

September 5, 2025

The Honorable Michael C. O'Malley
Cuyahoga County Prosecuting Attorney
The Justice Center
1200 Ontario Street, 9th floor
Cleveland, Ohio 44113

SYLLABUS:

2025-016

The Cuyahoga County Prosecutor has all the duties and responsibilities to the County of Cuyahoga that are assigned by R.C. 305.14, 309.08, and 309.09. These duties and responsibilities were not allocated to the county law director through the County Charter. Because these duties and responsibilities require the exercise of judgment and discretion, they may not be delegated by agreement. (2011 Ohio Atty.Gen.Ops. No. 2011-013, followed.)



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OPINION NO. 2025-016

The Honorable Michael C. O'Malley
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The Justice Center
1200 Ontario Street, 9th floor
Cleveland, Ohio 44113

Dear Prosecutor O'Malley:

You have requested an opinion addressing the duties and responsibilities of the Cuyahoga County Prosecutor under Ohio law and the Cuyahoga County Charter. Specifically, you ask:

May a prosecuting attorney relinquish legal duties that are specifically imposed upon him by both Ohio general law and a county charter by delegating such duties to an entity not under the prosecutor's authority and control, such as the County Director of Law and Law Department, by agreement?

I

The voters of Cuyahoga County adopted a charter form of county government for their county that became effective on January 1, 2010. In light of the new Cuyahoga County Charter, the Cuyahoga County Prosecutor in 2011 requested an attorney general opinion concerning the division of duties and responsibilities between the Cuyahoga County Prosecuting Attorney and the newly created office of Cuyahoga County Director of Law.

My predecessor issued an opinion that thoroughly answers that inquiry. To better address the present question, it is important to revisit the essential elements of the prior opinion. They are as follows:

1. Article V, § 5.06 of the Cuyahoga County Charter is valid and does not conflict with Article IV, § 4.01 of the Cuyahoga County Charter or the general law of the state as incorporated by reference into Article IV, § 4.01 of the Cuyahoga County Charter.
2. The Cuyahoga County Prosecuting Attorney, rather than the Cuyahoga County Director of Law, is responsible for:

- a. Prosecuting or defending a civil lawsuit or administrative action in which the County Executive or County Council is a party;
- b. Prosecuting or defending a civil lawsuit or administrative action in which a county officer, department, board, commission, or other authority appointed by, or under the jurisdiction of, the County Executive or County Council is a party;
- c. Prosecuting or defending a civil lawsuit or administrative action in which a political subdivision other than the county is a party;
- d. Providing legal advice and opinions to county officers, departments, boards, commissions, and other authorities appointed by, or under the jurisdiction of, the County Executive or County Council; and
- e. Providing legal advice and opinions to a political subdivision other than the county.

3. On the basis of Article IV, § 4.01 and Article V, § 5.06 of the Cuyahoga County Charter, both the Cuyahoga County Prosecuting Attorney and Cuyahoga County Director of Law may provide legal advice and opinions to the County Executive and County Council.
4. Neither the Cuyahoga County Director of Law nor the County Council may employ legal counsel for a county officer, office, department, board, commission, or agency.
5. Pursuant to R.C. 305.14, 309.09, and 309.10, and Article II, § 2.03 of the Cuyahoga County Charter, the County Executive may in certain situations employ or authorize the employment of legal counsel for a county officer, office, department, board, commission, or agency. Except as provided in R.C. 305.14, 309.09, and 309.10, the County Executive may not employ or authorize the employment of legal counsel for a county officer, office, department, board, commission, or agency without

obtaining the approval of the Cuyahoga County Prosecuting Attorney.

See 2011 Ohio Atty.Gen.Ops. No. 2011-013, at syllabus.

Following the issuance of that opinion, the Cuyahoga County Prosecutor and the Cuyahoga County Executive, along with the president of county council and the director of law, executed an agreement in August 2013 titled "Agreement Governing the Duties, Powers and Responsibilities of the Cuyahoga County Prosecutor's Office and Department of Law." The agreement was adopted by the Cuyahoga County Council as Resolution No. R2013-0184.

