

STATE OF MICHIGAN

BILL SCHUETTE, ATTORNEY GENERAL

COUNTY BOARD OF  
COMMISSIONERS:

Participation of quorum of county  
commissioners on county mental  
health authority board.

COUNTY MENTAL HEALTH  
AUTHORITY BOARD:

OPEN MEETINGS ACT:

Section 222, MCL 330.1222, of the Mental Health Code, MCL 330.1001 *et seq.*, authorizes county commissioners to serve as members of the same county's mental health authority board. Because this dual service is authorized by law, county commissioners appointed to a mental health authority board may fully participate in meetings and deliberations of that board, and are not precluded from considering the same matters at subsequent meetings of the county's board of commissioners in their capacity as county commissioners.

The Open Meetings Act (OMA), MCL 15.261 *et seq.*, applies to a meeting of a county mental health authority board, but the presence or participation of three members of a five-member county board of commissioners when the commissioners are meeting as appointed members of the county mental health authority board to discuss or deliberate on the business of that board, does not constitute a meeting of the county board of commissioners subject to the OMA.

Opinion No. 7290

July 14, 2016

The Honorable Aaron Miller  
State Representative  
The Capitol  
Lansing, Michigan 48909

You have asked two questions relating to a quorum of members of a county board of commissioners simultaneously serving as members on the same county's mental health authority board.

Before addressing your questions, it is helpful to review the composition and authority of the county's board of commissioners; the establishment and composition of the county's mental health authority; and the relationship between the county board of commissioners and the county mental health authority board.

**The composition of the county's board of commissioners.**

A county board of commissioners manages the affairs of the county as authorized by statute. See MCL 46.11. In exercising its authority and fulfilling its duties, the county board of commissioners makes decisions through the adoption of motions, resolutions, and ordinances at meetings. See MCL 46.1(1). The number of commissioners elected to a county board of commissioners is determined by each county subject to a maximum number based on the county's population as set forth in MCL 46.402.

The county at issue has a population of over 60,000, which authorizes the county to have up to 21 commissioners. Currently, however, the county has a five-member county board of commissioners. MCL 46.402. A quorum for the transaction of the ordinary business of a county board of commissioners is a majority of its commissioners. MCL 46.3(1). Here, three of the five commissioners constitutes a quorum of this county's board of commissioners.

**The creation and composition of the county's mental health authority.**

The county board of commissioners established this county's mental health authority by resolution in 2000, as authorized by MCL 330.1205, to comply with and carry out the requirements applicable to the county under the Mental Health Code, MCL 330.1001 *et seq.* A county mental health authority is a "public governmental entity separate from the county . . . that establish[es] it." MCL 330.1204(1). See also *Mason County v Dep't of Community Health*, 293 Mich App 462 (2011); *Huron Behavioral Health v Dep't of Community Health*, 293 Mich App 491 (2011). As provided in the enabling resolution establishing the county's authority, the authority is responsible for all executive, administrative, personnel administration, finance, accounting, and management information system functions, which it may discharge through direct staff or by contracting for services.

A county mental health authority is governed by a board of 12 members who are appointed by the county board of commissioners. MCL 330.1214; MCL 330.1222. MCL 330.1214 provides that "all board members shall be representatives of [the] county [that established the authority]." And MCL 330.1222(1) provides that the "composition of [the] . . . board shall be representative of providers of mental health services, recipients or primary consumers of mental health services, agencies and occupations having a working involvement with mental health services, and the general public."

In addition to these requirements and relevant here, a county board of commissioners is expressly authorized to appoint county commissioners to serve on a county mental health authority board:

Not more than 4 members of a board may be county commissioners, except that if a board represents 5 or more counties, the number of county commissioners who may serve on the board may equal the number of counties represented on the board, and the total of 12 board memberships shall be increased by the number of county commissioners serving on the board that exceeds 4. [MCL 330.1222(2).]

In this instance, the county board of commissioners availed itself of that right by appointing three county commissioners, a quorum of that board, to the county's 12-member mental health authority board.

**The relationship between the county board of commissioners and the county mental health authority.**

As provided for in the enabling resolution establishing the county's mental health authority, the county board of commissioners may dissolve the authority. MCL 330.1205(2)(b). The employees of the county mental authority are public employees but are not county employees. MCL 330.1205(2)(e)(i); MCL 330.1205(8). MCL 330.1205(6) provides that the county is not liable for the activities or financial obligations of the county mental health authority, but MCL 330.1226(1)(f) requires that the county mental health authority board annually request from the county board of commissioners an appropriation of county funds for its operations. In addition, the county board of commissioners may, after notice and an opportunity for a hearing, remove a member of the mental health authority board for official misconduct or neglect of official duty. MCL 330.1224.

**Question 1 – Participation by quorum of county commissioners.**

Against this background, you first ask whether it is lawful for the three members of the county board of commissioners, who constitute a quorum of that board, to participate in deliberations of the county mental health authority board as members of that board, where the matter deliberated may later be subject to approval by the county board of commissioners.

