

**OPINION NO. 86-066****Syllabus:**

1. When the State Dental Board issues a subpoena pursuant to R.C. 119.09 for purposes of an adjudicatory hearing conducted pursuant to R.C. Chapter 119 and R.C. Chapter 4715, a witness who lives outside of the county where the Board is located is not required to obey the subpoena if fees for one day's attendance and mileage are not tendered at the time of service of the subpoena, as provided in Ohio R. Crim. P. 17(D). A witness who lives in the county where the Board is located is not required to obey the subpoena if fees for one day's attendance and mileage are not tendered, upon demand, at the time of service of the subpoena, as provided in Ohio R. Crim. P. 17(D).
2. When the State Dental Board issues a subpoena

pursuant to R.C. 4715.03(D) for purposes of conducting an investigation thereunder, a witness may not refuse to obey the subpoena on the basis that witness fees and mileage are not tendered to him at the time of service of the subpoena.

3. If a witness subpoenaed by the State Dental Board pursuant to R.C. 119.09 accepts witness fees and mileage at the time of service and subsequently fails to obey the subpoena, the Board may, pursuant to R.C. 119.09, apply to the court of common pleas of the county where the disobedience occurred to compel obedience by attachment proceedings for contempt. If, however, the Board chooses not to compel the attendance of the witness, the Board may request the Treasurer of State to stop payment on the warrant which was issued in payment for the witness fees and mileage or, if such request is not timely made, shall initiate the procedure for collection of the moneys set forth in R.C. 131.02.
4. The Director of Budget and Management may, pursuant to R.C. 126.07, determine that the witness fees and mileage due a witness upon service of a subpoena issued by the State Dental Board are a valid claim against the State that is legally due and approve the State Dental Board's voucher for such amount, so that the Auditor of State may draw a warrant to be attached to the subpoena.

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To: Nicholas J. Tomasi, D.D.S., J.D., Secretary, Ohio State Dental Board, Columbus, Ohio  
By: Anthony J. Celebrezze, Jr., Attorney General, September 12, 1986

I have before me your request for my opinion concerning when the Ohio State Dental Board is required to tender witness fees and mileage due a witness upon whom it has served a subpoena. Pursuant to a telephone conversation you had with a member of my staff, you have restated your questions as follows:

1. Is it permissible for a witness to refuse to obey a subpoena served upon him by the State Dental Board, solely because a check for witness fees and mileage is not remitted with the subpoena at the time of service?
2. Does the State Dental Board have any recourse to recover witness fees and mileage from a witness who accepts service of a subpoena and the fees attached thereto, but subsequently does not appear as requested?
3. May the Auditor of State require the State Dental Board to produce evidence that a subpoena has actually been served upon a witness before issuing a warrant for the witness fees and mileage?

In order to answer your questions, I must first examine the statutory authority of the State Dental Board. The State Dental Board is established pursuant to R.C. 4715.02 and is

empowered to license or certify persons to practice dentistry, R.C. 4715.12, to act as dental interns, R.C. 4715.16, and to practice as dental hygienists, R.C. 4715.21. The Board has a further duty to investigate violations of R.C. Chapter 4715 by licensees. R.C. 4715.03(D). Pursuant to R.C. 4715.03(D), the Board has the authority to issue subpoenas for the purpose of such investigations.

If, after an investigation is completed, the Board has reasonable grounds to believe that a licensee has committed a violation of R.C. Chapter 4715, it shall conduct a disciplinary proceeding. R.C. 4715.03(D). See R.C. 4715.30. Disciplinary proceedings of the Board must be conducted pursuant to the requirements of R.C. Chapter 119. R.C. 4715.03(D); R.C. 4715.30. See R.C. 119.01(A)(defining "agency" for purposes of R.C. Chapter 119 as including, "the functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state specifically made subject to [R.C. 119.01-.13], and the licensing functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state having the authority or responsibility of issuing, suspending, revoking, or canceling licenses"); 7 Ohio Admin. Code 4715-15-01.

