OPINION NO. 78-036

Syllabus:

Absent an agreement with the attorney general pursuant to R.C. 109.08, an attorney who recovers a subrogation claim owed to the Department of Public Welfare under R.C. 5101.58 may not charge the Department a fee for representing it.

To: Kenneth B. Creasy, Director, Ohio Department of Public Welfare, Columbus, Ohio

By: William J. Brown, Attorney General, June 13, 1978

I have before me your request for my opinion regarding R.C. 5101.58, which grants the Department of Welfare a right of subrogation on all medical payments to recipients of public assistance where the need for medical care results from action taken by a third party. The problem which you have encountered involves payment of attorney's fees on these subrogation claims. Specifically, you have asked:

> Whether the terms of Revised Code Section 5101.58 permit attorneys representing recipients to deduct, in addition to fees for their clients, a fee for "representation" of the department?

R.C. 5101.58, as amended by Am. H.B. 707, is a relatively new provision. Effective since September 30, 1976, it provides in pertinent part as follows:

> An application for aid to dependent children under Chapter 5107, poor relief under Chapter 5113, or medical assistance under section 5101.51 of the Revised Code, gives a right of subrogation to the department of public welfare and the department of welfare of any county for the liability of a third party for the cost of medical services and care arising out of injury, disease, or disability of an applicant for or recipient of medical assistance to the extent of any payments made . . . Subrogation rights may be enforced separately or jointly by the department of public welfare and county department of welfare. The third party becomes liable to the department . . . as soon as notified in writing of the valid claim for subrogation under this section.
>
> Subrogation does not apply to that portion of any judgment, settlement, or compromise of a claim, to the extent of attorneys' fees, costs, and other expenses incurred by a recipient of aid or medical assistance in securing judgment, settlement, or compromise, or to the extent of medical, surgical, or hospital expenses paid by such recipient from his own resources. (Emphasis added.)

In your request, you outline current practice as follows: A recipient of public assistance is involved in an automobile accident, and enters the hospital. He requires $6000 in medical services which your department pays. The recipient then sues the tortfeasor and receives a $10,000 settlement. Prior to settlement, your department notifies all parties of the subrogation claim, but the tortfeasor's insurance company pays the recipient and his attorney the full $10,000. The attorney recoups his expenses of $1,000, leaving a balance of $9,000. According to information you have supplied, some attorneys are first charging their clients a

one-third contingent from the balance, or $3000.00, and then, they are charging the department one-third of the remainder, or $2000, as a fee for collecting the subrogation claim. The net result can be broken down as follows:

Settlement	$10,000.00
Less Attorney's expenses	1,000.00
Available for Disbursement	9,000.00
Attorney's fee to Client (1/3 x 9,000)	3,000.00
Available for subrogation claim	6,000.00
Attorney's fee for representation of the Department of Public Welfare (1/3 x 6,000)	2,000.00
Paid to department	4,000.00
Disbursement Summary	
Expenses	1,000.00
Attorney's fee from client	3,000.00
Attorney's fee from department	2,000.00
Subrogation paid to department	4,000.00
Amount paid to client	00.00
TOTAL	10,000.00

R.C. 5101.58 does not address itself to collection, but merely defines the extent of the subrogation to which the department is entitled. The claim is limited, under this section, to the amount of any judgment or settlement which does not represent attorneys fees, expenses made to secure judgment or settlement, and actual medical expenses incurred by the recipient. Therefore, an answer to your question requires analysis of additional authority.

At common law in Ohio, and other states, an attorney who secures a judgment against which a third party has a subrogation claim would be entitled to a fee from the party holding the claim. Thus, in Newcomb v. Cincinnati Ins. Co., 22 Ohio St. 382 (1872) the Supreme Court made the following observation:

> Where the assured, . . . sustains a loss in excess of the reimbursement or compensation by the underwriter, he has an undoubted right to have it satisfied by action against the wrong-doer. But if by such action, there comes into his hands, any sum for which, in equity and good conscience, he ought to account to the underwriter, reimbursement will, to that extent, be compelled in an action by the latter, based on his right in equity to subrogation. But the assured will not, in the forum on conscience, be required to account for more than the surplus, which may remain in his hands, after satisfying his own excess of loss in full, and his reasonable expenses incurred in its recovery; unless the underwriter shall, on notice and opportunity given, have contributed to, and made common cause with him, in the prosecution.

Among those expenses that the court found to be "deductable" were expenses for attorney's fees. Cases in other jurisdictions are similar, See generally, 2 A.L.R.3d 1441, and there is every reason to expect that Ohio would follow such a rule today.

The Newcomb case however, is limited to subrogation claims between private parties. A different result must follow where the state holds the claim. R.C. 109.02 provides, in pertinent part, as follows:

> The Attorney General is the chief law officer for the

> state and all its departments . . . No state officer, board, or the head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys at law . . . (Emphasis added.)

In State ex rel. Renner v. Guilbert, 58 Ohio St. 637 (1898), the Supreme Court interpreted this provision very strictly. The plaintiff, an attorney, had performed services for a "food and dairy commissioner" but the Auditor of State refused to honor his bill for services because the attorney had not been hired by the Attorney General. The attorney brought a mandamus action, but it was denied by the court. Thus, unless an attorney is engaged under proper statutory authority, no payment of a fee is permissible, even where the state has received a benefit from his services.

The procedure for employment of counsel to represent the state in collection matters is set forth in R.C. 109.08. It provides:

> The attorney general may appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect.
>
> Such special counsel shall be paid for their services from funds collected by them in an amount approved by the attorney general.

Since the attorneys about whom you inquire were not appointed to collect these subrogation claims pursuant to R.C. 109.08, they would not be permitted to collect any fee.

Accordingly, it is my opinion, and you are so advised that:

> Absent an agreement with the attorney general pursuant to R.C. 109.08, an attorney who recovers a subrogation claim owed to the Department of Public Welfare under R.C. 5101.58 may not charge the Department a fee for representing it.