While your question does not use the express terms, it suggests the existence of a conflict of interest relating to the dual service of the three county commissioners. County commissioners are subject to various conflict of interest provisions. See MCL 15.321 *et seq.*; MCL 46.30; OAG, 1995-1996, No. 6906, p 180, (June 25, 1996). And county commissioners are prohibited from accepting certain additional employment, appointments, or offices. See MCL 46.3(6); MCL 46.31. Members of a county mental health authority board are likewise subject to conflict of interest provisions. See MCL 15.321, *et seq.*; MCL 330.1222(5). And there are prohibitions as to who may be appointed to a county mental health authority board. See MCL 330.1222(4).

But as set forth above, the Legislature has expressly authorized the appointment of four or more county commissioners to a county mental health authority board. MCL 330.1222(2). And presumably the Legislature understood that allowing the appointment of up to four county commissioners from the same county to a mental health authority board could result in a quorum of that county's board of commissioners serving as authority board members in light of MCL 46.402.

See, e.g., *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993) (“the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws”). In light of this express authorization, it must be concluded that the Legislature saw no impermissible conflict in permitting county commissioners to simultaneously serve as members of county mental health authority boards.

The county board of commissioners’ relationship with the county mental health authority and its board is limited. The Michigan Court of Appeals explained in *Mason County v Dep't of Community Health*, 293 Mich App at 486, that a county’s “involvement with” an authority “is limited to appointing board members, reviewing documents, and approving the *county* funding, which covers a relatively small part of [the] [ ] authority’s budget, and having the power to dissolve [the] [ ] authority.”<sup>1</sup> The Court rejected an argument that a county retains substantial influence or control over a mental health authority due to its ability to appoint the authority’s board members. *Id.* at 483. With respect to the appointment of county commissioners to a mental health authority’s board, the Court observed that the dual role did not undermine the independence of each board:

The county commissioners operating in a dual role may, indeed, influence board decisions in favor of [a county], but, without more, this cannot be said to amount to *substantial* influence. They lack a majority vote, but even more importantly, they have the duty and ethical

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<sup>1</sup> Generally, counties are made financially liable for 10 percent of the net cost of services, see MCL 330.1302, and the State pays 90 percent of the annual net cost of a mental health authority, see MCL 330.1308(1)–(2).

obligation to act in the best interest of the [ ] authority while performing in their capacity as [ ] authority board members. [*Id.*]

The Court of Appeals did not assess the relationship in the reverse, i.e., when the mental health authority board members, who are also county commissioners, perform their duties on the county board of commissioners. When sitting as county commissioners, these members of the mental health authority board have “the duty and ethical obligation to act in the best interest” of the county. *Id.* But in this particular case, a quorum of the county’s board of commissioners are mental health authority board members, raising the concern that that board can influence the county board of commissioners through votes by the quorum. As stated above, the county board of commissioners must take action with respect to the county mental health authority board’s annual request for county funds. MCL 330.1226(1)(f).<sup>2</sup>

Generally, a public official cannot sit on opposite sides of a contractual or non-contractual matter because of the competing duties of loyalty owed to each public entity. In that scenario, the public official cannot advance the best interests of each entity simultaneously. Michigan’s Incompatible Public Offices Act (IPOA), 1978 PA 566, MCL 15.181 *et seq.*, typically applies to preclude a public official from holding both offices under those circumstances. See MCL 15.182 (“[A] public officer or public employee shall not hold 2 or more incompatible offices at the same time.”). However, the IPOA’s prohibitions do not apply where the Constitution or the Legislature has otherwise authorized the dual service, as here. See, e.g., Mich

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<sup>2</sup> The board of county commissioners is not required to approve the county mental health authority board’s annual plan or budget. *Mason County*, 293 Mich App at 486.

Const 1963, art 7, § 28 (authorizing dual office holding in connection with cooperative undertakings by local units of government); OAG, 1995-1996, No. 6837, p 19 (February 23, 1995) (“The Legislature may, of course, expressly authorize the simultaneous holding of two public offices that would otherwise be incompatible.”).<sup>3</sup>

Because the county commissioners’ dual service is expressly authorized in this case, they are entitled to fully participate in the deliberations and actions of both boards while acting in their capacity as either a county commissioner or as a member of the mental health authority board.<sup>4</sup> The county commissioners remain subject to any otherwise applicable conflict of interest provisions. And the law presumes that a public official will carry out his or her duties in accordance with legal requirements. *West Shore Community College v Manistee County Board of Commissioners*, 389 Mich 287, 302; 205 NW2d 441 (1973).

It is my opinion, therefore, that section 222, MCL 330.1222, of the Mental Health Code, MCL 330.1001 *et seq.*, authorizes county commissioners to serve as members of the same county’s mental health authority board. Because this dual service is authorized by law, county commissioners appointed to a mental health authority board may fully participate in meetings and deliberations of that board,

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<sup>3</sup> The IPOA also provides for a number of exceptions to its general prohibition. See MCL 15.183.

