

OPINION NO. 92-038**Syllabus:**

1. When fees and expenses incurred by counsel assigned to represent an indigent person come within the fee schedule established by the board of county commissioners under R.C. 120.33 and are approved by the court, the county must pay those fees and expenses; the county's obligation to pay the fees and expenses is not contingent on receipt of partial reimbursement for such fees and expenses from the State Public Defender under R.C. 120.33.
2. If fees imposed in connection with a diversion program are properly paid by counsel assigned to represent an indigent person, come within the fee schedule established by the board of county commissioners under R.C. 120.33, and are approved by the court as expenses of counsel, the county must pay counsel the amount of those fees.
3. The Attorney General is a member of the executive branch of government, and it is inappropriate for the Attorney General to presume to review determinations made by members of the judicial branch of government; accordingly, in issuing an opinion to a county prosecutor, the Attorney General will not question the validity of a court's approval of counsel expenses pursuant to R.C. 120.33.
4. The State Public Defender is directed by statute to administer R.C. 120.33 and make reimbursements pursuant to its provisions in accordance with standards and guidelines established for that purpose.
5. A county auditor is not required to seek partial reimbursement of expenses of assigned counsel through legal action if such reimbursement has been sought through administrative channels in accordance with R.C. 120.33 and has been denied.
6. If the county has sought partial reimbursement of expenses of assigned counsel under R.C. 120.33 and that reimbursement has been denied, and if the expenses in question are reasonably related and necessary to the defense of an indigent client, are specifically allowed by a county's fee schedule, have been approved by the court and paid by the county, and otherwise meet the standards set forth in the Ohio Public Defender Commission Assigned Counsel Standards, then it may be appropriate for the county to take legal action to seek partial reimbursement of the expenses.

To: James J. Mayer, Jr., Richland County Prosecuting Attorney, Mansfield, Ohio

By: Lee Fisher, Attorney General, September 11, 1992

You have requested an opinion concerning the payment of certain expenses incurred in connection with the defense of an indigent person by court-appointed counsel. You have described several situations in which court-appointed counsel have submitted to the court a statement of the fees and expenses incurred in defense of an indigent person, the court has approved the fees and expenses, and the county

has paid the fees and expenses. Upon submission to the State Public Defender for fifty percent reimbursement under R.C. 120.33, however, certain expenses incurred by counsel – namely, payment to the court of fees for a diversion program – have been disallowed, and the partial reimbursement provided for by R.C. 120.33 has been denied for such expenses. Your first question is whether Richland County is "required by law to pay such expenses as those now being determined by the public defender to be ineligible for reimbursement." Your second question is whether the Richland County Auditor is "required to begin legal action to obtain reimbursement of fifty percent of the costs and expenses paid by Richland County to local counsel" in accordance with R.C. 120.33.

I. The Obligation to Pay Expenses

A. The Nature of Expenses

R.C. 120.33 governs the payment of counsel by a county that, rather than use a county or joint county public defender, provides court-appointed counsel for indigent defendants, or permits an indigent person to select his own counsel. Counsel is provided in the circumstances specified in R.C. 120.16(A) – that is, to indigent adults and juveniles who are charged with a violation of a state statute for which there is a potential loss of liberty, and in postconviction proceedings; and to indigent adults and juveniles who are charged with the violation of a municipal ordinance for which there is a potential loss of liberty, if there is a contract for the county to provide such counsel. In a county where counsel is provided in this manner, the board of county commissioners "shall establish a schedule of fees by case or on an hourly basis to be paid to counsel for legal services provided pursuant to a resolution adopted under [R.C. 120.33]." R.C. 120.33(A)(3). Prior to establishing the schedule, the board of county commissioners must request a proposed schedule from the bar association or associations of the county; the schedule is then subject to review, amendment, and approval by the board. R.C. 120.33(A)(3).

Counsel selected by an indigent person or appointed by the court pursuant to R.C. 120.33 "shall be paid by the county and shall receive the compensation and expenses the court approves."¹ R.C. 120.33(A)(4). A request for payment must be accompanied by an affidavit of indigency. R.C. 120.33(A)(4). "Compensation and expenses shall not exceed the amounts fixed by the board of county commissioners" in the schedule that it has adopted. R.C. 120.33(A)(4). "No court shall approve compensation and expenses that exceed the amount fixed" in the schedule. R.C. 120.33(A)(4). R.C. 120.33 states expressly that "[t]he fees and expenses approved by the court shall not be taxed as part of the costs and shall be paid by the county." *See generally* 1990 Op. Att'y Gen. No. 90-109. "The county auditor shall draw his warrant on the county treasurer for the payment of counsel in the amount fixed by the court, plus the expenses the court fixes and certifies to the auditor." R.C. 120.33. *See generally* 1976 Op. Att'y Gen. No. 76-069; *see also* R.C. 2941.51; 1987 Op. Att'y Gen. No. 87-064.

