

OPINION NO. 94-014**Syllabus:**

The panel created by the Erie County Court of Common Pleas in local rule 17.08(F) is not subject to the open meeting requirements of R.C. 121.22.

To: Kevin J. Baxter, Erie County Prosecuting Attorney, Sandusky, Ohio
By: Lee Fisher, Attorney General, March 28, 1994

You have requested an opinion on the following question: "Whether a three member committee composed of a county commissioner, the president of the local bar [association], and a citizen, which sits to make a recommendation to a court of common pleas as to the reasonableness of attorney requests for extraordinary compensation for representation of indigent clients, is a committee subject to the provisions of [R.C.] 121.22?"

Requirements of R.C. 121.22

R.C. 121.22 establishes certain requirements with which public bodies¹ must comply in conducting official business. The primary requirement is stated in R.C. 121.22(C), as follows:

¹ The term "public body," as used in R.C. 121.22, is defined in division (B)(1) of that statute as meaning either of the following:

(a) any board, commission, committee, or similar decision-making body of a state agency, institution, or authority, and any legislative authority or board, commission, committee, agency, authority, or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution;

(b) any committee or subcommittee of a body described in division (B)(1)(a) of this section.

"All meetings of any public body are declared to be public meetings open to the public at all times." For purposes of R.C. 121.22, a "meeting" is defined as "any prearranged discussion of the public business of the public body by a majority of its members." R.C. 121.22(B)(2). Whether the committee you describe must comply with R.C. 121.22 in the performance of its duties depends upon whether its deliberations constitute a meeting for purposes of R.C. 121.22.

Statutory Scheme Governing Payment of Appointed Counsel

R.C. 2941.51, which provides for the payment of appointed counsel, states in part:

(A) *Counsel* appointed to a case or selected by an indigent person under [R.C. 120.16(E)] or [R.C. 120.26(E)], or otherwise appointed by the court, except for counsel appointed by the court to provide legal representation for a person charged with a violation of an ordinance of a municipal corporation, *shall be paid for their services by the county the compensation and expenses that the trial court approves.... Compensation and expenses shall not exceed the amounts fixed by the board of county commissioners pursuant to division (B) of this section.*

(B) *The board of county commissioners shall establish a schedule of fees by case or on an hourly basis to be paid by the county for legal services provided by appointed counsel. Prior to establishing such schedule, the board shall request the bar association or associations of the county to submit a proposed schedule. The schedule submitted shall be subject to the review, amendment, and approval of the board of county commissioners.*

....

(E) The county auditor shall draw his warrant on the county treasurer for the payment of such counsel in the amount *fixed by the court, plus the expenses that the court fixes and certifies to the auditor.* The county auditor shall report periodically, but not less than annually, to the board and to the Ohio public defender commission the amounts paid out pursuant to the approval of the court under this section, separately stating costs and expenses that are reimbursable under [R.C. 120.35]. (Emphasis added.)

The scheme established by R.C. 2941.51 was characterized by the court in *State ex rel. Marco v. Jaffe*, 25 Ohio St. 3d 236, 238, 495 N.E.2d 958, 959 (1986), as follows: "compensation for court-appointed counsel is to be approved by the trial court, but in no case is the compensation set by the court to exceed amounts fixed by the board of commissioners pursuant to division (B)." Thus, R.C. 2941.51 affords the trial court a certain discretion in fixing the amount of compensation to be paid to appointed counsel; the court may exercise such discretion, however, only within the limitations established by the board of county commissioners. *See generally State ex rel. Wood v. Christiansen*, 14 Ohio St. 3d 27, 28, 470 N.E.2d 895, 896 (1984) ("[w]hile R.C. 2941.51 requires payment for services to assigned counsel, division (A) thereof affords discretion to the trial court by limiting such payment to 'such compensation and expenses as the trial court may approve'").

The payment of appointed counsel is also governed by R.C. 120.33, which authorizes a board of county commissioners to establish a system of appointed counsel, in lieu of using a county public defender or joint county public defender, to represent indigent persons in proceedings set forth in R.C. 120.16(A). The payment of such counsel is provided for in R.C. 120.33(A)(3) and (4) in terms essentially identical to the scheme established by R.C. 2941.51. R.C. 120.33(A)(3) requires the board of county commissioners to establish a fee schedule for payment of counsel. Pursuant to R.C. 120.33(A)(4), counsel shall receive the compensation and

expenses approved by the court within the limits of the fee schedule established by the board of county commissioners under R.C. 120.33(A)(3). *See generally* 1976 Op. Att'y Gen. No. 76-069.

Payment of Assigned Counsel in Erie County

As stated in your opinion request, the Erie County Court of Common Pleas adopted local rule 17.08,² concerning the payment of assigned counsel. Rule 17.08 states in part:

Assigned counsel for indigent defendants shall receive compensation for professional services in accordance with the following fee schedule set by the Erie County Commissioners by Resolution 92-103, adopted pursuant to O.R.C. Sections 120.33 and 2941.51.

