

## OPINION NO. 87-064

## Syllabus:

1. A county is entitled to the reimbursement authorized by R.C. 2941.51 for costs incurred in providing appointed counsel for rape victims under R.C. 2907.02(F).
2. In order for counsel to be paid by the county pursuant to R.C. 2941.51, a person for whom representation is provided pursuant to R.C. 2907.02(F) must submit an affidavit of indigency on forms prescribed by the State Public Defender. A person who is not indigent may complete such an affidavit by asserting that such person is not indigent but is otherwise unable to obtain the services of counsel.
3. A person for whom counsel is provided pursuant to R.C. 2907.02(F) must, under R.C. 2941.51(D), reimburse the county in such amount as is reasonable if such person has the means to meet some part of the cost of the services rendered.
4. There is no statutory requirement that an affidavit of indigency must be submitted to the State Public Defender in order for a county to obtain reimbursement under R.C. 2941.51 for costs incurred in providing appointed counsel for a rape victim under R.C. 2907.02(F).

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To: **Randall M. Dana, State Public Defender, Columbus, Ohio**  
By: **Anthony J. Celebrezze, Jr., Attorney General, August 20, 1987**

I have before me your request for an opinion concerning the costs of providing appointed counsel to represent rape victims. R.C. 2907.02(F) states that, in certain circumstances, counsel may be appointed at public expense to represent a rape victim:

Upon approval by the court, the [rape] victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise unable to obtain the services of counsel, the court may, upon request, appoint counsel to represent the victim without cost to the victim. (Emphasis added.)

Other provisions of R.C. 2907.02 contain certain restrictions on the admissibility of evidence in a rape case, as follows:

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case

and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code [relating to the proof of defendant's motive], and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

See generally State v. Gardner, 59 Ohio St. 2d 14, 17-18, 391 N.E.2d 337, 340 (1979) (R.C. 2907.02(D) advances the following state interests: "First, by guarding the complainant's sexual privacy and protecting her from undue harassment, the law discourages the tendency in rape cases to try the victim rather than the defendant. In line with this, the law may encourage the reporting of rape, thus aiding crime prevention. Finally, by excluding evidence that is unduly inflammatory and prejudicial, while being only marginally probative, the statute is intended to aid in the truth-finding process" (footnote omitted)); State v. Leslie, 14 Ohio App. 3d 343, 346, 471 N.E.2d 503, 507 (Montgomery County 1984) ("[t]he purpose behind [R.C. 2907.02(D)] is to exclude evidence on charges of rape [of] other sexual activity by the alleged victim or the defendant. Such evidence is not to be admitted unless the trial court determines that the evidence is material to a fact at issue and that its prejudicial nature does not outweigh its probative value").

You have inquired about the role of your office in providing reimbursement for the costs of counsel appointed pursuant to R.C. 2907.02(F). Your questions may be phrased as follows:

1. Since there is no potential loss of liberty for a rape victim, is a county entitled to any state reimbursement for costs incurred in providing appointed counsel pursuant to R.C. 2907.02(F)?

2. Is a person for whom representation is provided pursuant to R.C. 2907.02(F) required to submit an affidavit of indigency with the request for reimbursement as required by R.C. 120.34?

Your questions arise in the context of R.C. Chapter 120, which establishes the Ohio Public Defender Commission, see R.C. 120.01, and the position of State Public Defender, see R.C. 120.03-.04. The provisions of R.C. Chapter 120 require that a county provide legal representation "to indigent adults and juveniles who are charged with the commission of an offense or