Repeated use of the word "shall" in the statutory provisions governing payment of court-appointed counsel indicates a mandatory duty on the part of the

¹ An exception exists 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." R.C. 120.33(A)(4); *see also* R.C. 120.16(A)(2). It is assumed that the situation with which you are concerned does not come within this exception.

county to pay counsel all compensation and expenses approved by the court. *See generally Dorrian v. Scioto Conservancy District*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (in statutory construction, the word "shall" is ordinarily used in a mandatory sense). The court in turn is limited by the schedule established pursuant to R.C. 120.33. Once qualifying amounts have been approved by the court, they must be paid by the county pursuant to R.C. 120.33. *See generally, e.g., State ex rel. Colgrove v. Supanick*, 41 Ohio St. 2d 141, 324 N.E.2d 183 (1975); *State ex rel. Giuliani v. Perk*, 14 Ohio St. 2d 235, 237 N.E.2d 397 (1968); *State ex rel. Clifford v. Cloud*, 7 Ohio St. 2d 55, 218 N.E.2d 605 (1966).²

The expenses with which you are concerned are expenses incurred in connection with a diversion program. 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 2, uncodified); *City of Cleveland v. Mosquito*, 10 Ohio App. 3d 239, 461 N.E.2d 924 (Cuyahoga County 1983); *State v. Urvan*, 4 Ohio App. 3d 151, 446 N.E.2d 1161 (Cuyahoga County 1982). You have not indicated the precise nature of the diversion program to which your question relates. It is assumed, for purposes of this opinion, that the diversion fees in question were properly imposed and charged.

B. The Attorney General's Deference to Judicial Determinations

A fundamental principle of constitutional law dictates that the legislative, executive, and judicial branches of government are separate and distinct, and that one branch may not impinge upon the rights or authority of the others. *See, e.g., State ex rel. Finley v. Pfeiffer*, 163 Ohio St. 149, 126 N.E.2d 57 (1955); *Knapp v. Thomas*, 39 Ohio St. 377, 391 (1883) ("each [branch of government] can best preserve the jurisdiction and power confided to it, by carefully abstaining from all interference with the rightful authority of the others"). The Attorney General is a member of the executive branch of government. *See* Ohio Const. art. III, §1; *State ex rel. Doerfler v. Price*, 101 Ohio St. 50, 128 N.E. 173 (1920). There is no express grant of constitutional or statutory authority for the Attorney General to review determinations of members of the judicial branch of government. *See* Ohio Const. art. III; R.C. Chapter 109; *accord, e.g.,* 1984 Op. Att'y Gen. No. 84-077; 1972 Op. Att'y Gen. No. 72-097; 1928 Op. Att'y Gen. No. 2304, vol. III, p. 1648 at 1649.

The information that you have provided indicates that the diversion fees in question were paid to the clerk of courts by counsel for the defendant and were designated variously as "costs," "court costs," or "costs - diversion." In the situation with which you are concerned, the court allowed the diversion fees as expenses of counsel.³ The information submitted contains no basis for questioning the validity

² Under earlier statutes, fees and expenses of counsel assigned to represent an indigent person were taxed as part of the costs and subject to reimbursement by the state pursuant to statutory provisions then in effect. *See, e.g., State ex rel. Giuliani v. Perk*, 14 Ohio St. 2d 235, 237 N.E.2d 397 (1968); *State ex rel. Clifford v. Cloud*, 7 Ohio St. 2d 55, 218 N.E.2d 605 (1966). Currently, such fees and expenses are paid by the county and are subject to reimbursement pursuant to R.C. 120.33 or R.C. 2941.51; the statutes specify that they shall not be taxed as part of the costs.

³ 1980 Op. Att'y Gen. No. 80-099 considered, under the law then in effect, whether costs of procuring a transcript should be considered an expense of counsel, as under R.C. 120.33, or a cost of the case under R.C. 2949.19, and concluded that such costs should be considered an expense of

of that allowance. Therefore, it is presumed that the court acted properly and in accordance with its duly-adopted schedule, and the court's determination is accepted as valid. *See, e.g.*, 1928 Op. No. 2304. When a court allows expenses of counsel, the county must pay those expenses pursuant to R.C. 120.33.

