

OPINION NO. 2010-025**Syllabus:**

2010-025

1. A joint board of county commissioners established under R.C. 6133.02 to undertake a joint county ditch improvement is not a “county board” for the purpose of receiving legal representation from a prosecuting attorney under R.C. 309.09(A). Consequently, a prosecuting attorney is not required to represent a joint board of county commissioners established under R.C. 6133.02.
2. A county commissioner serving on a joint board of county commissioners established under R.C. 6133.02 is not by reason of that service a “county officer” for the purpose of receiving legal representation from a prosecuting attorney under R.C. 309.09(A). Consequently, a prosecuting attorney is not required to represent a county commissioner serving on a joint board of county commissioners with respect to a county commissioner’s discharge of duties related to the actions and decisions of the joint board of county commissioners established under R.C. Chapter 6133.
3. An auditor and treasurer who serve pursuant to R.C. 6133.07 as the fiscal agents of counties participating in a joint county ditch improvement are not by reason of that service “county officers” for the purpose of receiving legal representation from a prosecuting attorney under R.C. 309.09(A). Consequently, a prosecuting attorney is not required to represent an auditor and treasurer in their capacity as fiscal agents of counties participating in a joint county ditch improvement.
4. An engineer who serves a joint board of county commissioners or a joint county ditch improvement pursuant to R.C. 6133.08 is not by reason of that service a “county officer” for the purpose of receiving legal representation from a prosecuting attorney under R.C. 309.09(A). Consequently, a prosecuting attorney is not required to represent an engineer who serves a joint board of county commissioners or joint county ditch improvement pursuant to R.C. 6133.08.
5. A clerk who serves a joint board of county commissioners or a joint county ditch improvement pursuant to R.C. 6133.04 and R.C. 6133.06 is not by reason of that service a “county officer” for the purpose of receiving legal representation from a prosecuting attorney under R.C. 309.09(A). Consequently, a prosecuting attorney is not required to represent a clerk who serves a joint board of county commissioners or joint county ditch improvement pursuant to R.C. 6133.04 and R.C. 6133.06.

6. A prosecuting attorney does not have discretion to provide legal representation to a joint board of county commissioners established under R.C. 6133.02 or an individual member of the joint board of county commissioners.
7. A prosecuting attorney does not have discretion to provide legal representation to an auditor and treasurer who serve as the fiscal agents of counties participating in a joint county ditch improvement pursuant to R.C. 6133.07, an engineer who serves a joint board of county commissioners or joint county ditch improvement pursuant to R.C. 6133.08, or a clerk who serves a joint board of county commissioners or joint county ditch improvement pursuant to R.C. 6133.04 and R.C. 6133.06.
8. A joint board of county commissioners established under R.C. Chapter 6133 has implied authority to retain legal counsel for performance of its statutory duties and for the purpose of representing and advising officers serving on behalf of a joint county ditch improvement.

To: Morris J. Murray, Defiance County Prosecuting Attorney, Defiance, Ohio
By: Richard Cordray, Ohio Attorney General, October 5, 2010

You have requested a formal opinion concerning these issues: (1) whether a prosecuting attorney has a statutory duty to represent a joint board of county commissioners created under R.C. Chapter 6133 or the *ex officio* fiscal agents, clerk, and engineer of a joint county ditch improvement undertaken pursuant to R.C. Chapter 6133; and (2) whether a prosecuting attorney may provide such representation at his discretion if a statutory duty does not exist.

According to your letter, Defiance County and Williams County are engaged in a joint county ditch improvement under R.C. Chapter 6133, and a joint board of county commissioners consisting of the boards of commissioners of both counties has been established. Because the petition for this improvement was filed in Defiance County, the *ex officio* fiscal agents, clerk, and engineer involved in the joint county ditch improvement originate from Defiance County.

For reasons that follow, we conclude that (1) a prosecuting attorney does not have a statutory duty to represent a joint board of county commissioners established under R.C. Chapter 6133, a county commissioner serving on a joint board of county commissioners established under R.C. 6133.02, *ex officio* fiscal agents of a joint county ditch improvement, the county engineer of a joint county ditch improvement, or the clerk of a joint board of county commissioners; and (2) a prosecuting attorney lacks discretion to represent a joint board of county commissioners created under R.C. Chapter 6133, a county commissioner serving on a joint board of county commissioners established under R.C. 6133.02, *ex officio* fiscal agents of a joint county ditch improvement, a county engineer of a joint county ditch improvement, or clerk of a joint board of county commissioners.

Joint County Ditch Improvements Under R.C. Chapter 6133

R.C. Chapter 6133 provides the statutory framework for joint county ditch improvements in Ohio. *Cf.* R.C. Chapter 6131 (single county ditches); R.C. Chapter 6135 (interstate county ditches). R.C. 6133.02 provides:

When an improvement is proposed to be located in or benefits or damages land in two or more counties, the proceeding shall be conducted by a joint board of county commissioners consisting of the members of the boards of county commissioners of the several counties in which land may be benefited or damaged by the proposed improvement. In such case, the petition for the improvement shall be filed with the clerk of the board of county commissioners of the county in which the majority of the proposed improvement is located.