act that is a violation of a state statute and for which the penalty or any possible adjudication includes the potential loss of liberty" and in certain postconviction proceedings. R.C. 120.16; R.C. 120.26; see R.C. 120.33. A county may provide such representation through any of three systems: appointment of a county public defender, see R.C. 120.13-.15; appointment of a joint county public defender, see R.C. 120.23-.25; or establishment of a county appointed counsel system, see R.C. 120.33. Pursuant to R.C. 120.18, R.C. 120.28, and R.C. 120.33, the state provides reimbursement for a certain percentage of the expenses of the offices of county and joint county public defenders and of county appointed counsel systems. See R.C. 120.14; R.C. 120.24; R.C. 120.34; R.C. 120.35. The reimbursement scheme established under R.C. 120.18, R.C. 120.28, and R.C. 120.33 thus applies, in general, to the expenses of providing counsel for indigent defendants. Certain other types of expenses have been included in the scheme by statutory reference. See, e.g., R.C. 2151.352 ("[a] child, his parents, custodian, or other person in loco parentis...is entitled to representation by legal counsel at all stages of the proceedings [in juvenile court] and if, as an indigent person, he is unable to employ counsel, to have counsel provided for him pursuant to Chapter 120. of the Revised Code....The court...shall provide counsel upon request pursuant to Chapter 120. of the Revised Code"); Ohio R. Juv. P. 4(A); State ex rel. Butler v. Demis, 66 Ohio St. 2d 123, 420 N.E.2d 116 (1981); 1984 Op. Att'y Gen. No. 84-023 (syllabus) ("[p]ursuant to R.C. 2151.352, a child, his [parent], custodian, or other [person] in loco parentis, if indigent, is entitled to be represented in all juvenile proceedings by a public defender in accordance with the comprehensive system set forth in R.C. Chapter 120, regardless of whether the outcome of the proceeding could result in a loss of liberty"). The scheme for state reimbursement of costs of representation under R.C. 120.18, R.C. 120.28, and R.C. 120.33 does not, however, expressly include expenses incurred in providing counsel for rape victims pursuant to R.C. 2907.02(F).

In 1985 Op. Att'y Gen. No. 85-090, I found that the reimbursement scheme established under R.C. 120.18, R.C. 120.28, and R.C. 120.33 extends to all "instances where the courts have found a constitutional right to representation at public expense," including, in particular, parentage proceedings where the complainant-mothers and their children are recipients of public assistance and the indigent paternity defendants are constitutionally entitled to representation at public expense as provided in State ex rel. Cody v. Toner, 8 Ohio St. 3d 22, 456 N.E.2d 813 (1983), cert. denied, 466 U.S. 938 (1984). Op. No. 85-090 at 2-380. See also 1982 Op. Att'y Gen. No. 82-098 (concluding that the Ohio Public Defender Commission must provide reimbursement to counties for a percentage of the costs incurred in providing representation through a county or joint county public defender office or county appointed counsel system to an indigent defendant in contempt proceedings for nonpayment of child support and noting that, since a defendant may be deprived of his physical liberty as a result of such proceedings, there is a constitutional right to appointed counsel in such proceedings). See generally State ex rel. Butler v. Demis, 66 Ohio St. 2d at 132, 420 N.E.2d at 122 ("the appointment of counsel by the court to represent indigent parties, where such appointment and representation is constitutionally mandated, is a necessary function of the court in the exercise of its jurisdiction"). The provision of counsel to a rape victim under R.C. 2907.02(F)

is, however, apparently based upon that statutory provision, rather than upon a constitutional requirement. See State v. Keaton, No. H-84-47, slip op. at 7 (Ct. App. Huron County Nov. 1, 1985) (unreported) (noting that the attorney appointed under R.C. 2907.02(F) to represent a rape victim properly made numerous evidentiary objections "for the purpose of protecting the victim from needless emotional trauma"). See generally, e.g., Hope v. State, 449 So. 2d 1315, 1318 (Fla. Dist. Ct. App. 1984) ("a witness, as opposed to an accused, in a judicial proceeding has no constitutional right to counsel unless the witness' Fifth Amendment rights are in jeopardy"); People v. Brooks, 125 Misc. 2d 992, 480 N.Y.S.2d 859 (Sup. Ct. 1984). As you have noted, a rape victim suffers no potential loss of liberty in the rape proceeding. Further, the fact that the language of R.C. 2907.02(F) is discretionary, rather than mandatory, indicates that there is no general requirement that counsel be appointed to represent a rape victim. Cf. State ex rel. Cody v. Toner (syllabus) ("[t]he denial of court-appointed counsel for an indigent paternity defendant who faces the state as an adversary, when the complainant-mother and her child are recipients of public assistance, violates the due process guarantees of the Ohio and United States Constitutions"). See also Lassiter v. Department of Social Services, 452 U.S. 18 (1981); State ex rel. Heller v. Miller, 61 Ohio St. 2d 6, 399 N.E.2d 66 (1980) (finding a right to appointed counsel under the constitutional guarantees of due process and equal protection of the law in state actions to force the permanent, involuntary termination of parental rights). The analysis applied in Op. No. 85-090 is, therefore, not determinative of the question whether a county is entitled to any reimbursement for the provision of appointed counsel to rape victims under R.C. 2907.02(F).

