

Note from the Attorney General's Office:

2003 Op. Att'y Gen. No. 2003-005 was overruled by
2011 Op. Att'y Gen. No. 2011-017.

OPINION NO. 2003-005**Syllabus:**

A county prosecuting attorney that has established a pre-trial diversion program pursuant to R.C. 2935.36 may not require participants in the program to pay a fee for supervision services.

To: James J. Mayer, Jr., Richland County Prosecuting Attorney, Mansfield, Ohio
By: Jim Petro, Attorney General, February 10, 2003

You have requested an opinion concerning the authority of a county prosecuting attorney to charge participants in a pre-trial diversion program a fee for supervisory services. Specifically, you wish to know the following:

1. May a County Prosecutor who has established a Diversion Program pursuant to authority given him by O.R.C. 2935.36 also charge diversion participants a reasonable fee for monitoring, drug testing, and similar services?
2. What formal procedure, if any, would be required to lawfully establish each participant's obligation to pay a monetary fee? (i.e., solely by contract with the participant, or resolution by the County Commissioners, or by Order of the Common Pleas Court?)
3. Would such fee be designated as additional "court costs", or simply a contractual charge?

4. To whom may the payments be made?
5. Where may such monies be deposited upon receipt?
6. What accounting procedures would be acceptable upon deposit?
7. Who would have authority to write checks or requisition the paid monies to pay the reasonable costs of the Diversion Program?

Before addressing your specific questions, it is helpful to review the provisions of R.C. 2935.36 establishing pre-trial diversion programs.¹ R.C. 2935.36(A) provides that a “prosecuting attorney may establish pre-trial diversion programs for adults who are accused of committing criminal offenses and whom the prosecuting attorney believes probably will not offend again.” See generally R.C. 4301.69(E)(2)(b) (“[i]f a person is charged in a criminal complaint with violating [R.C. 4301.69(E)(1)], [R.C. 2935.36] shall apply to the offense, except that a person is ineligible for diversion under that section if the person previously has been diverted pursuant to division (E)(2)(a) or (b) of this section”). The programs are operated in accordance with written standards approved in a journal entry of the court of common pleas. R.C. 2935.36(A).

Pursuant to R.C. 2935.36(B), a person’s entry into a pre-trial diversion program is conditioned upon the person’s waiving, in writing, certain specified rights and agreeing, in writing, to the conditions of the program established by the prosecuting attorney. If a person agrees to enter a pre-trial diversion program, the trial court, upon the application of the prosecuting attorney, is required to order the person’s release from confinement, discharge and release any existing bail, release any sureties on recognizances, and release the person on a recognizance bond conditioned upon the person’s compliance with the terms of the program. R.C. 2935.36(C).

A person’s successful completion of a pre-trial diversion program results in a dismissal of the criminal charge or charges against the person. R.C. 2935.36(D). However, if a person violates any of the conditions of the program, the person may be brought to trial upon the criminal charge or charges and the waiver executed pursuant to R.C. 2935.36(B)(1) is void on the date the person is removed from the program for the violation. *Id.*

A review of R.C. 2935.36 in its entirety thus discloses that “[t]he legislature vested the prosecuting attorney with discretion regarding the determination of whether to prosecute an individual who might be eligible for the diversionary programs.” *State v. Curry*, 134 Ohio App. 3d 113, 116, 730 N.E.2d 435 (Summit County 1999); accord *City of Cleveland v. Mosquito*, 10 Ohio App. 3d 239, 240, 461 N.E.2d 924 (Cuyahoga County 1983); see also *City of Cleveland v. Buchanon*, No. 46046, 1983 Ohio App. LEXIS 12825, at *3 (Cuyahoga County July 7, 1983); 1976 Op. Att’y Gen. No. 76-002 at 2-4. See generally *State v. Urvan*, 4 Ohio App.

¹As stated in 1992 Op. Att’y Gen. No. 92-038 at 2-148, “Ohio law provides for a variety of diversion programs.” See, e.g., R.C. 2935.36; 1977-1978 Ohio Laws, Part II, 2770, 2772 (Am. Sub. H.B. 473, eff. June 6, 1978) (section two, uncodified); *City of Cleveland v. Mosquito*, 10 Ohio App. 3d 239, 461 N.E.2d 924 (Cuyahoga County 1983); *City of Cleveland v. Buchanon*, No. 46046, 1983 Ohio App. LEXIS 12825 (Cuyahoga County July 7, 1983); 1976 Op. Att’y Gen. No. 76-002. Because you have inquired about pre-trial diversion programs established pursuant to R.C. 2935.36, we will address the assessment of a fee for supervision services in programs established only pursuant to that statute.

3d 151, 153 n.3, 446 N.E.2d 1161 (Cuyahoga County 1982) (the objective of a pre-trial diversion program is "to permit first offenders in specified categories to demonstrate reform and avoid the stigma of a record"); Debra T. Landis, Annotation, *Pretrial Diversion: Statute or Court Rule Authorizing Suspension or Dismissal of Criminal Prosecution on Defendant's Consent to Noncriminal Alternative*, 4 A.L.R.4th 147, 153 (1981) ("[p]retrial intervention or diversion programs are alternative procedures to the traditional process of prosecuting criminal defendants and are intended to augment the criminal justice system where prosecution would be counterproductive, ineffective, or unwarranted").