See R.C. 6133.01 (definitions) (as used in R.C. Chapter 6133, the terms “owner,” “person,” “public corporation,” “land,” “benefit,” and “improvement” have the same meaning as in R.C. 6131.01); *see also* *Elder v. Smith*, 103 Ohio St. 369, 133 N.E. 791 (1921) (syllabus, paragraph 1) (“[a] joint board of county commissioners is a mere creature of statute and has only such power and jurisdiction as are expressly conferred by statutory provision”); *Chesbrough v. Comm’rs*, 37 Ohio St. 508 (1882) (syllabus, paragraph 1) (“[i]t is within the scope of legislative power to provide . . . that where a proposed ditch is in more than one county, a majority of the board of county commissioners of each county, may, in joint session, locate and establish the same”).

R.C. 6133.03 provides, in part, as follows:

A joint board of county commissioners may do all of the things that a board of county commissioners may do in a single county improvement, and shall be governed by and be subject to sections 6131.01 to 6131.64 of the Revised Code, relating to single county ditches insofar as applicable. The proceedings for a joint county improvement shall proceed before the joint board the same as if the joint board were a board of county commissioners representing a county that included all the territory of all the counties represented by the commissioners on the joint board.

See R.C. 6133.04 (“[t]he director of the department of natural resources shall be a member ex officio of the joint board [of county commissioners] and may participate, either in person or through a designated representative, in deliberations and proceedings of the joint board but shall have no vote except in case of a tie”); *see also* R.C. 6133.09 (“[c]laims for compensation for land taken or for damages to land may be appealed by an owner interested, or by the prosecuting attorney, to the court of common pleas of the county in which the land for which the owner claims compensation or damages is located”).

Authority of a Prosecuting Attorney to Provide Legal Representation to a Joint Board of County Commissioners Created Under R.C. Chapter 6133 and the Officers of a Joint County Ditch Improvement

“A prosecuting attorney is a county officer whose election is provided for

and whose duties are prescribed by statute.” *State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (1940) (syllabus, paragraph 1). In *State ex rel. Doerfler v. Price*, 101 Ohio St. 50, 57, 128 N.E. 173 (1920), the Ohio Supreme Court explained:

[A prosecuting attorney of a county] exists only by virtue of the favor of the general assembly of Ohio, under Section 1, Article X, wherein the general assembly is authorized to “provide, by law, for the election of such county and township officers as may be necessary.” The general assembly of Ohio that passed the act providing for the prosecuting attorney of each county may tomorrow abolish the office and create a new one, or entirely change the duties of the office.

Accord 1983 Op. Att’y Gen. No. 83-064, at 2-267 (“[t]he office of prosecuting attorney is . . . statutorily defined and exists as a result of legislation enacted by the General Assembly of Ohio under Ohio Const. art. X, § 1, wherein the General Assembly is authorized to ‘provide by general law for the organization and government of counties, and [to] provide by general law alternative forms of county government’”). Accordingly, a prosecuting attorney “has only those powers conferred by statute, either expressly or by necessary implication.” 2009 Op. Att’y Gen. No. 2009-045, at 2-325 (citing *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981) and *Lodwich, supra*); see 2004 Op. Att’y Gen. No. 2004-032, at 2-287; 2000 Op. Att’y Gen. No. 2000-008, at 2-38; 1994 Op. Att’y Gen. No. 94-035, at 2-175; 1984 Op. Att’y Gen. No. 84-099, at 2-334.

R.C. 309.09 imposes requirements upon a prosecuting attorney to provide legal representation to particular governmental entities and officers. R.C. 309.09(A) declares, in pertinent part, that a 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[.]” See *State ex rel. Hamilton County Bd. of Comm’rs. v. Hamilton County Court of Common Pleas*, 126 Ohio St. 3d. 111, 2010-Ohio-2467, 931 N.E.2d 98, at ¶21 (R.C. 309.09(A) specifies the general rule that the prosecuting attorney shall be the legal adviser to a board of county commissioners, county officers, and county boards). Cf. R.C. 309.09(D)-(H) (permitting a prosecuting attorney to serve as legal counsel to specific public entities).¹

Accordingly, in this instance we must determine (1) whether a joint board

¹ R.C. 309.09 has no express provision authorizing a prosecuting attorney to serve as legal counsel to a joint board of county commissioners established under R.C. Chapter 6133. If the General Assembly had wished to require a prosecuting attorney to represent a joint board of county commissioners created under R.C. Chapter 6133 or other county officers involved in a joint ditch improvement undertaken pursuant to R.C. Chapter 6133, the General Assembly could have amended R.C. 309.09 or R.C. Chapter 6133 to include such a provision. The General Assembly has not done so. See, e.g., 2001 Op. Att’y Gen. No. 2001-028, at 2-163 n.3 (observing that after the issuance of 1989 Op. Att’y Gen. No. 89-102, wherein it was concluded that a prosecuting attorney was not required to serve as legal adviser

of county commissioners established under R.C. 6133.02 is a “county board” for purposes of R.C. 309.09(A), and (2) whether a county commissioner who serves on a joint board of county commissioners, as well as persons who serve a joint county ditch improvement as *ex officio* fiscal agents, engineer, and clerk, are “county officers” for purposes of R.C. 309.09(A).