That question may, however, be answered by an examination of R.C. 2941.51, which contains general provisions governing the payment of appointed counsel. R.C. 2941.51 states:

(A) Counsel appointed to a case or selected by an indigent person under division (E) of section 120.16 or division (E) of section 120.26 of the Revised Code, 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. Each request for payment shall be accompanied by an affidavit of indigency completed by the indigent person on forms prescribed by the state public defender. 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 review, amendment, and approval of the board of county commissioners.

(C) In a case where counsel have been appointed to conduct an appeal under Chapter 120. of the Revised Code, such compensation shall be fixed by the court of

appeals or the supreme court, as provided in divisions (A) and (B) of this section.

(D) The fees and expenses approved by the court under this section shall not be taxed as part of the costs and shall be paid by the county. However, if the person represented has, or reasonably may be expected to have, the means to meet some part of the cost of the services rendered to him, he shall reimburse the county in an amount that he reasonably can be expected to pay. The county shall pay to the state public defender a percentage of the reimbursement received from such person in an amount proportionate to the percentage of the costs of the person's case that were paid to the county by the state public defender pursuant to this section. The money paid to the state public defender shall be credited to the public defender reimbursement fund created pursuant to division (B)(5) of section 120.04 of the Revised Code.<sup>1</sup>

(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

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<sup>1</sup> R.C. 120.04 states, in part:

(B) The state public defender shall:

...

(5) Collect all moneys due the state for reimbursement for legal services under this chapter and institute any actions in court on behalf of the state for the collection of such sums that he considers advisable. Except as provided otherwise in division (D) of section 120.06 of the Revised Code, all moneys collected by the state public defender under this division shall be deposited in the state treasury to the credit of the public defender reimbursement fund, which is hereby created. All moneys credited to the fund shall be used to reimburse counties for the operation of county public defender offices, joint county public defender offices, and county appointed counsel systems pursuant to sections 120.18, 120.28, and 120.33 of the Revised Code.

R.C. 120.06(D) states:

When the state public defender is designated by the court or requested by a county public defender or joint county public defender to provide legal representation for an indigent person in any case, other than pursuant to a contract entered into under authority of division (C)(7) of section 120.04 of the Revised Code, the state public defender shall send to the county in which the case is filed an itemized bill for fifty per cent of the actual cost of the representation. The county, upon receipt of an

pursuant to the approval of the court under this section, separately stating costs and expenses that are reimbursable under section 120.35 of the Revised Code [relating to capital cases]. The board, after review and approval of the auditor's report, may then certify it to the state public defender for reimbursement. The state public defender shall review the report and, in accordance with the standards, guidelines, and maximums established pursuant to divisions (B)(7) and (8) of section 120.04 of the Revised Code, pay fifty per cent of the total cost, other than costs and expenses that are reimbursable under section 120.35 of the Revised Code, if any, of paying appointed counsel in each county and pay fifty per cent of costs and expenses that are reimbursable under section 120.35 of the Revised Code, if any, to the board.

(F) If any county system for paying appointed counsel fails to maintain the standards for the conduct of the system established by the rules of the Ohio public defender commission pursuant to divisions (B) and (C) of section 120.03 of the Revised Code, the commission shall notify the board of the county that the county system for paying appointed counsel has failed to comply with its rules. Unless the board corrects the conduct of its appointed counsel system to comply with the rules within ninety days after the date of the notice, the county's right to reimbursement from the state provided for in this section shall terminate at the end of the ninety-day period. (Emphasis and footnote added.)

Pursuant to R.C. 2941.51, counsel appointed by the court is paid by the county. The county auditor reports to the board of county commissioners and the Ohio Public Defender Commission the amounts that have been paid. The board of county commissioners reviews the auditor's report and, after approval, certifies the report to the State Public Defender. The State Public Defender then reviews the report and makes the appropriate reimbursement, applying the standards, guidelines, and maximums established pursuant to R.C. 120.04(B)(7) and (8).

R.C. 120.04 states, in part:

(B) The state public defender shall:

...

(7) Establish standards and guidelines for the reimbursement, pursuant to sections 120.18, 120.28, 120.33, 2941.51, and 2949.19 of the Revised Code, of

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itemized bill from the state public defender pursuant to this division, shall pay fifty per cent of the actual cost of the legal representation as set forth in the itemized bill. There is hereby created in the state treasury the county representation fund for the deposit of moneys received from counties under this division. All moneys credited to the fund shall be used by the state public defender to provide legal representation for indigent persons when designated by the court or requested by a county or joint county public defender.

counties for the operation of county public defender offices, joint county public defender offices, and county appointed counsel systems and for other costs related to felony prosecutions;

(8) Establish maximum amounts that the state will reimburse the counties, pursuant to sections 120.18, 120.28, 120.33, and 2941.51 of the Revised Code;

(10) Administer sections 120.18, 120.28, 120.33, 2941.51, and 2949.19 of the Revised Code and make reimbursements pursuant to those sections....

