 2005 Op. Att’y Gen. No. 2005-025 at 2-260 through 2-265; 1983 Op. Att’y Gen. No. 83-078 at 2-317 and 2-318. *See generally* R.C. 1925.04(B) (“[i]f an action is brought on behalf of a [CDJFS], a representative of the prosecuting attorney of the county, designated under [R.C. 1925.18], may commence the action”); R.C. 1925.18(B) (“[d]ivision (A) of this section does not preclude the appearance of the prosecuting attorney on behalf of a [CDJFS] as provided in [R.C. 309.09]”); 2004 Op. Att’y Gen. No. 2004-032 at 2-288 (“[f]or purposes of R.C. 309.09, county boards are generally ‘limited to boards which are essentially a subdivision of a county or a subordinate department of the county’” (quoting 1981 Op. Att’y Gen. No. 81-059 at 2-237)). This means that a prosecuting attorney is required to be the legal adviser and representative of a CDJFS that serves as a public children services agency and that he must prepare, file, and advocate on behalf of the CDJFS pleadings, motions, and other documents in a civil or criminal proceeding that is connected to the performance of the official duties of the CDJFS when the CDJFS directs the prosecuting attorney to do so.

A CDJFS that serves as a public children services agency and that has been awarded temporary custody of an abused, neglected, or dependent child at a dispositional hearing conducted pursuant to R.C. 2151.35 has the authority to file a motion with the juvenile court that issued the dispositional order to modify the order while the court retains jurisdiction over the child.<sup>4</sup> R.C. 2151.353(E)(2); R.C. 2151.415(A), (F); R.C. 2151.417(B); Ohio R. Juv. P. 34(G); *see also* R.C. 2151.416(E); Ohio R. Juv. P. 14(C). *See generally* R.C. 5153.16(A)(19) (a public children services agency must “[m]ake reasonable efforts to place the child in a timely manner in accordance with the permanency plan approved under [R.C. 2151.417(E)] and to complete whatever steps are necessary to finalize the permanent placement of the child”); R.C. 5153.18(A) (a “public children services agency shall have the capacity possessed by natural persons to institute proceedings in any court”); 1975 Op. Att’y Gen. No. 75-035 (syllabus) (“[c]hildren committed by a juvenile court to a county department of welfare [(now a CDFJS)] pursuant to R.C. Chapter 2151, either permanently or temporarily, remain the responsibility of the department until they reach the age of twenty-one, unless the court, upon a proper application, terminates the order of commission at an earlier date”). As summa-

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<sup>4</sup> If a juvenile court determines that a child is an abused, neglected, or dependent child, the court must hold a separate dispositional hearing prior to issuing a dispositional order. R.C. 2151.35(B)(1). After the conclusion of the dispositional hearing, a juvenile court may make any order of disposition that is set forth in R.C. 2151.353, including committing the child to the temporary custody of a CDJFS that serves as a public children services agency. R.C. 2151.35(B)(3); R.C. 2151.353(A)(2); Ohio R. Juv. P. 34; *see also* R.C. 2151.3520; R.C. 2151.3521. *See generally* R.C. 5153.16(A)(3) (a public children services agency may accept custody of children committed to it by a court exercising juvenile jurisdiction).

rized in Ohio R. Juv. P. 34(G), “[t]he department of human services or any other public or private agency or any party, other than a parent whose parental rights have been terminated, may at any time file a motion requesting that the court modify or terminate any order of disposition.”