C. Request for Reimbursement

After a court approves expenses incurred by court-appointed counsel in defense of an indigent person and the county pays the expenses, the county auditor must include the amounts so paid in periodic reports made to the board of county commissioners and to the Ohio Public Defender Commission. R.C. 120.33. The board of county commissioners, upon approving the report, may certify it to the State Public Defender for reimbursement. R.C. 120.33.

The State Public Defender is required to review reports received from the various counties and, in accordance with the standards, guidelines, and maximums established pursuant to R.C. 120.04(B)(7) and (8),⁴ prepare a voucher for reimbursement of the appropriate amount. The fact that the State Public Defender may disallow partial reimbursement for the costs of diversion fees does not affect the county's duty to pay such amounts, if such amounts have been approved by the court as expenses of counsel under R.C. 120.33. The county's duty to pay such amounts is simply not contingent upon partial reimbursement by the State Public Defender. *See, e.g.*, Op. No. 90-109, at 2-481 ("the primary responsibility for these fees and expenses [approved by the court under R.C. 120.33] rests with the county").

II. Actions When Reimbursement Is Denied By The State Public Defender

Your second question is whether, on the basis of the facts set forth above, the county auditor is "required to begin legal action to obtain reimbursement of fifty percent of the costs and expenses paid by Richland County to local counsel" in accordance with R.C. 120.33. Your question relates to a county's efforts to recover from the State Public Defender reimbursement that the county feels has erroneously been denied. You ask whether the county auditor is "required" to seek to obtain such amounts through legal action against the Public Defender.

counsel. R.C. 2949.19 as then in effect provided for reimbursement of actual costs of conviction in felony cases, rather than providing a general subsidy. *See, e.g.*, 1983-1984 Ohio Laws, Part II, 2872, 2995 (Am. Sub. H.B. 291, eff. July 1, 1983); 1978 Op. Att'y Gen. No. 78-004.

⁴ R.C. 120.04 states, in part:

(B) The state public defender shall do all of the following:

....

(7) Establish standards and guidelines for the reimbursement, pursuant to sections 120.18 [county public defender's office], 120.28 [joint county public defender's office], 120.33 [county appointed counsel system], 2941.51 [appointed counsel], and 2949.19 [criminal costs] 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....

The simple answer to your question is that a county auditor has no statutory duty to seek reimbursement through legal action if reimbursement sought through administrative channels under R.C. 120.33 is denied. This does not mean, however, that legal action is not permitted or is inadvisable. The determination to take or not take legal action in such circumstances is a discretionary one. *See generally, e.g.,* R.C. 120.33; R.C. 309.09; R.C. 309.12; R.C. Chapter 319; *see also* R.C. 117.28. It is not possible to use an opinion of the Attorney General to make findings of fact necessary to resolve particular controversies or to make judgments necessary to evaluate the merits of particular legal action. *See, e.g.,* 1990 Op. Att'y Gen. No. 90-080, at 2-343; 1983 Op. Att'y Gen. No. 83-057, at 2-232. This determination would need to be made at the county level in light of all relevant facts and circumstances.

In this regard, R.C. 120.03(B) provides that the Ohio Public Defender Commission "shall establish rules...for the conduct of county appointed counsel systems in the state." Certain of those rules appear in 1 Ohio Admin. Code Chapter 120-1. R.C. 120.04 provides that the State Public Defender shall establish standards and guidelines for the reimbursement of counties for, *inter alia*, the operation of county appointed counsel systems and other costs related to felony prosecutions, shall establish maximum amounts that the state will reimburse the counties under various statutory provisions, and shall establish maximum amounts that the state will reimburse the counties pursuant to R.C. 120.33 for specific types of legal services performed by a county appointed counsel system. R.C. 120.04(B)(7), (8), (9). The following language relating to the reimbursement of expenses incurred by assigned counsel appears in the Ohio Public Defender Commission Assigned Counsel Standards (revised February 28, 1990), at 4-5:

A.C. 5- Transcripts, Experts, and Other Costs:

The Office of the State Public Defender shall reimburse 50% of all expenses reasonably related and necessary to the defense of an indigent client. These expenses include transcripts, expert advice and testimony, polygraph examinations, phone calls, photocopying, and certain other items. Reimbursement for these expenses is subject to the following:

