

## **Opinion No. 65-150**

August 6, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Frank Bachicha, Jr., Assistant Attorney General

**TO:** Honorable Alfonso G. Sanchez, District Attorney, First Judicial District, County Court House, Santa Fe, New Mexico

### **QUESTION**

#### **QUESTIONS**

1. Is a full time staff psychiatrist employed by the New Mexico State Hospital, at Las Vegas, New Mexico, entitled to be paid expert witness fees from the court fund when he testifies concerning his examination of:

A. A patient admitted to the State Hospital pursuant to the emergency procedure outlined in Section 34-2-18, N.M.S.A., 1953 Compilation, and who is examined at the hospital?

B. A person not yet committed to the State Hospital but who is examined pursuant to court appointment of such psychiatrist?

2. If a prohibition exists to bar payment of expert witness fees directly to the staff psychiatrist, may the amount of such fees be paid over to the New Mexico State Hospital?

#### **CONCLUSIONS**

1. A. No, but see analysis. B. Yes, and see analysis.

2. Yes.

### **OPINION**

#### **{\*254} ANALYSIS**

We must assume, for purposes of this opinion, that in every instance where it would be sought to pay expert witness fees for the testimony of the staff psychiatrist above mentioned, the Court would in fact permit him to testify as an expert.

The authority placed in the district court of this state to order the payment of expert witness fees is contained in Section 20-1-4, N.M.S.A., 1953 Compilation, which we quote as follows:

"20-1-4. Witness fees -- Per diem and mileage -- Expert testimony. -- A. Witnesses shall be allowed fees for services in all cases, as follows: For attending any district court, referee, clerk, commission or the taking of any deposition, within one hundred [100] miles from where the witness resides, for each day, five dollars (\$ 5.00); for attendance as aforesaid, at a distance more than one hundred [100] miles, five dollars (\$ 5.00) for each day; for each mile of travel in going to and returning from the place of attendance, eight cents (\$ .08).

{\*255} B. The district judge **in any case pending in the district court** may order the payment of a reasonable fee, to be taxed as costs in addition to the witnesses fees provided for in subsection A, for any witness who qualifies as an expert and who testifies in the cause in person or by deposition. **The additional compensation shall include a reasonable fee to compensate the witness for the time required in attendance and the necessary time required in preparation or investigation prior to the giving of the witness's testimony.** The expert witness fee which may be allowed by the court shall be paid to only one [1] expert witness unless the court finds that the testimony of more than one expert was reasonably necessary to the prevailing party and reasonably necessary to and the expert testimony was not cumulative. Provided that the total expert witness fees which may be allowed by the court to the prevailing party shall not exceed one hundred fifty dollars (\$ 150)." (Emphasis supplied)

Subsection A of Question 1 above refers to a patient committed to the State Hospital on an emergency status pursuant to Section 34-2-18, supra. Provision is made therein for examination of such a patient in the following language:

"34-2-18. Hospitalization on medical certification -- Emergency procedure -- Detention pending judicial determination. --

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C. Whenever a patient has been admitted pursuant to this section, he shall be examined by a physician on the staff of the hospital as soon as practicable and in all events within twenty-four [24] hours after admission. . . ." (Emphasis supplied).

On the other hand, where a situation exists such as that set forth in subsection B of Question 1, the Court, pursuant to paragraph C of Section 34-2-5, supra, is directed to "appoint one [1] or more licensed physicians to examine the proposed patient. . . ."

In this latter instance the examining physician is required to report his findings to the Court. In the former instance, however, a report and certification is to be presented to the Court by the hospital staff examining physician only if the patient is required to remain at the institution. It can thus be seen that in one instance (Subsection A of Question 1) the staff physician must, once a patient is admitted, perform an examination, and if such patient is not released, make a report of his findings to the Court. In the other instance (Subsection B of Question 1), no duty is placed upon the staff psychiatrist of the State Hospital to either examine the patient or report to the Court

unless he is appointed for that purpose. Such an appointment of the State Hospital staff physician by the Court in preference over other private physicians, would appear to constitute the employment of such staff physician in his private capacity, thereby making him eligible for receipt of expert witness fees.

The State Hospital is under the Personnel Act; therefore, the following provisions of the Personnel Board Rules may be applicable:

"912. COURT AND JURY LEAVE. -- When in obedience to a subpoena or direction by a proper authority, an incumbent appears as a juror or a witness for the Federal Government, the State of New Mexico, or a political subdivision thereof, he shall be entitled to court or jury leave with pay for the period required. Fees received as a witness or compensation for court and jury duty, not including reimbursement for transportation, shall be turned {\*256} over to the agency."

"912.1. When an incumbent is subpoenaed, not in his official capacity but as an individual in private litigation by some party other than the Federal Government, the State of New Mexico, or political subdivision thereof, to testify, the time absent from duty shall be taken as annual leave or leave without pay."

"912.2. Attendance in court or at an official hearing in connection with an incumbent's official duties, and the time required in going and returning, shall not be considered as absence from duty."

It would appear that Section 912 above would apply to the situation posed by Subsection B in Question 1, i.e., where the psychiatrist is appointed by the Court, as any private physician could be, to conduct an examination and report to the Court. These rules, however, do not distinguish between ordinary and expert witnesses. In actuality, and for obvious reasons, a person receives greater compensation as an expert than as an ordinary witness; and, quite possibly he would be compensated at a higher rate as an expert witness than at his regular job. If this is the case and the procedure in Section 912 above is exclusive, he must turn over to the agency all witness fees, expert or otherwise, which could conceivably be more than his salary for that period of time. The rules, particularly Section 912, were obviously framed with the thought in mind of maintaining the employee's salary intact, while minimizing the loss to the State for the employee's time off, by requiring the fees to be turned over to the agency. This is evident when one notes that Section 912.1 requires annual leave or leave **without** pay where an individual is required to testify in private litigation. Consequently, it is our opinion that Section 912, supra, does not operate as the exclusive procedure. Rather, if the employee desires and the employing agency permits, he may be credited with annual leave or even leave without pay and retain his witness fees. This is purely discretionary with the employer. On the other hand if the employee chooses to take leave **with** pay, all witness fees, otherwise required to be turned over, must be relinquished to the agency.

Section 912.2, supra, applies to the situation posed by Subsection A of Question 1, i.e., where it is the express statutory duty of a staff physician to examine the patient and to report to the Court under certain circumstances. His attendance in Court to testify in regard to his examination and diagnosis would then be in "connection with official duties," which is not, as per Section 912.2, considered "absence from duty." This being so he is entitled to receive his regular salary, though not witness fees. There is nothing which would prevent paying the amount of such witness fees, expert or otherwise, to the employee's agency.

Thus, it is our opinion, based upon the foregoing analysis, that the staff psychiatrist of the New Mexico State Hospital may be paid expert witness fees for testifying with regard to his examination of a person, pursuant to court appointment, if he wishes and the hospital permits him to take annual leave or leave without pay. Otherwise, he may take leave with pay, but all witness fees, in accord with Section 912 of the Personal Board Rules, must be turned over to the hospital. It is further our opinion that such staff psychiatrist may not be paid witness fees for testifying in connection with his examination of a patient admitted to the State Hospital pursuant to Section 34-2-18, supra; however, the hospital is entitled to receive the amount of all such fees, except reimbursement for transportation, unless such transportation is furnished by the hospital. This likewise provides the answer to your Question No. 2.