A Joint Board of County Commissioners Established Under R.C. 6133.02 Is Not a “County Board” for the Purpose of Receiving Legal Representation from a Prosecuting Attorney Under R.C. 309.09(A)

On many occasions opinions of the Attorney General have addressed what constitutes a “county board” for purposes of determining a prosecuting attorney’s duty to represent such a body under R.C. 309.09(A). For example, in 1999 Op. Att’y Gen. No. 99-028, at 2-186, the Attorney General discussed factors that should be used in evaluating the status of a particular public board or other public entity for purposes of R.C. 309.09(A):

Although the term “county board” is not defined by statute, it has been interpreted, for purposes of R.C. 309.09, by numerous opinions of the Attorneys General. These opinions have consistently limited the meaning of “county board” to entities that are “essentially a subdivision of the county or a subordinate department of the county.” In determining whether a particular entity is “essentially a subdivision of the county or a subordinate department of the county,” the opinions have considered three factors: (1) whether the boundaries of the entity are coextensive with the boundaries of the county; (2) whether the county is responsible for the organization, operation, or supervision of the entity; and, (3) whether the entity is funded by or through the county.

to a joint solid waste management district board of directors, the General Assembly amended the relevant statute to permit a joint solid waste management district board to designate the prosecuting attorney of one of the counties forming the district to serve as legal adviser, and stating that such an amendment “demonstrates that, where the General Assembly has intended to authorize a county prosecuting attorney to act as legal adviser to a multi-county entity, it has expressly so provided”); *see also* 2009 Op. Att’y Gen. No. 2009-045, at 2-326 n.3.

R.C. Chapter 6133 does not impose a legal duty upon a prosecuting attorney to represent a joint board of county commissioners or officers involved in a joint county ditch improvement. Except for R.C. 6133.09, which provides, in part, that “[c]laims for compensation for land taken or for damages to land may be appealed by an owner interested, or by the *prosecuting attorney*, to the court of common pleas of the county in which the land for which the owner claims compensation or damages is located” (emphasis added), we find no other reference to the powers of a prosecuting attorney in R.C. Chapter 6133. Accordingly, absent from R.C. Chapter 6133 is any provision authorizing a prosecuting attorney to represent a joint board of county commissioners created under R.C. Chapter 6133 or officers involved in a joint county ditch improvement.

With respect to the first factor, it is well established that an entity whose boundaries exceed those of the county cannot be a “county board” for purposes of R.C. 309.09. Rather, its territory must be coextensive with or contained within the territory of the county. (Citations omitted.)

Accord 1993 Op. Att’y Gen. No. 93-050, at 2-243 (Attorney General opinions that have considered whether an entity is a “county board” for purposes of R.C. 309.09 “have employed, in general, an analysis based on one or more of the following factors: (1) whether the territory that comprises the entity is coextensive with the territorial limits of the county; (2) whether the county is responsible for the organization and supervision of the entity; and (3) whether the entity is funded by or through the county”). In this instance, we need only look to the first factor identified by the Attorney General in 1999 Op. Att’y Gen. No. 99-028, at 2-186, namely, whether the boundaries of the entity are coextensive with the boundaries of a county, to evaluate whether a joint board of county commissioners should be considered a “county board” for purposes of R.C. 309.09(A).