This agreement was not submitted to the voters as an amendment to the county charter. The document purports to divide the duties and responsibilities of the prosecutor and law director. Although the document is quite detailed, for purposes of this inquiry I will focus on the most salient areas where the prosecutor and law director purported to divide their duties. These include the following:

1.b. The Cuyahoga County Department of Law

"The Department of Law shall advise and represent the County of

Cuyahoga, Executive, County Council, Inspector General, Charter Review Commission, departments, agencies, offices, employees, boards and other authorities responsible to the County Executive or Council on all legal matters, including labor negotiations and litigation unless otherwise expressly specified in this Agreement. The Law Department shall also be responsible for Court-related contracts and labor negotiations. With respect to court litigation, the following procedures shall be followed:

- i. Except as provided in subsection l(a)(v) and sub-sections ii, iii, iv, v, vi, and vii herein, the Law Department shall be responsible as the primary litigators for all of the County offices, including all County offices, departments, and other authorities responsible to the County Executive and Council, such as the Fiscal, Medical Examiner, Clerk of Courts, Public Works, Law, Treasurer, Sheriff, Economic Development, Health and Human Services, Purchasing

(Office of Procurement and Diversity), Human Resources, Public Safety and Justice Affairs, Information Technology, and Communications Departments, County Law Library, Charter Review Commission, the County Planning Commission, and the Solid Waste District. The Prosecutor's Office can choose to serve on these matters in a consulting capacity to the Law Department.

- ii. It is understood and agreed that the Law Department shall still serve as the primary litigators for the Sheriff and Medical Examiner Departments on labor and employment litigation, contractual disputes, and purchasing.”

...

2. Designation of Law Department Attorneys as Assistant Prosecuting Attorneys.

“The Cuyahoga County Prosecutor shall designate all current and future attorneys in the Law Department doing litigation for the County as

Assistant Prosecuting attorneys, unless for good cause shown. It is understood and agreed that the Law Department's lawyers will appear in Court pursuant to this designation by the Prosecutor and shall so indicate on all pleadings filed in Court.”

...

6. Outside Legal Counsel

“For retention of outside legal counsel pursuant to ORC 305.14(A), the County Council and County Executive or designee shall each select their own outside legal counsel, and the County Prosecutor shall promptly apply for the appointment of the selected outside counsel in accordance with ORC 305.14(A), unless the County Prosecutor determines that there is a conflict of interest, ethical or competence reasons for not doing so. In that case, the County Prosecutor will promptly advise the selecting party so as to allow for the selection of another outside legal counsel. It is understood and agreed that contracts for legal services with outside legal counsel shall be entered into between

the County and the outside legal counsel, and the Council and Law Department shall each be respectively responsible for monitoring and handling the billing for outside legal counsel retained by them. This provision does not apply to the appointment of outside legal counsel under ORC 305.14(B) and 309.09(C).”

In 2017, a new “Memorandum of Understanding” was executed between the county prosecutor and law director modifying the terms of the 2013 agreement. As you described it, the 2017 MOU “provided that the Prosecutor would handle all litigation for Cuyahoga County, while providing that the Law Department would continue to handle labor negotiations and advising of the County Council, County Executive and certain departments that were deemed to be ‘under’ the Executive.” It appears you question whether this arrangement violates the Charter and Ohio’s general laws.

II

The essential question that I have been asked to resolve is whether the Cuyahoga County Prosecutor can relinquish or delegate duties that were imposed by statute or charter.