R.C. 119.06 provides that, "[n]o adjudication order shall be valid unless an opportunity for a hearing is afforded in accordance with [R.C. 119.01-.13]." R.C. 119.01(D) defines "adjudication" as "the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature." Pursuant to R.C. 4715.30(C), disciplinary proceedings of the State Dental Board may result in various actions against a licensee, if he is found to have committed one of the grounds for discipline listed in R.C. 4715.30(A) or (B). These actions include placing a license on probationary status and limiting the practice of the license holder, or the suspension or revocation of a certificate or license. Since disciplinary actions by the State Dental Board result in a determination of a specified person's rights, duties, or privileges, and, thus, come within the definition of an "adjudication," the Board must conduct a hearing in accordance with R.C. 119.01-.13 prior to issuing any adjudication order. R.C. 119.09, in setting forth the procedure to be followed by an agency in conducting an adjudication hearing, provides that an agency may, for the purpose of conducting an adjudication hearing, require the attendance of such witnesses as it desires.

Your first question involves the right of a witness, to whom the State Dental Board has issued a subpoena, to refuse to obey the subpoena, when witness fees and mileage are not attached to the subpoena. You have informed me that some witnesses who are subpoenaed by the State Dental Board have refused to obey subpoenas issued to compel their attendance at investigations conducted prior to disciplinary proceedings, as well as at disciplinary proceedings.

I will first address a witness' refusal to obey a subpoena issued for purposes of compelling attendance at a disciplinary proceeding. Since, as discussed above, such proceedings are adjudication hearings for purposes of R.C. Chapter 119, they

are to be conducted in accordance with R.C. 119.09, which states in part, that:

For the purpose of conducting any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may require the attendance of such witnesses and the production of such books, records, and papers as it desires...and for that purpose the agency may, and upon the request of any party receiving notice of said hearing as required by section 119.07 of the Revised Code, shall, issue a subpoena for any witness or a subpoena duces tecum to compel the production of any books, records, or papers, directed to the sheriff of the county where such witness resides or is found, which shall be served and returned in the same manner as a subpoena in a criminal case is served and returned. The fees and mileage of the sheriff and witnesses shall be the same as that allowed in the court of common pleas in criminal cases.... (Emphasis added.)

Service of a subpoena in a criminal case is governed by Ohio R. Crim. P. 17(D), which states in part, that:

Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person or by reading it to him in person or by leaving it at his usual place of residence, and by tendering to him upon demand the fees for one day's attendance and the mileage allowed by law....If the witness being subpoenaed resides outside the county in which the court is located, the fees for one day's attendance and mileage shall be tendered without demand.... (Emphasis added.)

See R.C. 2335.06 and R.C. 2335.08 (setting forth fees to which witnesses in criminal cases are entitled). Therefore, when a witness is subpoenaed in a proceeding held under R.C. 119.09, he must be served pursuant to Ohio R. Crim. P. 17(D).

Ohio R. Crim. P. 17(D) clearly distinguishes between those witnesses who live within the county and those who live outside the county with regard to tendering fees. Pursuant to Ohio R. Crim. P. 17(D), if a witness lives outside the county, the fees for one day's attendance and mileage "shall be tendered [to the subpoenaed witness] without demand". A "demand" is an "assertion of a legal right." Black's Law Dictionary 386 (5th ed. 1979). The legal right involved in this instance is the right of a subpoenaed witness to receive witness fees and mileage which are legally due him. See also Black's Law Dictionary 1315 (5th ed. 1979)(defining "tender" as "[t]he act by which one produces and offers to a person holding a claim or demand against him the amount of money which he considers and admits to be due, in satisfaction of such claim or demand, without any stipulation or condition"). Consequently, a witness "shall" be offered the witness fees and mileage which are legally due him and he need not assert his legal right to receive them. The word "shall" is generally construed as rendering the provisions to which it relates mandatory. See Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971). I conclude, therefore, that for purposes of a disciplinary proceeding conducted pursuant to R.C. 4715.03(D), Ohio R. Crim. P. 17(D) imposes an obligation upon the Board serving a subpoena to a witness who resides outside

the county where the Board is located, to tender to the witness fees for one day's attendance and mileage without demand. Consequently, if such witness fees and mileage for such a proceeding are not attached to the subpoena served upon a witness who resides outside the county, the witness is not obligated to appear as directed in the subpoena.