Pursuant to this authority, a CDJFS that serves as a public children services agency may, as part of its official duties, file and advocate a post-dispositional motion to transfer legal custody of an abused, neglected, or dependent child in the temporary custody of the CDJFS to a person who seeks legal custody of the child. *See generally* R.C. 5153.16(A)(12) (a public children services agency is required to “[c]ooperate with, make its services available to, and act as the agent of persons, courts, the department of job and family services, the department of health, and other organizations within and outside the state, in matters relating to the welfare of children”). This authority may be exercised whenever a CDJFS that serves as a public children services agency determines that such a transfer of custody is in the best interest of the child and is performed as part of the CDJFS’s official duties to provide for the care and protection of the child. *See, e.g.*, R.C. 2151.412 (a public children services agency shall prepare and maintain a case plan for any child in the temporary custody of the agency and file the plan with the court. The plan shall strive to eliminate with all due speed the need for the out-of-home placement so that the child can safely return home); R.C. 2151.415(A) (in certain situations in which a public children services agency has been given temporary custody of a child, the agency “shall file a motion with the court that issued the order of disposition requesting” the court to issue a disposition order regarding the custody or supervision of the child); R.C. 2151.416 (a public children services agency shall prepare a written summary of the semiannual administrative review of a case plan that includes an estimated date by which the child may be returned to, and safely maintained in, the child’s home or placed for adoption or legal custody); R.C. 2151.417(F) (a public children services agency may appear at a court review regarding a child’s placement and testify and present other evidence with respect to the child’s custody arrangement).

Because the official duties of a CDJFS include filing and advocating such a motion, a prosecuting attorney, as the legal adviser and representative of the CDJFS, is required to file and advocate the motion on behalf of the CDJFS when he is directed to do so by the CDJFS. *See* R.C. 309.09(A); *see also Kline v. Bd. of Township Trustees of Chester Township*, 13 Ohio St. 2d 5, 7-8, 233 N.E.2d 515 (1968) (“the prosecuting attorney of a county is the legal adviser and counsel of a board of township trustees within the county and is required to prosecute and defend any action which may affect such board”); 2004 Op. Att’y Gen. No. 2004-032 at 2-293 (“both the language of R.C. 309.09(A) and the general usage of the term ‘legal adviser’ indicated that the county prosecuting attorney has the obligation or duty to act for a county board in the capacity of an attorney with respect to all matters for which the board needs an attorney”); 1989 Op. Att’y Gen. No. 89-015 (syllabus, paragraph 1) (“[w]ith respect to child support enforcement actions, the county prosecuting attorney must perform those duties expressly imposed by statute upon his office and, where the county department of human services [(now a CDJFS)] has

been designated under R.C. 2301.35 as the child support enforcement agency for the county, such duties as may be required of his office by R.C. 309.09(A)"); 1987 Op. Att'y Gen. No. 87-090 (syllabus, paragraph 3) ("[p]ursuant to R.C. 309.09(A), the county prosecuting attorney must prosecute an action in the small claims division of a municipal or county court on behalf of a county department of human services [(now a CDJFS)]").

Support for this conclusion also is reflected in the language of R.C. 2151.40. This statute states that "[e]very county, township, or municipal official or department, including the prosecuting attorney, shall render all assistance and co-operation within his jurisdictional power which may further the objects of [R.C. 2151.01-.54]." The main objectives of R.C. 2151.01-.54 include, among other things, the care, protection, and mental and physical development of children and the provision of judicial procedures to govern the placement of abused, neglected, and dependent children. R.C. 2151.01. R.C. 2151.40 thus requires a prosecuting attorney to assist a CDJFS that serves as a public children services agency in transferring legal custody of an abused, neglected, or dependent child in the temporary custody of a CDJFS to a person who seeks legal custody of the child. Accordingly, a prosecuting attorney is required to file and advocate a post-dispositional motion to transfer legal custody of an abused, neglected, or dependent child in the temporary custody of a CDJFS that serves as a public children services agency to a person who seeks legal custody of the child when the CDJFS directs the prosecuting attorney to do so on its behalf.