In 1989 Op. Att’y Gen. No. 89-102, at 2-492, the Attorney General advised that “a joint solid waste management district is an autonomous legal entity distinguishable from the individual counties that . . . participate in its creation In such a situation, the proposition is well established that the governing board . . . of such a regional, multicounty entity cannot, for purposes of R.C. 309.09(A), be considered a county board[.]” *Accord* 1979 Op. Att’y Gen. No. 79-019, at 2-69 (“there is ample authority for the proposition that the term ‘county board,’ as used in R.C. 309.09, does not apply to any entity established on a multi-county basis”). Similarly, multiple counties participate in a joint county ditch improvement undertaken under R.C. Chapter 6133, and thus a joint board of county commissioners exercises authority over an area exceeding the territorial limits of any one county, *see* R.C. 6133.02. Accordingly, a joint board of county commissioners created under R.C. Chapter 6133 is not a “county board” for purposes of R.C. 309.09(A). Because a joint board of county commissioners established under R.C. Chapter 6133 is not a “county board” for purposes of R.C. 309.09(A), it follows that such a board is not entitled to legal representation by a prosecuting attorney pursuant to R.C. 309.09(A). *See, e.g.,* 2004 Op. Att’y Gen. No. 2004-032, at 2-288 n.3 (observing that previous opinions of the Attorney General have advised that a prosecuting attorney does not serve as legal adviser to an entity that is established on a multi-county basis or to an entity that may include one or more municipalities or other subdivisions that are not the prosecuting attorney’s statutory clients); 1958 Op. Att’y Gen. No. 2736, p. 567 (syllabus, paragraph 1) (regional planning commission with more than one participating county is not a “county board” and its members are not “county officers” for purposes of R.C. 309.09 and therefore such a commission is not eligible to receive services of the prosecuting attorney as its legal advisor). Furthermore, because a joint board of county commissioners established under R.C. Chapter 6133 is not a “county board” for purposes of R.C. 309.09, a prosecuting attorney is not required to represent a joint board of county commissioners pursuant to R.C. 309.09(A).

A County Commissioner Who Serves on a Joint Board of County Commissioners Established Under R.C. 6133.02 Is Not a “County Officer” For Purposes of Receiving Legal Representation from a Prosecuting Attorney Under R.C. 309.09(A)

R.C. 6133.02 requires a joint board of county commissioners to conduct a proceeding “[w]hen an improvement is proposed to be located in or benefits or damages land in two or more counties[.]” *Cf.* R.C. Chapter 6131 (single county ditches). Thus, under R.C. Chapter 6133 county commissioners serving on a joint board of county commissioners established under R.C. 6133.02 perform their duties on behalf of a proposed improvement that extends beyond the territorial limits of any one county.

In 2004 Op. Att’y Gen. No. 2004-032, at 2-288 to 2-289, the Attorney General advised that “[w]hen a board is not a county or township board, the members of that board do not become county or township officers by virtue of their membership on the board, even if they are appointed to serve as representatives of a county or township. Rather, they perform their duties for the board of which they are members.” *See* 1983 Op. Att’y Gen. No. 83-064, at 2-268 (“[w]hile the terms ‘county board’ and ‘county officers’ are not statutorily defined, it has been opined by several of my predecessors that, when a joint-county entity is created, by virtue of the fact that such board or officers may exercise authority over an area exceeding the territorial limits of any one county, such board or officers may not be considered a county board or county officers”). In this instance, a county commissioner’s service on the joint board of county commissioners is on behalf of the joint county ditch improvement, which extends beyond the territorial limits of any one county. Because the county commissioner’s service is on behalf of an improvement that extends beyond the territorial limits of any one county, he cannot be considered a “county officer” for purposes of R.C. 309.09(A). And, because a county commissioner serving on a joint board of county commissioners established under R.C. Chapter 6133 is not a “county officer” for purposes of R.C. 309.09(A), it follows that a county commissioner serving on a joint board of county commissioners is not entitled to legal representation by a prosecuting attorney pursuant to R.C. 309.09(A) with respect to a county commissioner’s discharge of duties related to the actions and decisions of the joint board of county commissioners. Furthermore, because a county commissioner serving on a joint board of county commissioners is not entitled to legal representation by a prosecuting attorney pursuant to R.C. 309.09(A) with respect to a county commissioner’s discharge of duties related to the actions and decisions of the joint board of county commissioners, it follows that under R.C. 309.09(A) a prosecuting attorney is not required to represent a county commissioner with respect to a county commissioner’s discharge of duties related to the actions and decisions of the joint board of county commissioners established under R.C. Chapter 6133.

We shall now examine the responsibilities of a county auditor, county treasurer, county engineer, and county clerk involved in a joint county ditch improvement to determine whether for purposes of R.C. 309.09(A) these parties are entitled to legal representation by a prosecuting attorney.

An Auditor and Treasurer Who Serve Pursuant to R.C. 6133.07 as *Ex Officio* Fiscal Agents of a Joint County Ditch Improvement Are Not “County Officers” For Purposes of Receiving Legal Representation from a Prosecuting Attorney Under R.C. 309.09(A)

R.C. 6133.07 provides, in part, that “[t]he county auditor and county treasurer of the county in which the petition authorized by section 6133.02 of the Revised Code is filed shall *ex officio* become the fiscal agents of all the counties interested in the proposed improvement.” *See Black’s Law Dictionary* 657 (9th ed. 2009) (defining “*ex officio*” as “[b]y virtue or because of an office; by virtue of the authority implied by office”). Thus, by virtue of their offices in the county wherein a petition for a joint county ditch improvement is filed, a county auditor and county treasurer serve as fiscal agents of all the counties interested in a proposed joint county ditch improvement.