When, however, a subpoena is served upon a witness who lives in the county where the Board is located, the witness is entitled to receive fees for one day's attendance and mileage only "upon demand."<sup>1</sup> That is, a witness is required to assert his legal right to receive the fees due him, as a prerequisite to receiving such fees at the time the subpoena is served. Consequently, if a witness asserts his legal right to the witness fees and mileage due him and they are not tendered to him, he is not required to appear. See In re Quick, 1 Ohio N.P. (n.s.) 57 (C.P. Hamilton County 1903).<sup>2</sup> See also R.C. 2317.21 (witness who has demanded and not been paid his traveling fees and fee for one day's attendance when a subpoena is served upon him is not subject to attachment proceedings for contempt). If, however, a witness does not demand payment of the witness fees and mileage due him, and accepts service of the subpoena, he is said to have waived his right to receive his fees at the time the subpoena is served upon him. In re Quick. Consequently, where a witness, who lives in the county where the Board is located, accepts service of a subpoena but fails to demand his fees, he may not later refuse to appear as

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<sup>1</sup> It is my understanding that most of the adjudication hearings conducted by the State Dental Board are held at the Board's offices in Franklin County. In those situations, witnesses who live outside of Franklin County are entitled to their fees and mileage, without demand, at the time the subpoena is served. Witnesses who live within Franklin County are entitled to their fees and mileage at the time the subpoena is served only upon demand. The Board may, however, conduct a particular hearing outside of Franklin County. In those instances, witnesses who reside in the county where the hearing is being conducted are entitled to their fees and mileage at the time of service of the subpoena only upon demand, while witnesses who live outside of the county where the hearing is being held are entitled to their fees and mileage, without demand, at the time of service of the subpoena.

<sup>2</sup> The court in In Re Quick, 1 Ohio N.P. (n.s.) 57 (C.P. Hamilton County 1903), was construing R.S. 5251, the provisions of which are analogous to Ohio R. Crim. P. 17(D). R.S. 5251 read as follows:

A witness may demand his traveling fees and fee for one day's attendance when the subpoena is served upon him, and if the same be not paid, the witness shall not be obliged to obey the subpoena; and, when a witness has attended upon the court, he may in like manner demand his fees from day to day until discharged by the court. The fact of such demand and payment or non-payment shall be stated in the return by the officer; and, if the witness be not discharged on the day he is notified to appear, then the fact of payment or non-payment shall be noted by the clerk in the witness book.

required by the subpoena solely because the witness fees and mileage were not tendered to him when the subpoena was served. Id.

You have also asked about subpoenas issued for the purpose of an investigation conducted prior to a disciplinary proceeding. Pursuant to R.C. 4715.03(D), "[f]or the purpose of any investigation conducted prior to a disciplinary proceeding the board may administer oaths, order the taking of depositions, issue subpoenas, compel the attendance and testimony of persons at depositions and compel the production of books, accounts, papers, and documents." (Emphasis added.)

Investigations conducted prior to a disciplinary hearing are not "adjudications," for purposes of R.C. Chapter 119, since there is no determination by the State Dental Board of the rights, duties, privileges, benefits, or legal relationships of a specified person. Further, there is no provision in R.C. Chapter 4715 expressly making such investigations subject to the requirements of R.C. Chapter 119. Thus, subpoenas issued for purposes of an investigation conducted prior to a disciplinary proceeding under R.C. 4715:03(D) are not governed by R.C. 119.09. Additionally, I am unaware of any other express provisions governing the time when witness fees and mileage are to be tendered to persons subpoenaed under R.C. 4715.03(D).