**Duty of a Prosecuting Attorney to Serve as Legal Counsel for a Person Who Seeks Legal Custody of an Abused, Neglected, or Dependent Child**

Your second question asks whether a prosecuting attorney is required to serve as legal counsel for a person who seeks legal custody of an abused, neglected, or dependent child in the temporary custody of a CDJFS that serves as a public children services agency during dispositional or post-dispositional proceedings concerning the child when the person has not retained private legal counsel. It is well settled that a prosecuting attorney has only those powers conferred by statute, either expressly or by necessary implication. 2009 Op. Att'y Gen. No. 2009-050 at 2-374; *see also State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981); *State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (1940). As explained above, R.C. 309.09(A) requires a prosecuting attorney to be the legal adviser to all county officers and boards and prosecute and defend all suits and actions that a county officer or board directs or to which it is a party. In addition, a prosecuting attorney is required to serve as the legal adviser or counsel for various other public bodies, as specified by statute. *See, e.g.*, R.C. 309.09(B); R.C. 309.09(D)-(H); R.C. 3313.35; R.C. 3709.33.

Neither R.C. 309.09 nor any other statute, however, expressly or by implication authorizes a prosecuting attorney to serve as legal counsel for a person who seeks legal custody of an abused, neglected, or dependent child. Also, we are not aware of any statute that either expressly or by necessary implication authorizes a CDJFS or another public body that receives legal services from a prosecuting attorney to require the prosecuting attorney to provide such legal counsel. *See gener-*

*ally In re Guardianship of Spangler*, 126 Ohio St. 3d 339, 2010-Ohio-2471, 933 N.E.2d 1067, at ¶17 (2010) (“[c]ounty boards, being creatures of statute, have no more authority than that specifically conferred upon them or clearly implied by the statute”). Insofar as no statute expressly or by implication authorizes a prosecuting attorney to act as legal counsel for a person seeking legal custody of an abused, neglected, or dependent child or authorizes a CDJFS or other public body that receives legal services from a prosecuting attorney to request or require the prosecuting attorney to provide such legal counsel, a prosecuting attorney may not provide any legal services to a person who seeks legal custody of an abused, neglected, or dependent child. *See* 2009 Op. Att’y Gen. No. 2009-050.

In 2009 Op. Att’y Gen. No. 2009-050 we considered the authority of a prosecuting attorney to act as legal counsel for an organization or person seeking guardianship of an adult with developmental disabilities and reached a similar conclusion. In that opinion we determined that no statute authorizes a prosecuting attorney to act as legal counsel for an organization or person seeking guardianship of an adult with developmental disabilities or a county board of developmental disabilities to request or require the prosecuting attorney to do so. Given this lack of authority, we concluded that a prosecuting attorney may not provide legal services to an organization or person seeking guardianship of an adult with developmental disabilities: “A county prosecuting attorney has no authority to act as legal counsel for an organization or person seeking guardianship of an adult with developmental disabilities, and a county board of developmental disabilities has no authority under R.C. 5126.31(C) or elsewhere to request or require the county prosecuting attorney to do so.” 2009 Op. Att’y Gen. No. 2009-050 (syllabus, paragraph 1).

In reaching this conclusion, 2009 Op. Att’y Gen. No. 2009-050 at 2-376 noted that earlier opinions of the Attorney General examined the duty or authority of a prosecuting attorney to represent in his official capacity private persons and entities. In each of these opinions the lack of a statute either expressly or by implication authorizing a prosecuting attorney to serve as legal counsel for a private person or entity in a particular matter prohibited the prosecuting attorney from serving as the person’s or entity’s legal counsel in the matter. *See, e.g.*, 2004 Op. Att’y Gen. No. 2004-032 (syllabus, paragraph 3) (“[a] county prosecuting attorney has no statutory duty, obligation, or authority to act as legal counsel of a private nonprofit corporation such as the Council for Older Adults”); 2000 Op. Att’y Gen. No. 2000-008 (syllabus, paragraph 1) (“[a] prosecuting attorney has no duty or authority to act as legal adviser or to provide written opinions to a private entity with whom a county officer or entity transacts business”); 1959 Op. Att’y Gen. No. 172, p. 85 (syllabus, paragraph 1) (R.C. 309.09 “imposes no obligation on the prosecuting attorney to defend one who has a contract with a county child welfare board for the custody of children, pursuant to [R.C. 5153.16] in an action for damages for a tort alleged to have been committed by him”); 1959 Op. Att’y Gen. No. 172, p. 85 (syllabus, paragraph 2) (R.C. 309.09 “defining the duties of the prosecuting attorney, does not confer on the county child welfare board power to order such prosecuting attorney to defend one with whom such board has made a contract for the custody of a child, in an action brought against such custodian for an alleged tort against such child or against its parent”).