R.C. 120.18, R.C. 120.28, and R.C. 120.33 deal, respectively, with partial state reimbursement for the costs of county public defender offices, joint county public defender offices, and county appointed counsel systems. R.C. 2949.19 governs state reimbursement to the clerks of the courts of common pleas for certain transportation and other criminal costs.

R.C. 2941.51, quoted above, applies to reimbursement for costs of counsel appointed or selected under R.C. 120.16(E) or R.C. 120.26(E) or, more generally, of counsel "otherwise appointed by the court," with the exception of counsel appointed to provide legal representation for a person charged with a violation of an ordinance of a municipal corporation. R.C. 120.16 and R.C. 120.26 define instances in which representation is to be provided by the county public defender or the joint county public defender. R.C. 120.16(E) states:

Nothing in this section shall prevent a court from appointing counsel other than the county public defender or from allowing an indigent person to select his own personal counsel to represent him. A court may also appoint counsel or allow an indigent person to select his own personal counsel to assist the county public defender as co-counsel when the interests of justice so require.

R.C. 120.26(E) contains a parallel provision pertaining to the joint county public defender. R.C. 2941.51 thus expressly applies to instances in which a county or joint county public defender system has been established and counsel other than the public defender is appointed to represent an indigent defendant. R.C. 2941.51 also applies when counsel is "otherwise appointed by the court."

The language "otherwise appointed by the court" is general, containing a single limitation relative to municipal ordinances. R.C. 2941.51. It is not by its terms restricted to the appointment of counsel under county appointed counsel systems, see generally R.C. 120.33, or any other particular type of arrangement. Rather, the language "otherwise appointed by the court" appears to serve as a catchall that establishes a method for payment by the county and partial reimbursement by the state whenever counsel is appointed by the court.<sup>2</sup> See, e.g., R.C. 120.06(C) (governing instances in which the State Public Defender provides legal representation and stating:

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<sup>2</sup> It appears that R.C. 2941.51 will not apply in a particular instance if a more specific scheme governing the payment of appointed counsel is applicable. See generally, e.g., R.C. 120.33; 1980 Op. Att'y Gen. No. 80-099.

"[w]hen co-counsel is appointed to assist the state public defender, the co-counsel shall receive any compensation that the court may approve, not to exceed the amounts provided for in section 2941.51 of the Revised Code"); 1980 Op. Att'y Gen. No. 80-099. Cf. 1972 Op. Att'y Gen. No. 72-095 (concluding that since, under statutes then in effect, there was no legislation providing for payment of counsel appointed to defend indigents in misdemeanor cases involving a jail sentence, neither the county commissioners nor other state fiscal officers could appropriate funds for that purpose, even though Argersinger v. Hamlin, 407 U.S. 25 (1972), had recently held that, absent a knowing and intelligent waiver, no person could be imprisoned for any offense, including a misdemeanor, unless he was represented by counsel). See also State ex rel. Wood v. Christiansen, 14 Ohio St. 3d 27, 470 N.E.2d 895 (1984). The language "otherwise appointed by the court" thus appears to include instances in which counsel is appointed, pursuant to R.C. 2907.02(F), to represent a rape victim.

The conclusion that R.C. 2941.51 extends partial state reimbursement to counsel appointed to represent persons other than indigent defendants is consistent with the breadth of duties assigned by statute to the Ohio Public Defender Commission. The Ohio Public Defender Commission was created by R.C. 120.01 "to provide, supervise, and coordinate legal representation at state expense for indigent and other persons." (Emphasis added.) The Commission is, thus, responsible for coordinating legal representation that is provided at state expense regardless of whether the persons so represented are indigent. The Commission is, by R.C. 120.03(C), given the duty of adopting rules "prescribing minimum qualifications of counsel appointed pursuant to this chapter or appointed by the courts." Again, the reference to appointment by the courts is unqualified and appears to extend beyond those appointments that are required by R.C. Chapter 120 for the representation of indigent defendants. See generally Op. No. 84-023 at 2-72 ("R.C. Chapter 120 creates a comprehensive system for providing legal representation for indigent persons").