“It is the general rule in Ohio that public officials have both such powers as are expressly conferred by statute and such powers as may be reasonably and necessarily inferred from the statutory powers.” *Cummings v. Husted*, 795 F.Supp.2d 677, 689 (S.D. Ohio 2011). The Ohio Supreme Court has reiterated this legal precept many times. For instance, in *Delaney v. Testa*, the Court stated, “The office of county auditor is the creation of Ohio law, and as a result, its powers and duties extend only so far as the statutes grant authority, while being constrained by whatever limits the statutes impose.” 128 Ohio St.3d 248, 253 (2011). *See also State ex rel. Lucas Cty. Bd. of Commrs. v. Ohio Environmental Protection Agency*, 88 Ohio St.3d 166, 171 (2000) (“An administrative agency has no authority beyond the authority conferred by statute and it may exercise only those powers that are expressly granted by the General Assembly”); *Shell v. Ohio Veterinary Med. Licensing Bd.*, 2005-Ohio-2423, ¶32. That said, “[a] county charter may provide for the transfer of the duties, which are imposed upon an elected county officer by general law, to another county officer, regardless of whether such officer is elected or appointed under the charter, so long as the charter provides for the exercise of all powers vested in, and the performance of all duties imposed upon, counties and county officers by law.” 1985 Ohio Atty.Gen.Ops. No. 85-039, paragraph two of the syllabus.

Pursuant to Article X, Section 3 of the Ohio Constitution, Cuyahoga County adopted a charter form of government that became effective January 1, 2010. Article IV, Section 4.01 of the Charter preserves the elected office and duties of the Cuyahoga County Prosecutor:

The Prosecuting Attorney shall be elected, and the duties of that office and the compensation therefor, including provision for the employment of outside counsel, shall continue to be determined in the manner provided by general law.

Article V, Section 5.06 of the Cuyahoga County Charter establishes the appointed position of director of law:

The Director of Law shall be the legal advisor to and representative of the County Executive and County Council. The Director of Law shall be an attorney at law in good standing in the State of Ohio and shall have had at least five years' experience in advising or representing political subdivisions in Ohio.

Neither the 2013 nor the 2017 agreements are actual amendments to the Charter. Article XII, Section 12.10 of the Cuyahoga County Charter provides that “[p]roposed amendments to this Charter shall be submitted to the electors of the County in the manner

provided for by the Ohio Constitution.” County council members introduced a resolution to place a charter amendment on the ballot in 2013 that would have clarified the respective powers, duties, and responsibilities of the county prosecutor and law director. However, instead of proceeding with the charter amendment, the county council passed a resolution authorizing the 2013 agreement between the prosecutor and law director. The resolution states that the agreement was intended to resolve their disagreements “without resort to a Charter amendment.” See Cuyahoga County Council Resolution No. R2013-0184. As a result, the allocation of powers and responsibilities in the 2013 and 2017 agreements have not been made part of the charter to date.

The prosecutor’s duties “continue to be determined in the manner provided by general law.” Article IV, § 4.01 of the Charter. Attorney General Opinion No. 2011-013 explains, “The term ‘general law,’ as used in the context of a charter county government, refers to statutes enacted by the General Assembly that have application to the organization and operation of county government throughout the entire state.” *Id.* at fn. 2, citing *Village of Linndale v. State*, 85 Ohio St.3d 52, 54 (1999); 2008 Ohio Atty.Gen.Ops. No. 2008-032, at 2-333. “Even in a properly established charter form of county government, the General Assembly continues to provide by general law for the ‘government of counties.” *State ex rel. O’Connor v. Davis*, 139 Ohio App.3d

701, 713 (9th Dist. 2000). R.C. 309.09(A) is a “general law” that preexists the charter and establishes the parameters of the office of county prosecutor. In relevant part, the statute states:

The prosecuting attorney shall be the legal adviser of the board of 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 section 305.14 of the Revised Code.

Concerning the employment of outside counsel by a county, R.C. 305.14(A) provides:

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.

R.C. 309.09(C) further provides:

Whenever the board of county commissioners employs an attorney other than the prosecuting attorney of the county, without the authorization of the court of common pleas as provided in section 305.14 of the Revised Code, either for a particular matter or on an annual basis, to represent the board in its official capacity and to advise it on legal matters, the board shall enter upon its journal an order of the board in which the compensation to be paid for the legal services shall be fixed. The compensation shall be paid from the county general fund. The total compensation paid, in any year, by the board for legal services under this division shall not exceed the total annual compensation of the prosecuting attorney for that county.