Let us now turn to your first question, which asks whether a county prosecuting attorney that has established a pre-trial diversion program pursuant to R.C. 2935.36 may require participants in the program to pay a fee for supervision services. It is a well-established principle that county prosecuting attorneys are creatures of statute and have only those powers expressly provided by statute or as may exist by necessary implication. *State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (1940); *State ex rel. Doerfler v. Price*, 101 Ohio St. 50, 128 N.E. 173 (1920). In accordance with this principle, a county prosecuting attorney may not charge a fee for any service absent express or implied statutory authority to do so. 1999 Op. Att'y Gen. No. 99-012 at 2-101; see R.C. 325.36 ("[n]o salaried county official ... shall collect a fee other than that prescribed by law"); *R.R. Co. v. Lee*, 37 Ohio St. 479 (1882) (county prosecuting attorney, who in response to a citizen request exercised discretionary authority to prosecute a case in magistrate's court, had no authority to require payment of a fee from that citizen).

No statute expressly authorizes a county prosecuting attorney to charge participants in a pre-trial diversion program established pursuant to R.C. 2935.36 a fee for supervision services. Thus, unless there is implied statutory authority, the imposition of such fees is impermissible.

In assessing the existence of implied authority, we note that R.C. 2935.36(B)(2) provides, in part, that a person who enters into a pre-trial diversion program is required to "[a]gree, in writing, ... to the conditions of the diversion program established by the prosecuting attorney." (Emphasis added.) R.C. 2935.36(B)(2) thus authorizes a county prosecuting attorney to establish the conditions of a pre-trial diversion program that a person must comply with in order to satisfactorily complete the program. It, therefore, appears that the General Assembly intended to vest prosecuting attorneys with at least some discretionary authority in determining the conditions of a pre-trial diversion program that a person must comply with in order to satisfactorily complete the program.

The question for our purposes, then, is whether this grant of authority includes the implied authority to require participants in a pre-trial diversion program to pay a fee for supervision services. In considering this question, we note that in similar statutory contexts where the legislature has intended to provide authority to collect supervisory fees, it has done so expressly. So, for instance, R.C. 2951.021(B)(1) states that, "[i]f a court places a misdemeanor offender on probation or places a felony offender under a community control sanction under [R.C. 2929.16, R.C. 2929.17, or R.C. 2929.18] and if the court places the offender under the control and supervision of a probation agency, the court may require the offender, as a condition of probation or of community control, to pay a monthly supervision fee of not more than fifty dollars for supervision services." R.C. 2929.15(D)(3) provides, in part, that "[a]n offender who is required under [R.C. 2929.15(A)(1)] to submit to random drug testing as a condition of release under a community control sanction and whose test results indicate that the offender ingested or was injected with a drug of abuse shall pay the fee for the drug test if the department of probation or the adult parole authority that has

general control and supervision of the offender requires payment of a fee." R.C. 2929.23(E)(1) also states that "[e]ach court that imposes electronically monitored house arrest may adopt by local court rule a reasonable daily fee to be paid by each eligible offender upon whom a period of electronically monitored house arrest is imposed as a sentencing sanction or alternative." In each of these statutes the General Assembly has also provided for the collection, disposition, deposit, and use of the supervision fees imposed. *See, e.g.*, R.C. 2929.15(D)(3); R.C. 2929.23(E)(1); R.C. 2951.021.

In light of these statutory provisions authorizing the imposition of supervisory fees in similar contexts, it appears that, when the General Assembly wishes a person involved in the criminal justice system to pay a fee for supervision services, it provides explicit authority to do so. *See generally Metro. Sec. Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81 (1927) ("having used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended"); *Lake Shore Elec. Ry. Co. v. P.U.C.O.*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (had the legislature intended a particular meaning, "it would not have been difficult to find language which would express that purpose," having used that language in other connections). The General Assembly's failure to expressly require participants in a pre-trial diversion program to pay such supervisory fees thus evidences a legislative intent that the authority to impose such fees should not be implied.

In addition, the fact that the procedures governing the collection, disposition, deposit, and use of such fees would also have to be implied militates against finding implied authority to impose such fees. Such procedures are necessary to ensure that any fees collected from participants in a pre-trial diversion program are properly handled and safeguarded. It is a paramount concern of the general public that public moneys be accounted for accurately at all times and spent only for their intended purposes. The appropriate mechanism for establishing these necessary procedures is legislation enacted by the General Assembly, rather than a formal opinion of the Attorney General. *See generally* 1993 Op. Att'y Gen. No. 93-072 at 2-343 ("[i]f any changes are to be made to the scheme for providing established lifetime permanent and total disability benefits to Ohio's police officers and firefighters, those changes must be made by the General Assembly. Such changes cannot be made by opinion of the Attorney General"); 1982 Op. Att'y Gen. No. 82-010 at 2-34 ("it is not the role of the Attorney General to legislate. *See* 1980 Op. Att'y Gen. No. 80-011. This power is vested solely in the General Assembly and any change in the law must be made by that body").

In light of the foregoing, it is our belief that the discretionary authority vested in county prosecuting attorneys to determine the conditions of a pre-trial diversion program that a person must comply with in order to satisfactorily complete the program does not include the implied authority to require participants in the program to pay a fee for supervisory services. In the absence of either express or implied statutory authority, a county prosecuting attorney is not permitted to charge participants in a pre-trial diversion program a fee for supervisory services.

Accordingly, a county prosecuting attorney that has established a pre-trial diversion program pursuant to R.C. 2935.36 may not require participants in the program to pay a fee for supervision services.

Your remaining questions concern the collection, accounting, deposit, and disposition of fees imposed by a county prosecuting attorney for supervision services provided in a

pre-trial diversion program. In light of our answer to your first question, it is unnecessary for us to address your remaining questions.

Based on the foregoing, it is our opinion, and you are hereby advised that a county prosecuting attorney that has established a pre-trial diversion program pursuant to R.C. 2935.36 may not require participants in the program to pay a fee for supervision services.