Pursuant to R.C. 6133.07 the auditor of the county in which a petition is filed “shall certify to the auditor of the other counties a schedule of the assessments to be levied for the cost of locating and constructing the improvement and the auditor of such other county shall proceed forthwith to place such assessment upon the duplicates. The assessments so certified for collection to an auditor of another county shall be a lien on the land within such county from the date such certificate is received by the auditor of such other county.” Under R.C. 6133.07, an auditor, as well as a treasurer, shall receive and account for funds in the same manner as they receive and account for assessments collected for a single county improvement, and with their bondsman they shall be liable on their official bonds for any misappropriation of funds. Pursuant to R.C. 6133.07, “[a]ll warrants for the payment of costs of location and for costs of construction of a joint county improvement shall be drawn by the auditor of the county in which the petition is filed, on the treasurer of said county, payable out of the general ditch improvement fund of said county.” R.C. 6133.07 also provides that the treasurer of a county in which assessments are levied shall collect assessments certified for collection and such assessments shall be paid to the treasurer of the county in which the petition was filed. Under R.C. 6133.07 “[a]ll assessments when collected in all the counties and any amount which another county should pay shall be paid into the treasury of the county in which the petition was filed, and credited to the general ditch improvement fund of said county.”

It is apparent that a county auditor and county treasurer that serve as *ex officio* fiscal agents pursuant to R.C. 6133.07 perform their duties for the benefit of the joint county ditch improvement and the counties interested in that improvement. The fact that a county auditor or county treasurer is a “county officer” for purposes of R.C. 309.09(A) in other circumstances, *see, e.g.*, R.C. Chapter 319 (county auditor); R.C. Chapter 321 (county treasurer), does not, in this instance, serve as a basis for classifying either of them as a “county officer” for purposes of R.C. 309.09(A) because of their service on behalf of a joint county ditch improvement. *See* 1979 Op. Att’y Gen. No. 79-039, at 2-128 (“[t]he mere fact that some . . . members [of a board of trustees of a joint ambulance district] are representatives from the townships involved is not a basis for classifying them as township officers”); *see also* 1990 Op. Att’y Gen. No. 90-017, at 2-72 (a county officer’s or township officer’s

service as director of a countywide emergency management agency is not part of his duties as a county or township officer, but instead constitutes service to a separate entity); 1960 Op. Att’y Gen. No. 1234, p. 205, at 207 (overruled in part by 2001 Op. Att’y Gen. No. 2001-028) (“[t]ownship trustees when acting as a joint township district hospital board are not, of course, dealing specifically with affairs of their respective townships, but are representing a separate district which has been termed a separate subdivision”). *Accord* 1993 Op. Att’y Gen. No. 93-001 (syllabus, paragraph 2) (“[a] person appointed to serve as a member of the governing board of the Northeast Ohio Areawide Coordinating Agency is not, by reason of such appointment, a ‘county officer’ for purposes of receiving legal counsel or representation pursuant to R.C. 309.09(A)”); 1989 Op. Att’y Gen. No. 89-102, at 2-493 (individual members of a joint solid waste management district board are not county officers for purposes of R.C. 309.09(A)); 1985 Op. Att’y Gen. No. 85-071, at 2-277 (overruled in relevant part on the basis of statutory amendment by 2004 Op. Att’y Gen. No. 2004-032) (“[e]ven as a joint fire district is not a county board, it is clear that members of a board of fire district trustees are not county officers”); 1979 Op. Att’y Gen. No. 79-039, at 2-128 (“[t]he status of the district as a separate legal entity also indicates that its board members are not ‘township officers’”).

Because an auditor and treasurer who serve pursuant to R.C. 6133.07 as the fiscal agents of counties participating in a joint county ditch improvement are not by reason of that service “county officers,” it follows that a county auditor and county treasurer of a joint county ditch improvement are not entitled to legal representation from a prosecuting attorney under R.C. 309.09(A). And, because in this instance a county auditor and county treasurer are not entitled to legal representation from a prosecuting attorney under R.C. 309.09(A), it follows that a prosecuting attorney is not required to represent a county auditor or county treasurer with respect to the discharge of duties related to their service as *ex officio* fiscal agents of counties participating in a joint county ditch improvement.

An Engineer Who Serves a Joint Board of County Commissioners Pursuant to R.C. 6133.08 Is Not By Reason of that Service a “County Officer” For Purposes of Receiving Legal Representation from a Prosecuting Attorney Under R.C. 309.09(A)

R.C. 6133.08 provides that a joint board of county commissioners “may designate the engineer of the county where the petition is filed to do the field work and make the survey, plans, and estimates, but the engineer of each county interested shall assist in making the reports and schedules.” Under R.C. 6133.08, “[t]he engineer who did the field work and made the survey and plans shall proceed to take bids, inspect the progress of the work and make estimates and reports on the progress of the work, accept the work and material for the improvement, and issue certificates therefor, as in the case of single county improvements, and shall do all things to be done by an engineer after the letting of the contracts.”