1. Expenses must be specifically allowed in the pertinent county's fee schedule adopted pursuant to Ohio Revised Code Section 120.33(A)(4).
2. Expenses submitted must be approved by the judge presiding over the proceeding giving rise to the request for reimbursement, or by the administrative judge pursuant to A.C. 7.
3. Expenses associated with transportation, lodging, and meals for non-expert, regular witnesses may be reimbursed provided such expenses comply with the provisions of A.C. 3.
4. All expenses claimed under this section must be itemized. Expenses exceeding \$5.00 must be accompanied by a receipt.
5. Transcript expenses for one (1) original and one (1) copy of a transcript are reimbursable. To receive reimbursement for transcript expenses the form OPD-E-205, *Clerk's/Auditor's Transcript Fee for an Indigent Defendant* must be completed and filed.

The State Public Defender is required to provide reimbursement of counsel expenses in accordance with applicable statutes, rules, and standards. *See* R.C.

120.04. Thus, if the county has sought partial reimbursement of expenses of assigned counsel under R.C. 120.33 and that reimbursement has been denied, and if the expenses in question are reasonably related and necessary to the defense of an indigent client, are specifically allowed in the county's fee schedule, have been approved by the court and paid by the county, and otherwise meet the standards set forth in the Ohio Public Defender Commission Assigned Counsel Standards, it may be appropriate for the county to take legal action to seek partial reimbursement of the expenses. *See generally, e.g.*, 1984 Op. Att'y Gen. No. 84-047, at 2-148 to -149 ("[p]ursuant 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)"); 1982 Op. Att'y Gen. No. 82-098, at 2-272 ("the state may be required [under R.C. 120.33] to reimburse a board of county commissioners for fifty per cent of the fees, costs, and expenses fixed by the court in proceedings in which county appointed counsel has represented an indigent defendant"). Again, the final decision in this regard rests within the discretion of the county auditor upon the advice of counsel.

It should be noted that amounts that are not subject to partial reimbursement by the State Public Defender under R.C. 120.33 may be defrayed, in part, by the subsidy granted to the county under R.C. 2949.19. That subsidy is based on the number of cases in which an indigent person was convicted of a felony and the number of cases requiring reimbursement under R.C. 2949.20 because of final judgment of reversal. The State Public Defender computes the subsidy amount for each county in accordance with R.C. 2949.19 and pays that amount to the clerk of the court of common pleas. The clerk pays to the clerk of the municipal court, for municipal court costs, an amount that does not exceed fifteen dollars for each case submitted for the subsidy in which the defendant was bound over to the court of common pleas from the municipal court. R.C. 2949.19. Amounts received pursuant to R.C. 2949.19 serve to offset, in part, expenses incurred in the representation of indigent defendants, including court costs. *See generally* notes 2 and 3, *supra*.

III. Conclusion

In response to your questions, it is my opinion, and you are hereby advised, as follows:

1. When fees and expenses incurred by counsel assigned to represent an indigent person come within the fee schedule established by the board of county commissioners under R.C. 120.33 and are approved by the court, the county must pay those fees and expenses; the county's obligation to pay the fees and expenses is not contingent on receipt of partial reimbursement for such fees and expenses from the State Public Defender under R.C. 120.33.
2. If fees imposed in connection with a diversion program are properly paid by counsel assigned to represent an indigent person, come within the fee schedule established by the board of county commissioners under R.C. 120.33, and are approved by the court as expenses of counsel, the county must pay counsel the amount of those fees.
3. The Attorney General is a member of the executive branch of government, and it is inappropriate for the Attorney General to presume to review determinations made by members of the judicial branch of government; accordingly, in issuing an opinion to a county prosecutor, the Attorney General will not question the validity of a court's approval of counsel expenses pursuant to R.C. 120.33.

4. The State Public Defender is directed by statute to administer R.C. 120.33 and make reimbursements pursuant to its provisions in accordance with standards and guidelines established for that purpose.
5. A county auditor is not required to seek partial reimbursement of expenses of assigned counsel through legal action if such reimbursement has been sought through administrative channels in accordance with R.C. 120.33 and has been denied.
6. If the county has sought partial reimbursement of expenses of assigned counsel under R.C. 120.33 and that reimbursement has been denied, and if the expenses in question are reasonably related and necessary to the defense of an indigent client, are specifically allowed by a county's fee schedule, have been approved by the court and paid by the county, and otherwise meet the standards set forth in the Ohio Public Defender Commission Assigned Counsel Standards, then it may be appropriate for the county to take legal action to seek partial reimbursement of the expenses.