With this statutory framework in mind, I can proceed to address your question on delegating authority and responsibilities. The legal maxim "*delegata potestas non potest delegari*" (a delegated authority cannot be again delegated) is applicable here. One of my predecessor attorneys general, adhering to this maxim, opined on delegations of authority in 2005 Ohio Atty.Gen.Ops. No. 2005-033, at 2-350:

The general rule regarding the delegation of authority by a public body is that, in the absence of specific statutory authority, a public body may delegate ministerial duties, but may not delegate duties that require the exercise of judgment and discretion. *See, e.g.*, 1997 Op. Att'y Gen. No. 97-054 at 2-332; 1994 Op. Att'y Gen. No. 94-030 at 2-135; 1993 Op. Att'y Gen. No. 93-026 at 2-135; 1987 Op. Att'y Gen. No. 87-083 at 2-558 to 2-559 n.1; 1987 Op. Att'y Gen. No. 87-034 at 2-237; 1979 Op. Att'y Gen. No. 79-067 at 2-223. There is a presumption that "the board or officer whose judgment and discretion is required, was chosen because they were deemed fit and competent to exercise that judgment and discretion and unless power to substitute another in their place has been given, such board or officer cannot delegate these duties to another." *CB*

Transp., Inc. v. Butler County Bd. of Mental Retardation, 60 Ohio Misc. 71, 82, 397 N.E.2d 781 (C.P. Butler County 1979); see also, e.g., *Burkholder v. Lauber*, 6 Ohio Misc. 152, 216 N.E.2d 909 (C.P. Fulton County 1965); *Kelley v. City of Cincinnati*, 7 Ohio N.P. 360, 362 (C.P. Hamilton County 1899); 1991 Op. Att'y Gen. No. 91-048 at 2-251; 1979 Op. Att'y Gen. No. 79-067 at 2-223 ("it would contravene the legislative intent . . . to allow a judgmental and discretionary act to be delegated to an entity other than the entity originally entrusted with the duty by statute").

The general rule concerning delegation of authority by a public agency was also aptly expressed in 1979 Ohio Atty.Gen.Ops. No. 1979-067, at 2-223:

When power or authority is granted to a governmental agency, such agency may exercise only that authority which is expressly conferred on it by statute. *New Bremen v. Public Utilities Commission*, 103 Ohio St. 23 (1921). It follows that the power to delegate authority, if not expressly conferred, is excluded.

There are, however, exceptions to the general rule which allow implication of authority to delegate statutory duties. Whether such authority may be implied is controlled by the nature of the duty. *Kelley v. City of Cincinnati*, 7 Ohio N.P. 360 (C.P. Hamilton County 1900). See also *Bell v. Board of Trustees*, 34 Ohio St.2d 70 (1973). If a duty imposed by statute is purely ministerial, i.e., a “mere physical act,” it may be delegated; the duty is not delegable, however, if it requires judgment and discretion in its performance. 1973 Op. Att’y Gen. No. 73-126 (overruled, in part, for other reasons, by 1977 Op. Att’y Gen. No. 77-064). The presumption exists that the Legislature has delegated duties to an agency named in a statute because the agency is deemed competent to exercise the judgment and discretion necessary for performance of the duties. Cf. 1977 Op. Att’y Gen. No. 77-064 (concluded that certain public officers may not designate alternates to serve in their capacity). It would contravene the legislative intent of such a statute, therefore, to allow a judgmental and discretionary act to be delegated to an entity other than the entity originally entrusted with the duty by statute.

See also 2023 Ohio Atty.Gen.Ops. No. 2023-009 (concluding for similar reasons that the duties of a county record commission and microfilming board cannot be delegated to a board of county commissioners).