R.C. 6133.08 requires that “[a]ll reports and schedules of the engineer shall be signed and approved by all the engineers of the several counties interested and shall be filed with the clerk with whom the petition is filed.” But, under R.C.

6133.08, if the engineers of the interested counties do not concur in the reports or schedules, one or more of the engineers may file separate reports or schedules. R.C. 6133.08 also provides that “[i]n making up the schedules and reports the engineers shall proceed to make the schedules and reports of the improvement the same as if the improvement were an improvement within a county of the size of the several counties interested in the proposed improvement.” Under R.C. 6133.08, “[t]he engineers who do not make the survey may make such observations and take such levels as are necessary to assist them in making their schedules and in arriving at the proper amount to be assessed against each tract of land.”

R.C. 6133.08 makes it evident that the duties of a county engineer on behalf of a joint county ditch improvement are wholly focused on engineering requirements of the joint county ditch improvement (*e.g.*, surveying and making plans, receiving bids, and inspecting the progress of the work) and, thus, these duties are separate from an engineer’s other duties for a specific county. *Cf.* R.C. 315.08 (duties of county engineer). Although a county engineer is a “county officer” for purposes of R.C. 309.09(A) in other circumstances, *see* R.C. Chapter 315 (county engineer), such a fact does not, in this instance, serve as a basis for classifying him as a “county officer” for purposes of R.C. 309.09(A) in respect of his service on behalf of a joint county ditch improvement. *See* 1979 Op. Att’y Gen. No. 79-039, at 2-128; *see also* 1990 Op. Att’y Gen. No. 90-017, at 2-72; 1960 Op. Att’y Gen. No. 1234, p. 205, at 207 (overruled in part by 2001 Op. Att’y Gen. No. 2001-028). It follows that a county engineer serving a joint board of county commissioners or a joint county ditch improvement pursuant to R.C. 6133.08 is not by reason of that service a “county officer” who is entitled to legal representation from a prosecuting attorney under R.C. 309.09(A). And, because in this instance a county engineer is not entitled to legal representation from a prosecuting attorney under R.C. 309.09(A), it follows that a prosecuting attorney is not required to represent a county engineer serving a joint board of county commissioners or joint county ditch improvement pursuant to R.C. 6133.08.

A Clerk Who Serves a Joint Board of County Commissioners Pursuant to R.C. 6133.04 Is Not By Reason of that Service a “County Officer” For Purposes of Receiving Legal Representation from a Prosecuting Attorney Under R.C. 309.09(A)

R.C. 6133.04 provides, in part: “The clerk of the board of county commissioners of the county in which the petition is filed shall act as clerk of the joint board and shall enter the findings of the joint board in the journal of the board of county commissioners of his county, shall do all things required to be done by the clerk, and shall make the final record of the improvement in his county. The clerk shall file certified copies of all proceedings with the clerks of the boards of all affected counties.” R.C. 6133.06 further specifies the duties of a clerk of a joint board of county commissioners established under R.C. Chapter 6133. Pursuant to R.C. 6133.06, the clerk of the joint board of county commissioners shall (1) call a joint meeting of the boards of county commissioners of all the interested counties for the purpose of organizing the joint board of county commissioners; (2) give notice of the filing of the petition for the proposed improvement and the joint meeting to the

board of commissioners of his county, as well as to the clerks of the boards of the county commissioners of the other interested counties who shall provide notice to the boards of their counties; (3) receive applications, remonstrances, claims for compensation or damages, reports, schedules, certificates, statements, contracts, bonds, and other papers; and (4) file certified copies of all proceedings with the clerks of the boards of all affected counties.

Accordingly, R.C. 6133.04 and R.C. 6133.06 make it apparent that the duties of a clerk of a joint board of county commissioners are concentrated on serving that board and advancing the joint county ditch improvement (*e.g.*, acting as clerk of the joint board; journalizing findings of the joint board; receiving applications, remonstrances, and claims for compensation; and filing certificates, statements, contracts, bonds, and other papers). The fact that a clerk of a joint board of commissioners is a “county officer” in other circumstances, *see, e.g.*, R.C. 305.13 (appointment of a clerk of a board of county commissioners); *State ex rel. Attorney Gen. v. Brennan*, 49 Ohio St. 33, 38-39, 29 N.E. 593 (1892),² does not, in this instance, serve as a basis for classifying him as a “county officer” for purposes of R.C. 309.09(A) in respect of his service on behalf of a joint county ditch improvement. *See* 1979 Op. Att’y Gen. No. 79-039, at 2-128; *see also* 1990 Op. Att’y Gen. No. 90-017, at 2-72; 1960 Op. Att’y Gen. No. 1234, p. 205, at 207 (overruled in part by 2001 Op. Att’y Gen. No. 2001-028).

