

**OPINION NO. 84-047****Syllabus:**

Pursuant to R.C. 120.04, the State Public Defender may establish maximum amounts that the State will reimburse counties which have adopted a system of appointed counsel for the representation of indigent persons in criminal actions and which compensate such appointed counsel in accordance with a minimum fee schedule based on specific types of legal services performed rather than an hourly rate schedule.

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**To: Randall M. Dana, Public Defender, Office of the Ohio Public Defender,  
Columbus, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, July 31, 1984**

I have before me your request for my opinion on whether the State Public Defender may establish, pursuant to R.C. 120.04(B)(9), maximum amounts that the State will reimburse counties which have adopted a system of appointed counsel for the representation of indigent persons in criminal actions and which compensate such appointed counsel in accordance with a minimum fee schedule based on specific types of legal services performed rather than an hourly rate schedule.

In general, R.C. 120.33 provides that in lieu of using a county or joint county public defender to represent indigents in criminal matters, a county is permitted to adopt a system of appointed counsel. To establish such a system, the board of county commissioners, must adopt a resolution to pay counsel who are either selected by an indigent defendant or appointed by the court. Payment of counsel is to be made on an hourly basis or on a case basis according to a schedule required to be established by the county commissioners after reviewing schedules proposed by the county bar association. R.C. 120.33(C). The county is to pay the court-approved compensation and expenses of appointed counsel, except for counsel appointed to represent a person charged with any violation of an ordinance of a municipal corporation that has not contracted with the county commissioners for the payment of appointed counsel; such compensation and expenses may not exceed the amounts fixed by the county commissioners in the schedule established pursuant to R.C. 120.33(C). R.C. 120.33(D). Upon certification by the county commissioners as to the costs for the provision of legal counsel, the State Public Defender is obligated to review the costs in accordance with the standards, guidelines, and maximums established pursuant to R.C. 120.04(B)(7) and (8) and, prepare a voucher for the payment by the state of fifty percent of the total cost of the county appointed counsel system. R.C. 120.33(D). See R.C. 120.34.

Pursuant to R.C. 120.33(D), the State Public Defender is under a statutory obligation to prepare a voucher for fifty percent of the total cost of each county appointed counsel system in accordance with the standards, guidelines, and

maximums established pursuant to R.C. 120.04(B)(7) and (8). To this effect, R.C. 120.04 provides:

(B) The state public defender shall:

. . . .

(7) Establish standards and guidelines for the reimbursement, pursuant to sections 120.18 [reimbursement of costs of county public defender's office], 120.28 [reimbursement of costs of joint county public defender's office], 120.33 [county appointed counsel system], 2941.51 [providing for the payment by the state of assigned counsel in instances where the court assigns counsel regardless of the type of county level public defender system established], and 2949.19 [providing for the payment by the state of costs of conviction] of the Revised Code, of 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. . . .

R.C. 120.04(B) further provides that the State Public Defender must:

(9) Establish maximum amounts that the state will reimburse the counties pursuant to section 120.33 of the Revised Code for each specific type of legal service performed by a county appointed counsel system;

(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 in accordance with the appropriations made by the general assembly for reimbursements made pursuant to those sections.

In your letter you have indicated that your question arises under the following circumstances:

Included in [the fee schedule established by the State Public Defender] is a recommendation that the county commissioners enact a minimum fee and a statement that the Ohio Public Defender does not have the authority to establish such a minimum. Many counties have acted on this recommendation, establishing payment schedules which include minimum fees for particular types of legal services performed. These minimum flat fee schedules, recognizing that experienced attorneys can often successfully perform certain legal services in relatively short time periods, provide a means of insuring that indigents throughout the state are afforded adequate counsel.

The problem that has resulted from the increased use of minimum flat fee schedules concerns the inadequacy of an hourly rate schedule, as is currently in effect, as a means to calculate reimbursable amounts to be paid to the counties. For example, if a county has established a minimum fee of \$300.00 for the performance of a specific type of legal service and has appointed an attorney, pursuant to section 120.33 of the Ohio Revised Code, who performs this service, the current [state] fee schedule only authorizes reimbursement based on an hourly rate. If the attorney worked one hour in court and one hour out of court the current fee schedule authorizes payment of \$40.00 per in court hour and \$30.00 per out of court hour. The county is reimbursed 50% of these figures, based on the number of hours reported by the attorney to the local court and my office, or in this case, a total of \$35.00. This hourly fee schedule adversely affects counties [which] have established and incorporated minimum fee schedules.

The question that I . . . have is whether O.R.C. 120.04(B)(9) authorizes the establishment of a maximum reimbursable amount for counties [which] have established a minimum payment schedule for specific types of legal services performed. For example, if I were to establish a minimum flat fee of \$200.00 for misdemeanor cases, I would reimburse the county, provided it has established a minimum flat fee schedule, \$100.00 for an attorney who handled a misdemeanor case, regardless of the number of hours reported.

Clearly, under the provisions of R.C. 120.04(B) set forth above, the State Public Defender is authorized to establish maximum amounts of state reimbursement to the counties. An implication of this broad grant of authority is that the State Public Defender may employ any method of calculation in establishing the standards and guidelines for the reimbursement of counties and in establishing the maximum amounts of reimbursement, so long as such action is reasonable and does not constitute an abuse of judgment or discretion. As was stated in State ex rel. Hunt v. Hildebrant, 93 Ohio St. 1, 11-12, 112 N.E. 138, 140-141 (1915):

if the constitution of the state commands a public officer to do a particular thing, without directing the manner in which it shall be done, and the general assembly of the state has not, in the exercise of the authority conferred upon it, enacted any laws to facilitate the operation of the provisions of the constitution, it necessarily follows that the officer who is required to perform this duty has implied authority to determine, in the exercise of a fair and impartial official discretion, the manner and method of doing the thing commanded; otherwise, full directions would have been given the officer or the duty would not have been imposed upon him.

See 1984 Op. Att'y Gen. No. 84-036.

Pursuant to R.C. 120.33(C), a board of county commissioners in a county which has adopted an appointed counsel system may establish a schedule of fees by case or on an hourly basis. Within this grant of authority, a board may establish a minimum fee for particular types of legal services, whether it has adopted a schedule of fees based on an hourly rate of payment or on a case basis. The Public Defender is authorized to establish standards and guidelines for reimbursing counties which operate pursuant to R.C. 120.33, R.C. 120.04(B)(7), and more specifically, to establish maximum amounts of state reimbursement to counties operating pursuant to R.C. 120.33 for each specific type of legal service performed by a county appointed counsel system, R.C. 120.04(B)(9). If, pursuant to R.C. 120.33, a county establishes a minimum fee schedule, it appears to be well within the Public Defender's discretion to authorize reimbursement of the county for one-half of the amount paid by the county in accordance with the minimum fee schedule adopted by the county, rather than basing such reimbursement on an hourly rate of pay. If a county which operates under R.C. 120.33 is still using only an hourly rate schedule, with no provision for minimum fees, the Public Defender could continue to reimburse such counties on an hourly rate basis.

In conclusion, it is my opinion, and you are advised, that pursuant to R.C. 120.04, the State Public Defender may establish maximum amounts that the State will reimburse counties which have adopted a system of appointed counsel for the representation of indigent persons in criminal actions and which compensate such appointed counsel in accordance with a minimum fee schedule based on specific types of legal services performed rather than an hourly rate schedule.