The State Dental Board is required to pay a subpoenaed witness his witness fees and mileage. The legislature has provided for witness fees and mileage in civil cases, R.C. 2335.06, and in criminal cases, R.C. 2335.08. R.C. 2335.05 provides that, "[i]n all cases or proceedings not specified in sections 2335.06 and 2335.08 of the Revised Code, each person subpoenaed as a witness shall be allowed one dollar for each day's attendance and the mileage allowed in courts of record." Thus, the witness fees and mileage for an investigation conducted prior to a disciplinary proceeding are governed by R.C. 2335.05. There is, however, no requirement that the fees and mileage be paid at the time the subpoena is served. Thus, I conclude that a witness has no right to refuse to obey a subpoena on the basis that the witness fees and mileage are not tendered to him at the time of service. See 1916 Op. Att'y Gen. No. 1497, vol. I, p. 701 (if statute authorizing an administrative agency to subpoena witnesses for its investigations makes no provision for the payment of fees when summoned, then the witness has no right to demand his fees in advance). See generally 1980 Op. Att'y Gen. No. 80-052 at 2-211 ("[t]he payment of witness fees is wholly a matter of statute and rule...At common law, witnesses received no fees whatsoever" (citations omitted)).

Your second question asks whether the State Dental Board has any recourse to recover fees that are tendered to a witness who accepts service of a subpoena and the fees attached thereto, but subsequently does not appear as directed. Because I have concluded that the State Dental Board is not required to tender witness fees and mileage to a subpoenaed witness before the witness is requested to appear during an investigation conducted prior to a disciplinary proceeding, I will limit my discussion to the recovery of fees and mileage tendered to a witness subpoenaed for purposes of a disciplinary proceeding held pursuant to R.C. 4715.03(D).

I note first that the State Dental Board may compel the attendance of a witness who has been subpoenaed. As discussed

above, the State Dental Board's disciplinary proceedings are conducted pursuant to R.C. 119.09, which provides for the discipline of witnesses who fail to obey a subpoena, as follows:

In any case of disobedience or neglect of any subpoena served on any person or the refusal of any witness to testify to any matter regarding which he may lawfully be interrogated, the court of common pleas of any county where such disobedience, neglect, or refusal occurs or any judge thereof, on application by the agency shall compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court, or a refusal to testify therein. (Emphasis added.)

R.C. 2317.21 sets forth the procedure whereby a court may, by attachment proceedings, compel obedience of a subpoena issued by the court, and reads as follows:

When a witness, except a witness who has demanded and has not been paid his traveling fees and fee for one day's attendance when a subpoena is served upon him, as authorized by the provisions of section 2317.18<sup>3</sup> of the Revised Code, fails to obey a subpoena personally served, the court or officer, before whom his attendance is required, may issue to the sheriff or a constable of the county, a writ of attachment, commanding him to arrest and bring the person named in the writ before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt. If such writ does not require the witness to be immediately brought, he may give bond for a sum fixed by the court of common pleas or the court which issued the subpoena, with surety, for his appearance, which sum shall be endorsed on the back of the writ, except that, if no sum is so endorsed, it shall be one hundred dollars. When the witness was not personally served, the court, by a rule, may order him to show cause why such writ should not issue against him. (Footnoted added.)

See generally Ohio Motor Vehicle Dealers Board v. Remlinger, 8 Ohio St. 3d 26, 457 N.E.2d 309 (1983)(syllabus)("[t]he court of common pleas must fulfill the mandatory duty imposed upon it by R.C. 119.09 to compel obedience by attachment proceedings when a witness refuses to testify to matters relevant in an R.C. 119.09 administrative hearing..."). See also Green v. Western Reserve Psychiatric Habilitation Center, 3 Ohio App. 3d 218, 444 N.E.2d 442 (Summit County 1981)(an administrative agency possesses no inherent judicial power to sanction contempt of its subpoenas, but is limited by statute as to the manner of compelling the attendance of subpoenaed witnesses or otherwise punishing the contempt of witnesses); 1916 Op. Att'y Gen. No. 1284, vol. I, p. 307 (same).

<sup>3</sup> R.C. 2317.18 was repealed by 1969-1970 Ohio Laws, Part III, 3017 (eff. July 1, 1971). The provisions of R.C. 2317.18 now appear substantially in Ohio R. Civ. P. 45(C) and Ohio R. Crim. P. 17(D).

You have informed a member of my staff that the Board is specifically concerned as to whether it may recover witness fees and mileage where a witness has accepted such fees upon service of the subpoena, but has failed to attend the hearing, and the Board does not choose to compel the witness' attendance.