As evidenced by 2009 Op. Att’y Gen. No. 2009-050, the analysis used in the earlier opinions for determining whether a prosecuting attorney may represent in his official capacity a private person or entity remains controlling today. Hence, the absence of a statute expressly or by implication authorizing a prosecuting attorney to act as legal counsel for a person seeking legal custody of an abused, neglected, or dependent child or authorizing a CDJFS or other public body that receives legal services from a prosecuting attorney to request or require the prosecuting attorney to provide legal services to such a person prohibits a prosecuting attorney from providing any legal services to the person. Therefore, a prosecuting attorney may not serve as legal counsel for a person who seeks legal custody of an abused, neglected, or dependent child in the temporary custody of a CDJFS that serves as a public children services agency during dispositional or post-dispositional proceedings concerning the child.<sup>5</sup> *See generally* R.C. 2151.281(B)(1) (“[t]he court shall appoint a guardian ad litem, subject to rules adopted by the supreme court, to protect the interest of a child in any proceeding concerning an alleged abused or neglected child and in any proceeding held pursuant to [R.C. 2151.414]. The guardian ad litem so appointed shall not be the attorney responsible for presenting the evidence alleging that the child is an abused or neglected child”).

**Authority of a Prosecuting Attorney to Decline to Serve as Legal Counsel for a Person Who Seeks Legal Custody of an Abused, Neglected, or Dependent Child**

Your final question asks whether a prosecuting attorney may decline to serve as legal counsel for a person who seeks legal custody of an abused, neglected, or dependent child in the temporary custody of a CDJFS that serves as a public children services agency when the CDJFS requests the prosecuting attorney to do so. As we determined earlier, a prosecuting attorney may not serve as legal counsel for a person who seeks legal custody of an abused, neglected, or dependent child in the temporary custody of a CDJFS that serves as a public children services agency. In light of this answer, a prosecuting attorney must decline to serve as legal counsel for a person who seeks legal custody of an abused, neglected, or dependent child in the temporary custody of a CDJFS that serves as a public children services agency when the CDJFS requests the prosecuting attorney to do so.

**Conclusions**

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

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<sup>5</sup> When a prosecuting attorney files and advocates a motion to transfer legal custody of an abused, neglected, or dependent child in the temporary custody of a CDJFS that serves as a public children services agency to a person who seeks legal custody of the child, the prosecuting attorney acts on behalf of the CDJFS. *See* R.C. 309.09(A). For the reasons explained above, in such a situation the prosecuting attorney does not serve as legal counsel to the person seeking custody of the child. Instead, the prosecuting attorney may provide legal advice and representation to only the CDJFS.

1. A prosecuting attorney is required to file and advocate a post-dispositional motion to transfer legal custody of an abused, neglected, or dependent child in the temporary custody of a county department of job and family services that serves as a public children services agency to a person who seeks legal custody of the child when the county department of job and family services directs the prosecuting attorney to do so on its behalf.
2. A prosecuting attorney may not serve as legal counsel for a person who seeks legal custody of an abused, neglected, or dependent child in the temporary custody of a county department of job and family services that serves as a public children services agency during dispositional or post-dispositional proceedings concerning the child.
3. A prosecuting attorney must decline to serve as legal counsel for a person who seeks legal custody of an abused, neglected, or dependent child in the temporary custody of a county department of job and family services that serves as a public children services agency when the county department of job and family services requests the prosecuting attorney to do so.