Two cases decided by the Eighth District Court of Appeals (Cuyahoga County) are also relevant to whether the county prosecutor's duties may be delegated. First, in *State ex rel. Cty. of Cuyahoga v. Jones Lang Lasalle Great Lakes Co.*, the court dismissed a complaint to collect funds, brought by the Cuyahoga County Law Director on behalf of the county because it was not brought by the county prosecutor. 2017-Ohio-7727, ¶179 (8th Dist.). The law director argued that the 2013 agreement, formally adopted by resolution, gave the law director the authority to file suit. The court of appeals disagreed, noting:

Similar to the Summit County Charter, Article IV, Section 4.01 of the Cuyahoga County Charter states, "The Prosecuting Attorney shall be elected, and the duties of that office, and the compensation therefor, including provision for the employment of outside counsel, shall continue to be determined in the manner provided by general law." Thus, the prosecuting attorney "shall prosecute and defend all suits and actions" for the county, 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.”

Jones Lang Lasalle Great Lakes Co. at ¶76.

The court of appeals dismissed the law director’s argument partially because the 2013 agreement was not an amendment to the Cuyahoga County Charter pursuant to Article XII, § 12.10. *Id.* at ¶78. The court also relied on the reasoning in a prior attorney general opinion, 1995 Ohio Atty.Gen.Ops. No. 1995-035, and on *County of Summit ex rel. Slaby v. Morgan*, 1981 Ohio App. LEXIS 11194 (9th Dist. Nov. 25, 1981). *Id.* at ¶73 to 75.

Second, in a case involving the Cuyahoga County Board of Elections, the Eighth District Court of Appeals held that where the board failed to comply with the statutory requirements in R.C. 305.14(A) for hiring outside counsel to represent the board, a private attorney lacked authority to bring an action on behalf of the board in lieu of the prosecuting attorney under R.C. 305.14(A). *See State ex rel. Dreamer v. Mason*, 2007-Ohio-271, ¶11 (8th Dist.). Therefore, the board’s case was dismissed.

Summit County is the only other county in Ohio that has adopted a charter form of government. A case arising from that county involved an issue very similar to

the present matter. After Summit County adopted its charter, the Summit County Council enacted an ordinance that, in relevant part, authorized the county's general counsel, rather than the county prosecutor, to "represent the County Executive, and all departments under the authority of the County Executive, in all courts of law and equity, both state and federal, and to prosecute and defend all suits in which the County Executive, or any department under the authority of the County Executive, is a party." *State ex rel. O'Connor v. Davis*, 139 Ohio App.3d 701, 703 (9th Dist. 2000). The county prosecutor filed suit to challenge the ordinance delegating the powers and duties of her office to the general counsel. As summarized by 2011 Ohio Atty.Gen.Ops. No. 2011-013, at 2-121, the Ninth District Court of Appeals held that "a county may not use its powers as a charter county to authorize general counsel employed by the county to represent a county officer or board when the county's charter also requires the prosecuting attorney to continue to prosecute and defend suits and actions involving county officers or boards in accordance with R.C. 309.09(A)." The court reasoned that the "general laws [of Ohio] evidence a legislative intent to provide a comprehensive, uniform framework for the role of the prosecuting attorney," and the charter did not authorize the county to override that framework. *O'Connor* at 714.

In the present matter, the county law director contends that the question presented is based on a false

presumption – that the 2013 and 2017 agreements conflict with the charter and the general laws of Ohio. He disputes several of the conclusions that the Attorney General reached in Opinion No. 2011-013. The law director points to Article V, Section 5.06 of the Charter, which states the Director of Law “shall be *the* legal advisor to and representative of the County Executive and County Council.” (Emphasis added.) Further, the Law Director asserts that “it is clear that the Charter carved out the duties of advice and representation of the County Executive and County Council from any such duties of prosecuting attorneys under general law, and allocated them to the new Director of Law.” Additionally, the county law director contends that when the charter converted the formerly elected offices of county auditor, recorder, coroner, clerk of courts, treasurer, and engineer to appointees of the county executive and transferred all of their duties, it also transferred the duty of advising and representing those entities to the director of law.