I note first that the State Dental Board may request the office of the Treasurer of State to stop payment on the warrant which was issued in payment for the fees. (See discussion, infra, concerning the issuance of warrants for witness fees.) See generally R.C. 1304.26. The Treasurer's office should be contacted for further information on this procedure.

If, however, the warrant has been paid by the Treasurer before a stop payment order may be issued, the State Dental Board must follow the procedure set forth in R.C. 131.02, which reads:

Whenever any amount is payable to the state, the officer, employee, or agent responsible for administering the law under which the amount is payable shall immediately proceed to collect the amount or cause the amount to be collected and shall pay the amount into the state treasury in the manner set forth pursuant to section 113.08 of the Revised Code. If the amount is not paid within forty-five days after payment is due, the officer, employee, or agent shall certify the amount due to the attorney general, in the form and manner prescribed by the attorney general, and notify the director of budget and management thereof. The attorney general shall give immediate notice by mail or otherwise to the party indebted of the nature and amount of the indebtedness and shall collect the claim or secure a judgment and issue an execution for its collection. Each claim shall bear interest, from the day on which the claim became due, at the base rate per annum for advances and discounts to member banks in effect at the federal reserve bank in the second federal reserve district. The attorney general and the chief officer of the agency reporting the claim may adjust any claim in such manner as is equitable. They may extend the time of the payment of a claim or judgment for such period of time not to exceed one year as is best for the interests of the state, and they may require and take security for its payment. (Emphasis added.)

See also R.C. 131.03. To the extent that a witness, who has been paid witness fees and mileage in order to appear at an administrative hearing of the State Dental Board, fails to attend the hearing, I believe that such fees and mileage are "payable to the state" and must be collected pursuant to R.C. 131.02. See generally Darst v Brockway, 11 Ohio 462, 471 (1842)("[i]t is a general principle, that when money, or other valuable, has been paid on a consideration which has entirely failed, it may be recovered back"). Thus, the State Dental Board must attempt to collect the fees payable to the State. If such attempts are unsuccessful, the Board must certify the amount due to the Attorney General and notify the Director of Budget and Management.

Finally, you have asked whether the Auditor of State may require the State Dental Board to produce evidence that a



subpoena has actually been served upon a witness before issuing a warrant for the witness fees and mileage.

I note initially that R.C. 119.09, which governs fees and mileage paid to a witness who is subpoenaed to attend a disciplinary proceeding pursuant to R.C. 4517.03(D), provides that, "[f]ees and mileage shall be paid from the fund in the state treasury for the use of the agency in the same manner as other expenses of the agency are paid." Pursuant to R.C. 2335.05, which governs fees and mileage paid to a witness subpoenaed for purposes of an investigation conducted by the State Dental Board under R.C. 4715.03(D), such fees "shall be paid out of the proper public treasury, upon the certificate of the...officer, board, or commission conducting the proceeding." Expenses of the State Dental Board are paid pursuant to R.C. 4715.06, which provides that, "[a]ll vouchers of the board shall be signed by the board president or executive secretary, or both, as authorized by the board."

Money paid from the state treasury is subject to R.C. 113.11, which provides that, "[n]o money shall be paid out of the state treasury...except on the warrant of the auditor of state." See R.C. 113.12 ("[t]he treasurer of state, on presentation, shall pay all warrants drawn on him by the auditor of state").

Previously, R.C. 115.35 empowered the Auditor of State to examine each voucher presented to him, and if he found "it a valid claim against the state and legally due and that there [was] money in the state treasury appropriated to pay it, and that all requirements of law [had] been complied with," he was directed to issue a warrant on the Treasurer of State for the amount due. See 1981-1982 Ohio Laws, Part II, 3460, 3477 (Am. Sub. H.B. 694, eff. Nov. 15, 1981). The provisions of R.C. 115.35 were, however, repealed by Sub. H.B. 201, 116th Gen. A. (1985)(eff. July 1, 1985). R.C. 126.07 was amended by Sub. H.B. 201 and now provides as follows:

No contract, agreement, or obligation involving the expenditure of money chargeable to an appropriation, nor any resolution or order for the expenditure of money chargeable to an appropriation, shall be valid and enforceable unless the director of budget and management first certifies that there is a balance in the appropriation not already obligated to pay existing obligations....