<sup>4</sup> While this dual service is authorized by law, to avoid questions like those raised here, a board of county commissioners could exercise its discretion differently with respect to the number of county commissioners it appoints to a county mental health authority board. MCL 330.1222(2).



and are not precluded from considering the same matters at subsequent meetings of the county's board of commissioners in their capacity as county commissioners.

**Question 2 – Application of Open Meetings Act to a quorum.**

You next ask whether a quorum of county commissioners, when meeting as members of the mental health authority board, also constitute a meeting of the board of county commissioners subject to the Open Meetings Act (OMA), MCL 15.261 *et seq.*

Meetings of a county board of commissioners are subject to the OMA. See MCL 46.1(2) (“The business which a county board of commissioners may perform shall be conducted at a public meeting of the board held in compliance with the open meetings act.”). So too are meetings held by a county mental health authority board. See MCL 330.1205(9) (“As a public governmental body, a community mental health authority is subject to the open meetings act . . .”).

The OMA promotes transparency and accountability in government by requiring, in general, that all “deliberations” or “decisions” of “public bodies” be made at “meetings” that are “open to the public.” MCL 15.262; 15.263.<sup>5</sup> Meetings subject to the OMA must be held in a place available to the general public and must be properly noticed. MCL 15.263; MCL 15.264. Members of the public have a right

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<sup>5</sup> A “meeting” is defined in the OMA as the “convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy, or any meeting of the board of a nonprofit corporation formed by a city under section 40 of the home rule city act, 1909 PA 279, MCL 117.40.” MCL 15.262(b).

to attend an open meeting, as well as address the public body, and may record the proceedings, subject to reasonable regulations. MCL 15.263(1), (5).

Relevant to your question, where a quorum of the members of a public body gather to deliberate or decide matters in their role as members of that public body, such a gathering is subject to the requirements of the OMA as to all aspects of the meeting, including notice, public comment, and the taking and publication of meeting minutes. See *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525, 531-532; 609 NW2d 574 (2000), overruled in part on other grounds in *Speicher v Columbia Twp Bd*, 497 Mich 125, 133-136, 153; (2014) (quorum of a township board participating in a meeting of a committee of the township board constitutes a meeting of the township board).

But where a quorum of the members of one public body attend or participate in the meeting of a second public body, the presence of the quorum will generally not subject the first public body to the OMA unless they discuss or decide matters in their role as members of that public body. See, e.g., *Ryant v Cleveland Twp*, 239 Mich App 430; 608 NW2d 101 (2000) (quorum of a township board attending a meeting of the township planning commission, which included one member of the township board, and at which township supervisor who is a member of the township board made comments, was not a meeting of the township board where the other township board members were essentially observers who did not deliberate or render decisions at that meeting); OAG, 1989-1990, No. 6636, p 253 (October 23, 1989) (county commissioners attending meeting of a county planning committee,

which includes two members of the county board of commissioners, would not require the meeting to be posted as a meeting of the county board of commissioners provided that the other attending county commissioners were only observers and did not engage in deliberations or render decisions); and OAG, 1979-1980, No. 5560, p 386 (September 13, 1979) (a quorum of a local board of education may meet with the State Board of Education so long as the local board does not, at such meeting, deliberate on or decide matters of public policy).

Your question is understood as asking whether the OMA would apply to the three county commissioners as a quorum of the county board of commissioners when those commissioners gather at a properly noticed meeting of the county mental health authority board to deliberate and decide the authority's business. If the OMA applies, a meeting of the county board of commissioners would also have to be noticed and conducted in accordance with the act's requirements. MCL 15.262–MCL 15.264.

While the quorum requirement is critical for determining if a meeting of a public body—the county board of commissioners—is taking place when county commissioners are meeting in their role as county commissioners, the quorum requirement does not apply to the circumstance about which you inquire. This is because the county commissioners are not attending meetings of the county mental health authority board in their role as county commissioners, but rather in their appointed role as authority board members. MCL 330.1222(2); *Mason County*, 293 Mich App at 483. This conclusion is consistent with the decisions and opinions that

reflect the principle that the OMA applies to a meeting of a public body in its role of conducting the business of that body. That does not apply here to the county commissioners when acting as members of the county mental health authority board.

When and if the county board of commissioners meets to approve or disapprove an action of the county's mental health authority, such as its annual request for county funding, the county commissioners will be meeting for that purpose in exercising their authority for governing the county. That meeting would be subject to the requirements of the OMA.

It is my opinion, therefore, that the OMA applies to a meeting of a county mental health authority board, but the presence or participation of three members of a five-member county board of commissioners when the commissioners are meeting as appointed members of the county mental health authority board to discuss or deliberate on the business of that board, does not constitute a meeting of the county board of commissioners subject to the OMA.

A handwritten signature in black ink, reading "Bill Schuette". The signature is fluid and cursive, with a long horizontal stroke extending from the end.

BILL SCHUETTE  
Attorney General