By its terms, R.C. 2941.51 provides that, when counsel is "otherwise appointed" by the court, counsel shall be paid by the county the compensation and expenses that the trial court approves, not to exceed the amounts fixed by the board of county commissioners under R.C. 2941.51(B). R.C. 2941.51(A). The county auditor shall draw his warrant on the county treasurer for the payment of counsel in the amount of compensation and expenses fixed by the court and shall report periodically to the board of county commissioners and to the Ohio Public Defender Commission the amounts paid out pursuant to court approval under R.C. 2941.51, stating separately costs and expenses that are reimbursable under R.C. 120.35, which relates to capital cases. R.C. 2941.51(E). The board of county commissioners, after review and approval of the auditor's report, may certify it to the State Public Defender for reimbursement. R.C. 2941.51(E). The State Public Defender is required to take the following steps with respect to reimbursement:

The state public defender shall review the report and, in accordance with the standards, guidelines, and maximums established pursuant to divisions (B)(7) and (8) of section 120.04 of the Revised Code, pay fifty per cent of the total cost, other than costs and



expenses that are reimbursable under section 120.35 of the Revised Code, if any, of paying appointed counsel in each county and pay fifty per cent of costs and expenses that are reimbursable under section 120.35 of the Revised Code, if any, to the board.

R.C. 2941.51(E). I conclude that a county is entitled to state reimbursement pursuant to this provision for costs incurred in providing appointed counsel for rape victims under R.C. 2907.02(F).

You have also asked whether a person for whom representation is provided pursuant to R.C. 2907.02(F) is required to submit an affidavit of indigency with the request for reimbursement as required by R.C. 120.34. R.C. 120.34 states that the "total amount of money paid to all counties in any fiscal year pursuant to sections 120.18, 120.28, and 120.33 of the Revised Code for the reimbursement of a percentage of the counties' cost of operating county public defender offices, joint county public defender offices, and county appointed counsel systems shall not exceed the total amount appropriated for that fiscal year by the general assembly for the reimbursement of the counties for the operation of the offices and systems," and sets forth a procedure for making proportionate reductions in amounts paid to the various counties if the amount appropriated by the General Assembly is insufficient to pay fifty percent of the total costs. Similar provisions govern the proportionate reduction of amounts paid under R.C. 120.35, relating to capital cases, if the amounts appropriated by the General Assembly are insufficient to pay fifty percent of the total costs and expenses. R.C. 120.34 makes no direct reference to an affidavit of indigency.

R.C. 120.33, which is referenced in R.C. 120.34, does, however, require the submission of an affidavit of indigency. R.C. 120.33 governs county appointed counsel systems and states that, in general, counsel "shall be paid by the county and shall receive the compensation and expenses the court approves. Each request for payment shall be accompanied by an affidavit of indigency completed by the indigent person on forms prescribed by the state public defender." See R.C. 120.04(C)(6) (authorizing the State Public Defender to "[p]rescribe any forms that are necessary for the uniform operation of [R.C. Chapter 120]"). R.C. 120.33 provides that the county auditor shall prepare a periodic report on amounts that are paid to counsel under this provision and that the board of county commissioners, after review and approval of the auditor's report, may certify it to the State Public Defender for reimbursement. R.C. 120.33 states expressly: "If a request for reimbursement is not accompanied by an affidavit of indigency completed by the indigent person on forms prescribed by the state public defender, the state public defender shall not pay the requested reimbursement."

The other sections referenced in R.C. 120.34 contain no mention of an affidavit of indigency. R.C. 120.18 and R.C. 120.28, which govern reimbursement of the costs of county public defender offices and joint county public defender offices, do, however, require that each request for reimbursement submitted to the State Public Defender "shall include a certification by the [joint] county public defender that the persons provided representation by the [joint] county public defender's office during the period covered by the report were indigent." See also R.C. 120.15(D) and R.C.

120.25(D) ("[t]he [joint] county public defender shall determine indigency of persons, subject to review by the court, in the same manner as provided in section 120.05 of the Revised Code. Each monthly report submitted to the board of county commissioners and the state public defender shall include a certification by the [joint] county public defender that all persons provided representation by the [joint] county public defender's office during the month covered by the report were indigent under the standards of the Ohio public defender commission").

As discussed above, the representation of rape victims under R.C. 2907.02(F) is not a duty imposed upon county public defenders, joint county public defenders, or county appointed counsel systems under R.C. Chapter 120, and the costs of such representation do not come within the amounts that are subject to reimbursement under R.C. 120.18, R.C. 120.28, and R.C. 120.33. The provisions of R.C. 120.34 are, therefore, not directly applicable to the reimbursement of costs incurred under R.C. 2907.02(F). Rather, such costs are reimbursable under R.C. 2941.51.