The law director further asserts that “[p]art and parcel of providing advice to and representing the County Executive is to provide advice to and represent departments, agencies, offices, employees, boards, and other authorities responsible to the County Executive, at the County Executive’s request.” Arguing that there is no reason to change the arrangements now, the law director concludes:

In the end, the County Executive, County Council, two separate Directors of Law, and two separate County Prosecutors agreed to the legal viewpoints expressed in and incorporated into the 2013 Agreement (“clarified” by the 2017 MOU) as to respective powers, duties, and responsibilities of the Law Department and the Prosecutor's Office, which allocation has included the Law Department giving advice to and representing specified individuals and entities, and specifically drafting and approving contracts for specified individuals and entities. It has thus been the *modus operandi* of County government since the inception of its new Charter approximately fifteen years ago.

The assertion that the Cuyahoga County Charter allocated the prosecutor's duties to the law director was soundly rejected in the 2011 attorney general opinion:

Article IV, § 4.01 of the Charter states that “[t]he Prosecuting Attorney shall be elected, and *the duties of that office*, and the compensation thereof, including provision for the employment of outside counsel, *shall continue to be determined in the manner provided by general law.*”

(Emphasis added.) In its Charter, Cuyahoga County has retained the office of prosecuting attorney. And, under the Charter, the prosecuting attorney shall continue to exercise all powers and perform all duties vested in, or imposed by, general law upon the office of prosecuting attorney. In other words, the Charter does not alter or modify the provisions of general law that confer the powers and duties of the Cuyahoga County Prosecuting Attorney.

2011 Ohio Atty.Gen.Ops. No. 2011-013, at 2-114.

Continuing its analysis, the 2011 attorney general opinion stated:

[W]e take the foregoing language of Article IV, § 4.01 of the Charter to mean that the powers and duties of the Cuyahoga County Prosecuting Attorney, as they existed under the general law of the state *prior to* the effective date of the Charter, exist and endure without change or alteration under the Charter *upon and after* its effective date. This further means that upon and after the effective date of the Charter, the Cuyahoga County Prosecuting Attorney is

empowered to exercise without change or interruption the powers and duties that were conferred upon him by the general law of the state prior to the effective date of the Charter. (Emphasis in original.)

Id. at 2-115.

The applicable provisions of the Cuyahoga County Charter, Ohio Revised Code, and other legal precedent have not materially changed since the 2011-013 Opinion. As a consequence, there is no basis to alter the sound reasoning and conclusion reached in the 2011 opinion that the duties of the Cuyahoga County Prosecutor, as they existed prior to the adoption of the county's charter, were not re-directed to the law director through the charter. The 2013 and 2017 agreements that purport to allocate duties between the county prosecutor and the county law director do not alter this conclusion. The duties of the elected county prosecutor, as expressed in R.C. 305.14, 309.08, and 309.09 are not ministerial in nature. Instead, these duties require the exercise of judgment and discretion and, as such, are not subject to lawful delegation to another official by mere agreement.

Although both officials have general obligations to provide advice and opinions to the county executive and county council, as recognized in the 2011 opinion, the specific duties and obligations specified in R.C. 305.14,

309.08, and 309.09 lay within the sole authority of the Cuyahoga County Prosecutor. They may not be truncated or reassigned ad hoc by the 2013 and 2017 agreements because those accords are not amendments to the county charter. If the charter's existing allocation of powers and duties between the prosecutor and law director is to be revised, the county charter contains a method to do so. *See* Article XII, § 12.10, Cuyahoga County Charter.

Conclusion

Accordingly, it is my opinion, and you are hereby advised that:

The Cuyahoga County Prosecutor has all the duties and responsibilities to the County of Cuyahoga that are set forth in R.C. 305.14, 309.08, and 309.09. These duties and responsibilities were not allocated to the county law director through the County Charter. Because these duties and responsibilities require the exercise of judgment and discretion, they may not be delegated by agreement. (2011 Ohio Atty.Gen.Ops. No. 2011-013, followed.)

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive style with a large, looping initial "D".

DAVE YOST
Ohio Attorney General