In order to make a payment from the state treasury, a state agency shall first submit to the director all invoices, claims, vouchers, and other evidentiary matter related to the payment. If the director approves payment to be made, he shall submit the approval to the auditor of state for the drawing of a warrant as provided in section 117.45 of the Revised Code. The director shall not approve payment to be made if he finds that there is not an unobligated balance in the appropriation for the payment, that the payment is not for a valid claim against the state that is legally due, or that insufficient evidentiary matter has been submitted. If the director does not approve payment, he shall notify the agency of the reasons he has not given approval.

R.C. 117.45(A) now provides that, "[t]he auditor of state shall draw warrants against the treasurer of state pursuant to all

requests for payment that are approved by the director of budget and management under [R.C. 126.07]." See Sub. H.B. 201.

Thus, it is now the Director of Budget and Management, rather than the Auditor of State, who must examine a voucher of a state agency and determine whether there is an unobligated balance in the appropriation for payment of the voucher and that the payment is for a valid claim against the State that is legally due. If a voucher is approved by the Director, the Auditor must draw a warrant against the Treasurer for the amount due.

As discussed above, a witness who is subpoenaed by the State Dental Board, pursuant to R.C. 119.09 and Ohio R. Crim. P. 17(D), is entitled to his fees for one day's attendance and mileage upon service of the subpoena. A witness who lives in the county where the Board is located must demand his fees and mileage at the time of service, but once such demand is made, the fees and mileage must be paid to the witness at that time. Thus, at the time of service of a subpoena, the amount of the fees and mileage constitutes a valid claim against the State that is legally due. Further, in order for the witness fees and mileage to be available to be tendered at the time a subpoena is served, it is necessary that the warrant for such fees and mileage have been issued prior to service of the subpoena. I am aware of no reason, therefore, why the Director of the Office of Budget and Management may not determine, prior to the service of a subpoena, that the witness fees and mileage due a witness upon service of the subpoena are a valid claim against the State that is legally due, and approve the State Dental Board's voucher for such amount, so that the Auditor may draw a warrant to be attached to the subpoena.

It is, therefore, my opinion, and you are hereby advised, that:

1. When the State Dental Board issues a subpoena pursuant to R.C. 119.09 for purposes of an adjudicatory hearing conducted pursuant to R.C. Chapter 119 and R.C. Chapter 4715, a witness who lives outside of the county where the Board is located is not required to obey the subpoena if fees for one day's attendance and mileage are not tendered at the time of service of the subpoena, as provided in Ohio R. Crim. P. 17(D). A witness who lives in the county where the Board is located is not required to obey the subpoena if fees for one day's attendance and mileage are not tendered, upon demand, at the time of service of the subpoena, as provided in Ohio R. Crim. P. 17(D).
2. When the State Dental Board issues a subpoena pursuant to R.C. 4715.03(D) for purposes of conducting an investigation thereunder, a witness may not refuse to obey the subpoena on the basis that witness fees and mileage are not tendered to him at the time of service of the subpoena.
3. If a witness subpoenaed by the State Dental Board pursuant to R.C. 119.09 accepts witness fees and mileage at the time of service and subsequently fails to obey the subpoena, the Board may, pursuant to R.C. 119.09, apply to the court of

common pleas of the county where the disobedience occurred to compel obedience by attachment proceedings for contempt. If, however, the Board chooses not to compel the attendance of the witness, the Board may request the Treasurer of State to stop payment on the warrant which was issued in payment for the witness fees and mileage or, if such request is not timely made, shall initiate the procedure for collection of the moneys set forth in R.C. 131.02.

4. The Director of Budget and Management may, pursuant to R.C. 126.07, determine that the witness fees and mileage due a witness upon service of a subpoena issued by the State Dental Board are a valid claim against the State that is legally due and approve the State Dental Board's voucher for such amount, so that the Auditor of State may draw a warrant to be attached to the subpoena.