With respect to the procedure for obtaining payment for appointed counsel, R.C. 2941.51 requires that "[e]ach request for payment shall be accompanied by an affidavit of indigency completed by the indigent person on forms prescribed by the state public defender." R.C. 2941.51(A). Unlike R.C. 120.33, however, R.C. 2941.51 does not require that requests for reimbursement submitted by a county to the State Public Defender be accompanied by affidavits of indigency completed by the indigent persons. Instead, R.C. 2941.51 provides only that the State Public Defender "shall review the [county auditor's] report [certified to the State Public Defender by the board of county commissioners] and, in accordance with the standards, guidelines, and maximums established pursuant to [R.C. 120.04(B)(7) and (8)]," make reimbursement of the appropriate amounts. It is, therefore, required by R.C. 2941.51 that, in order for counsel to be paid by the county, a person for whom counsel is provided must complete an affidavit of indigency and submit the affidavit to the county. It is not, however, required by R.C. 2941.51 that such affidavits be forwarded to the State Public Defender in order for the county to obtain reimbursement from the state.<sup>3</sup>

Some question concerning the application of the provisions of R.C. 2941.51 to costs for counsel under R.C. 2907.02(F) may arise from the fact that R.C. 2907.02(F) expressly authorizes the appointment of counsel to represent a rape victim without

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<sup>3</sup> The State Public Defender is given statutory responsibility for the administration of R.C. 2941.51. See R.C. 120.04(B)(10). See also R.C. 120.04(B)(7); R.C. 120.04(B)(8); R.C. 120.04(C)(6). It appears that, in order to carry out this responsibility, the State Public Defender could impose a requirement that affidavits of indigency completed under R.C. 2941.51 be submitted to him along with the reports certified for reimbursement under R.C. 2941.51, if he were to find that such requirement was reasonably necessary for the efficient performance of his duties. See generally, e.g., Jewett v. Valley Railway Co., 34 Ohio St. 601 (1878); 1986 Op. Att'y Gen. No. 86-076; 1984 Op. Att'y Gen. No. 84-080.

cost to the victim "[i]f the victim is indigent or otherwise unable to obtain the services of counsel." See generally Webster's New World Dictionary 716 (2d college ed. 1978) (defining "indigent" to mean "in poverty; poor; needy; destitute"). It may be argued that a victim who is not indigent but is "otherwise unable to obtain the services of counsel" will be unable to complete the necessary affidavit of indigency.

I note, however, that in the application of requirements governing the provision of appointed counsel, the concepts of "indigent" and "indigency" have been construed as encompassing not only persons who are destitute but also persons who for other reasons are unable to obtain the services of counsel. In State v. Tymcio, 42 Ohio St. 2d 39, 43-45, 325 N.E.2d 556, 560, cert. denied, 423 U.S. 993 (1975), the Supreme Court of Ohio stated:

The obligation to provide counsel is often said to run to the "indigent." Generally speaking, such a statement is true, because undisputed indigence, and the inability for that reason alone to obtain counsel, is the major reason requiring the assistance of court-appointed counsel. In fact, the temptation is to say that where nonindigency can be factually found, the appointment of counsel by the court not only is not required, but may not be permitted.

Such a rigid requirement would be arguable if indigency were judicially definable as an abstract term without regard to the circumstances of the particular case, and if indigency, as so defined, were the only actual fact bearing on the inability to obtain counsel in this and other cases.\* But it is not.

Clearly, a bare finding of nonindigency does not explain why an accused, such as the defendant in this case, who represents that he has been unable while under bond to obtain adequate counsel with his available resources because of demands for substantial cash retainers, must stand alone.

Many factors may impinge upon a defendant's inability to obtain counsel, factors which may differ greatly from case to case. Here, one can discern from the record that the defendant was a troublesome man. He was contentious, violent in nature, estranged from his wife and family, frustrated by his inability to cope with his problems, and confronted with a serious charge against which there were perhaps few meritorious legal contentions or favorable facts. It can easily be seen why such a man, marginally indigent, might have difficulty in employing counsel.

That such circumstances exist was recognized by Attorney General Robert F. Kennedy, when, in his letter of transmittal of the Federal Criminal Justice Act of 1964 (H.R. Rep. 864, 88 Congress, 1st Sess. [1963]) to President John F. Kennedy, he stated: "\*\*\*\*the term indigency (in 18 U.S.C. §3006A(a)) is avoided because of its implication that only an accused who is destitute may need appointed counsel or services." To avoid this implication, that Act applies to those "financially unable to obtain an adequate defense."