....

F. Extraordinary Fees:

1. Cases eligible for extraordinary fees are ones which, because of extraordinarily complex issues, multiple offenses, lengthy trials or other reasons verified by the Court, warrant compensation which exceeds maximums established by the County.

2. Counsel may make written application to the Judge of the General Division of the Erie County Common Pleas Court for consideration of payment of the extraordinary fees beyond the limits set herein. The Judge shall refer the request to a three (3) person panel for review and recommendation back to the Court. The three (3) person panel shall consist of a representative from each of the following:

- a. Erie County Bar Association President or designee.
- b. Erie County Commission Chairman or designee.
- c. A third representative shall be any Erie County resident mutually agreed upon by the representatives in a. and b. listed above.

A written recommendation of the panel, in an amount not to exceed thirty thousand dollars (\$30,000.00), shall be made to the Judge of the General Division of the Erie County Common Pleas Court and the Judge may choose to accept or reject the recommendation at its discretion. If the Judge accepts all or a part of the recommended fee allowance, the Board of Erie County Commissioners shall approve said extraordinary fees.

Pursuant to local rule 17.08(F), the three-member panel about which you ask has been established to recommend to the trial judge the amount of fees to be approved for the payment of appointed counsel in extraordinary circumstances.

² C.P. Sup. R. 9 permits courts of common pleas to adopt local rules of practice, as follows:

(A) Nothing in these rules prevents the adoption of any local rule of practice that promotes the use of any device or procedure to facilitate the expeditious disposition of cases.

....

(C) Local rules of practice shall not be inconsistent with rules promulgated by the Supreme Court and shall be filed with the Clerk of the Supreme Court.

Application of R.C. 121.22(B)(1) to Entity Created by Common Pleas Court

Although the entity established by local rule 17.08(F) is described as a "panel," nothing in its description appears to distinguish it from a "board, commission, committee, or similar decision-making body," as that language is used in R.C. 121.22(B)(1)(a). Assuming, for purposes of discussion, that the panel you describe is a public body subject to R.C. 121.22, it is also necessary to examine the functions performed by the panel to determine the application of that provision.

Pursuant to local rule 17.08, the panel was formed to review, according to the criteria set forth in division F.1 of the rule, any case in which assigned counsel has requested extraordinary fees. Based upon this review, the panel makes a written recommendation to the court as to the amount, up to thirty thousand dollars, of extraordinary fees that the court should approve. The court then makes a determination, either accepting or rejecting the recommendation of the panel, as to the amount of extraordinary fees it will approve as part of the compensation of appointed counsel in that case, as required by R.C. 2941.51 and R.C. 120.33(A).

In a number of instances, the courts have recognized an exception from the term "meeting," as used in R.C. 121.22, for the adjudicatory activities of administrative agencies that are otherwise subject to R.C. 121.22. For example, in *Angerman v. State Medical Board*, 70 Ohio App. 3d 346, 591 N.E.2d 3 (Franklin County 1990), the court decided that the deliberations of a quasi-judicial body, which lead to the making of an adjudication, are not subject to the open meeting requirements of R.C. 121.22. The *Angerman* court stated: "Although R.C. 121.22 makes no general exception for judicial or quasi-judicial deliberations, even of the deliberations of a jury in either a civil or criminal case, it necessarily follows that such deliberations are not intended to be within the purview of the open-meeting requirements of R.C. 121.22." *Id.* at 351, 591 N.E.2d at 6-7. See also *In re Petition for Annexation*, 52 Ohio App. 3d 8, 12, 556 N.E.2d 200, 205 (Franklin County 1988) ("even though a public body must open all its meetings to the public, there is a category of gatherings, called 'hearings,' which do not have to be public"); see generally *Matheny v. Frontier Local Board of Education*, 62 Ohio St. 2d 362, 405 N.E.2d 1041 (1980) (concluding that a formal hearing mandated by statute does not constitute a "meeting" for purposes of R.C. 121.22). Controlling law appears to hold, therefore, that the General Assembly did not intend for R.C. 121.22 to apply to judicial or quasi-judicial activities.

In those circumstances requiring the court to determine and award attorney fees, such determination and award is a judicial function. See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991); *Blum v. Stenson*, 465 U.S. 886 (1984); *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *State ex rel. White v. City of Cleveland*, 34 Ohio St. 2d 37, 295 N.E.2d 665 (1973) (syllabus, paragraph three). Because the activities performed by the panel you describe are part of this function, the panel, like the court it is assisting, is performing a judicial or quasi-judicial activity. Therefore, the panel created by local rule 17.08(F) is not subject to the requirements of R.C. 121.22 when performing its duties as prescribed by rule 17.08 of the Erie County Court of Common Pleas.

Conclusion

It is, therefore, my opinion, and you are hereby advised that the panel created by the Erie County Court of Common Pleas in local rule 17.08 is not subject to the open meeting requirements of R.C. 121.22.