Because in this instance a clerk of a joint board of county commissioners is not a “county officer” for purposes of R.C. 309.09(A), it follows that a clerk serving a joint board of county commissioners pursuant to R.C. 6133.04 and R.C. 6133.06 is not by reason of that service entitled to legal representation from a prosecuting attorney under R.C. 309.09(A). And, because in this instance a clerk of a joint board of county commissioners is not entitled to legal representation from a prosecuting attorney under R.C. 309.09(A), it follows that a prosecuting attorney is not required to represent a clerk of a joint board of county commissioners with re-

² In *State ex rel. Attorney Gen. v. Brennan*, 49 Ohio St. 33, 38-39, 29 N.E. 593 (1892), the Ohio Supreme Court stated:

[I]t is safely within bounds to say that where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, or with public functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office. And where such 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, as one who is lawfully invested with an office is an officer, the person lawfully filling such place is necessarily a county officer.

spect to the discharge of duties related to his service on behalf of a joint board of county commissioners or a joint county ditch improvement.

A Prosecuting Attorney Lacks Discretion to Represent a Joint Board of County Commissioners Established Under R.C. Chapter 6133 or County Officers With Respect to Duties Relating to a Joint County Ditch Improvement

In your second question, you inquire whether a prosecuting attorney may represent at his discretion a joint board of county commissioners and the officers serving on behalf of a joint county ditch improvement.

In 2004 Op. Att’y Gen. No. 2004-032, the Attorney General examined whether, absent a duty to act as legal counsel, a prosecuting attorney may, within his discretion, choose to act as legal counsel for an entity and still retain civil immunity protections. In that opinion, the Attorney General explained: “Several Attorney General opinions address the question whether a county prosecuting attorney is permitted to provide legal counsel to an individual or entity when the county prosecuting attorney is not designated as legal adviser of that individual or entity. These opinions conclude generally that, in the absence of a grant of statutory authority to serve as legal counsel to an individual or entity, a county prosecuting attorney is not permitted to provide that individual or entity with legal services.” *Id.* at 2-289. Such a conclusion is rooted in the principle that “the county prosecuting attorney is not empowered to enlarge the scope of the duties of the office of prosecuting attorney by providing legal representation other than as authorized by law.” 1998 Op. Att’y Gen. No. 98-025, at 2-135;³ *see* 2004 Op. Att’y Gen. No. 2004-032, at 2-289 (authority of prosecuting attorney to provide legal counsel when not designated as legal adviser). As the Attorney General stated in 1964 Op. Att’y Gen. No. 1297, p. 2-322, at 2-324:

I am not aware of any statutory provision which would authorize a prosecuting attorney to enlarge the scope of his duties. Then, too, there might be a possibility of conflict of interest arising between a board which is not entitled to call upon the prosecuting attorney as legal counsel and one which the prosecutor has a legal duty to represent. I could not say that a prosecuting attorney may volunteer to represent in his official capacity a board which he has no duty to serve as legal adviser.

Cf. 2009 Op. Att’y Gen. No. 2009-045, at 2-325 (a prosecuting attorney “has only

³ In 1998 Op. Att’y Gen. No. 98-025 (syllabus, paragraphs 1 and 2), the Attorney General concluded that, under the law then in effect, a prosecuting attorney had no duty to represent a township board of zoning appeals when a decision of that board was appealed, and a prosecuting attorney, acting in an official capacity, was not permitted to provide legal representation to a township board of zoning appeals. These conclusions, however, are no longer valid because R.C. 309.09(B) has been amended to authorize a prosecuting attorney to advise and represent such an entity. *See* R.C. 309.09(B); 2004 Op. Att’y Gen. No. 2004-032, at 2-289 n.4; 1999 Op. Att’y Gen. No. 99-032.

those powers conferred by statute, either expressly or by necessary implication” (citing *Seminatore, supra* and *Lodwich, supra*)).

Similarly, in this instance, unless a statute grants a prosecuting attorney discretion to represent a joint board of county commissioners established under R.C. 6133.02, a county commissioner serving on a joint board of county commissioners, *ex officio* fiscal agents of a joint county ditch improvement, the county engineer of a joint ditch improvement, or the clerk of the joint board of county commissioners established under R.C. Chapter 6133, a prosecuting attorney lacks authority to enlarge the scope of the duties of his office by representing a joint board of county commissioners or officers serving on behalf of a joint county ditch improvement. Because we find no statute granting such discretion to a prosecuting attorney, we conclude that in this instance a prosecuting attorney may not represent a joint board of county commissioners or the officers serving on behalf of a joint county ditch improvement.