The same is true of Ohio Crim. R. 44(A) and R.C. 2941.50(A) [now repealed], neither of which employs

the term "indigency." Rather, both make reference to one who "is unable to employ counsel."

To make the right to the assistance of court-appointed counsel a factual reality, the determination of need must turn, not upon whether an accused ought to be able to employ counsel, but whether he is in fact able to do so.

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\*The Advisory Committee Notes to the 1966 amendment of the Federal Justice Act of 1964 contain the following:

"The right to assignment of counsel is not limited to those financially unable to obtain counsel. If a defendant is able to compensate counsel but still cannot obtain counsel, he is entitled to the assignment of counsel even though not to free counsel."

Accord, State v. Ackerman, 19 Ohio Op. 3d 347, 348 (C.P. Hamilton County 1979) ("[i]n the instant case, the defendant is obviously not indigent in the classic sense of the word as she does have valuable assets. However, at this time she is without 'available resources' which would be commonly described as easily negotiable or liquid and to this extent, she might be said to be unable to employ counsel immediately so as to protect and preserve her rights of appeal").

The conclusion that conditions other than indigency may require the provision of appointed counsel was reached also in State v. Haag, 49 Ohio App. 2d 268, 271, 360 N.E.2d 756, 759 (Ct. App. Summit County 1976), in which it was stated: "The requirement that an accused be given appointed counsel is not limited to those with financial disability. A duty is placed upon trial courts to inquire fully into any claim of inability to obtain counsel made by an accused." Ohio R. Crim. P. 44, which governs the assignment of counsel for defendants, does not use the word "indigent" or "indigency" but refers instead to instances in which a defendant is "unable to obtain counsel." Cf. R.C. 120.05 (determination of indigency by the State Public Defender, subject to review by the court); R.C. 120.15(D) (determination of indigency by the county public defender, subject to review by the court); R.C. 120.25(D) (determination of indigency by the joint county public defender, subject to review by the court); R.C. 120.33 (county appointed counsel system); R.C. 2941.51 (payment of appointed counsel).

In the situation with which you are concerned, the constitutional requirements that counsel be appointed are not present. Nonetheless, the reference in R.C. 2941.51 to an affidavit of indigency appears to apply to an affidavit stating that the person for whom counsel has been provided is unable to obtain the services of counsel, whether that inability is due to indigency or some other cause. See generally R.C. 120.01; 1 Ohio Admin. Code 120-1-01 (rules adopted by the Ohio Public Defender Commission should "be applied in a uniform manner that will insure proper and adequate legal services for the indigent and other persons entitled to such services in Ohio"); 1 Ohio Admin. Code 120-1-03 (entitled "Standards of indigency" and stating that "[r]epresentation shall be provided to any person who is financially or otherwise unable to obtain an adequate legal representation without substantial hardship to himself or his family").

I note, further, that R.C. 2941.51 states that, if a person for whom representation is provided "has, or reasonably may be expected to have, the means to meet some part of the cost of the services rendered to him, he shall reimburse the county in an amount that he reasonably can be expected to pay." R.C. 2941.51(D). The existence of this provision suggests that, notwithstanding the reference to an affidavit of indigency, counsel may be provided for a person who is not destitute. See generally State v. Ackerman.

It may appear that a conflict between R.C. 2907.02 and R.C. 2941.51 arises from the fact that R.C. 2907.02(F) expressly states that counsel may be appointed to represent the victim "without cost to the victim," whereas R.C. 2941.51(D) states that a person for whom representation is provided is required to reimburse the county if he has the means to meet part of the cost of the services rendered to him. It does not, however, appear to thwart the intent of R.C. 2907.02(F) to condition the permissive appointment of counsel at public expense upon the provision of R.C. 2941.51(D) that reimbursement be made where reasonable. Cf. R.C. 5122.05(C)(2) (providing that a person who is involuntarily detained in a mental hospital may, "if he is unable to obtain an attorney or independent expert evaluation, be represented by court-appointed counsel or have independent expert evaluation of his mental condition, or both, at public expense if he is indigent").

Since R.C. 2907.02(F) and R.C. 2941.51 both deal with the provision of appointed counsel to rape victims, they are in pari materia and their provisions should, accordingly, be read together and reconciled, if possible. See generally State ex rel. Pratt v. Weygandt, 164 Ohio St. 463, 132 N.E.2d 191 (1956); Op. No. 84-023. R.C. 2907.02(F) and R.C. 2941.51 focus on different aspects of the provision of appointed counsel. They are, however, not irreconcilable. R.C. 2907.02(F) authorizes a court to appoint counsel to represent a rape victim, without cost to the victim, if the victim is indigent or otherwise unable to obtain the services of counsel. R.C. 2941.51 requires that, as part of the procedure for paying for such counsel, an affidavit be completed by the person for whom counsel is provided, and the person reimburse the county for such amount of the costs as he can reasonably pay.

The conclusion that R.C. 2907.02(F) and R.C. 2941.51 can be reconciled so that effect is given to both sections is supported by the fact that certain of the potentially conflicting provisions of those sections appear together in R.C. 120.33, where they are read in harmony. R.C. 120.33 provides for a county appointed counsel system that may be adopted in lieu of the appointment of a county public defender or joint county public defender. R.C. 120.33 states that, under such a system, "[t]he court having jurisdiction over the proceeding...shall, after determining that the person is indigent and entitled to legal representation under this section," either, by signed journal entry, enter the name of the lawyer selected by the indigent person, or appoint counsel and, by signed journal entry, enter the name of such counsel. R.C. 120.33(A)(2). R.C. 120.33 goes on to provide that counsel shall be paid by the county and to require that "[e]ach request for payment shall be accompanied by an affidavit of indigency completed by the indigent person on forms prescribed by the state public defender." R.C. 120.33(A)(4). The fact that these provisions coexist in R.C. 120.33 indicates that there is no conflict between having the court determine that it is

appropriate to appoint counsel and requiring that the person for whom counsel is appointed complete an affidavit of indigency. Further, R.C. 120.33 contains a provision requiring reimbursement by the person to whom representation is provided of amounts that "he reasonably can be expected to pay." R.C. 120.33(A)(4). Thus, a finding of indigency or other inability to obtain counsel may, in effect, be modified by a finding that the person can, in fact, bear part of the costs of representation. See generally 1 Ohio Admin. Code 120-1-03(I)(1) ("[a] person provided public representation who is financially able to meet some part of the cost of services shall be required to pay any portion of the cost of legal representation that he is able to pay at the time").

It appears, accordingly, that R.C. 2907.02(F) and R.C. 2941.51 can be read in harmony. Under such construction, the provision that a court may appoint counsel to represent a rape victim without cost to the victim if the victim is indigent or otherwise unable to obtain the services of counsel is qualified by the requirement that each request submitted to the county for payment for appointed counsel must be accompanied by an affidavit completed by the person for whom counsel is provided, setting forth the fact of such person's inability to obtain the services of counsel, and by the requirement that the person for whom representation is provided must pay to the county such reimbursement as is reasonable in the circumstances.

I conclude, therefore, that, in order for counsel to be paid by the county pursuant to R.C. 2941.51, a person for whom representation is provided pursuant to R.C. 2907.02(F) must submit an affidavit of indigency on forms prescribed by the State Public Defender. A person who is not indigent may complete such an affidavit by asserting that such person is not indigent but is otherwise unable to obtain the services of counsel. A person for whom counsel is provided pursuant to R.C. 2907.02(F) must, under R.C. 2941.51(D), reimburse the county in such amount as is reasonable if such person has the means to meet some part of the cost of the services rendered. There is no statutory requirement that an affidavit of indigency must be submitted to the State Public Defender in order for a county to obtain reimbursement under R.C. 2941.51 for costs incurred in providing appointed counsel for a rape victim under R.C. 2907.02(F).

It is, therefore, my opinion, and you are hereby advised, as follows:

1. A county is entitled to the reimbursement authorized by R.C. 2941.51 for costs incurred in providing appointed counsel for rape victims under R.C. 2907.02(F).
2. In order for counsel to be paid by the county pursuant to R.C. 2941.51, a person for whom representation is provided pursuant to R.C. 2907.02(F) must submit an affidavit of indigency on forms prescribed by the State Public Defender. A person who is not indigent may complete such an affidavit by asserting that such person is not indigent but is otherwise unable to obtain the services of counsel.
3. A person for whom counsel is provided pursuant to R.C. 2907.02(F) must, under R.C. 2941.51(D),

reimburse the county in such amount as is reasonable if such person has the means to meet some part of the cost of the services rendered.

4. There is no statutory requirement that an affidavit of indigency must be submitted to the State Public Defender in order for a county to obtain reimbursement under R.C. 2941.51 for costs incurred in providing appointed counsel for a rape victim under R.C. 2907.02(F).