A Joint Board of County Commissioners Created Under R.C. Chapter 6133 Has Implied Authority to Retain Legal Counsel For Performance of Its Statutory Duties and For the Purpose of Representing and Advising Officers Serving on Behalf of a Joint County Ditch Improvement

We recognize that our conclusion that a prosecuting attorney has neither a statutory duty nor discretionary authority to represent a joint board of county commissioners established under R.C. Chapter 6133 or officers serving on behalf of a joint county ditch improvement leaves a joint board of county commissioners and its officers without a statutorily designated legal counsel. Such a situation is a matter that the counties involved in the joint ditch project may wish to pursue with the General Assembly, where a reasonable resolution of this issue may be readily provided. *See, e.g.*, R.C. 343.01(E)(2) (“[t]he board of directors of a joint [solid waste management] district may designate the prosecuting attorney of one of the counties forming the district to serve as the legal advisor of the district. When so designated, the prosecuting attorney shall provide such services to the joint district as are required or authorized to be provided to county boards under Chapter 309. of the Revised Code When that prosecuting attorney is so serving and the board considers it to be necessary or appropriate, the board, on its own initiative, may employ an attorney or other legal counsel to represent or advise the board regarding a particular matter in place of the prosecuting attorney”). In the meantime, a joint board of county commissioners established under R.C. Chapter 6133 has implied authority to retain legal counsel for performance of its statutory duties and for the purpose of representing and advising officers serving on behalf of a joint county ditch improvement. *See* 2009 Op. Att’y Gen. No. 2009-045 (concluding that a multi-county court of appeals has inherent authority to retain legal counsel to advise and represent the court and its judges); 2001 Op. Att’y Gen. No. 2001-028 (concluding that a board of a joint township hospital district has implied authority to employ legal counsel to carry out its statutory duties); 1989 Op. Att’y Gen. No. 89-102 (finding that a joint solid waste management district board of directors may hire legal counsel to provide the board of directors with advice and assistance); 1985 Op. Att’y Gen. No. 85-071 (overruled in relevant part on the basis of statutory

amendment by 2004 Op. Att’y Gen. No. 2004-032) (concluding that the board of fire district trustees of a joint fire district may employ legal counsel for performance of its functions); 1985 Op. Att’y Gen. No. 85-012 (concluding that a regional organization for civil defense may hire legal counsel as needed for performance of its duties).

Conclusions

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

1. A joint board of county commissioners established under R.C. 6133.02 to undertake a joint county ditch improvement is not a “county board” for the purpose of receiving legal representation from a prosecuting attorney under R.C. 309.09(A). Consequently, a prosecuting attorney is not required to represent a joint board of county commissioners established under R.C. 6133.02.
2. A county commissioner serving on a joint board of county commissioners established under R.C. 6133.02 is not by reason of that service a “county officer” for the purpose of receiving legal representation from a prosecuting attorney under R.C. 309.09(A). Consequently, a prosecuting attorney is not required to represent a county commissioner serving on a joint board of county commissioners with respect to a county commissioner’s discharge of duties related to the actions and decisions of the joint board of county commissioners established under R.C. Chapter 6133.
3. An auditor and treasurer who serve pursuant to R.C. 6133.07 as the fiscal agents of counties participating in a joint county ditch improvement are not by reason of that service “county officers” for the purpose of receiving legal representation from a prosecuting attorney under R.C. 309.09(A). Consequently, a prosecuting attorney is not required to represent an auditor and treasurer in their capacity as fiscal agents of counties participating in a joint county ditch improvement.
4. An engineer who serves a joint board of county commissioners or a joint county ditch improvement pursuant to R.C. 6133.08 is not by reason of that service a “county officer” for the purpose of receiving legal representation from a prosecuting attorney under R.C. 309.09(A). Consequently, a prosecuting attorney is not required to represent an engineer who serves a joint board of county commissioners or joint county ditch improvement pursuant to R.C. 6133.08.
5. A clerk who serves a joint board of county commissioners or a joint county ditch improvement pursuant to R.C. 6133.04 and R.C. 6133.06 is not by reason of that service a “county officer” for the purpose of receiving legal representation from a prosecuting attorney under R.C. 309.09(A). Consequently, a prosecuting attorney is not required to represent a clerk who serves a joint board of county

commissioners or joint county ditch improvement pursuant to R.C. 6133.04 and R.C. 6133.06.

6. A prosecuting attorney does not have discretion to provide legal representation to a joint board of county commissioners established under R.C. 6133.02 or an individual member of the joint board of county commissioners.
7. A prosecuting attorney does not have discretion to provide legal representation to an auditor and treasurer who serve as the fiscal agents of counties participating in a joint county ditch improvement pursuant to R.C. 6133.07, an engineer who serves a joint board of county commissioners or joint county ditch improvement pursuant to R.C. 6133.08, or a clerk who serves a joint board of county commissioners or joint county ditch improvement pursuant to R.C. 6133.04 and R.C. 6133.06.
8. A joint board of county commissioners established under R.C. Chapter 6133 has implied authority to retain legal counsel for performance of its statutory duties and for the purpose of representing and advising officers serving on behalf of a joint county ditch improvement.