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1. PHYSICIAN EMPLOYED AT LIMA STATE HOSPITAL—CALLED AS WITNESS IN CRIMINAL CASE—NOT REQUIRED IN DISCHARGE OF OFFICIAL DUTIES TO BE PRESENT AS WITNESS AT THE HEARING—ENTITLED TO SAME WITNESS FEE AS ANY PRIVATE PERSON CALLED AS WITNESS.
2. WHEN SUCH PHYSICIAN IS CALLED AS WITNESS IN CRIMINAL CASE AND HIS PRESENCE IS REQUIRED IN DISCHARGE OF OFFICIAL DUTIES, HE IS NOT ENTITLED TO WITNESS FEES—SECTION 13451-20 G. C.
3. WHEN AS STATED IN PARAGRAPH 1 OF SYLLABUS A PHYSICIAN IS ENTITLED TO A WITNESS FEE HE MAY RETAIN THE FEE AS DOES ANY OTHER WITNESS.

SYLLABUS:

1. When a doctor employed at the Lima State Hospital is called as a witness in a criminal case and he is not required in the discharge of his official duties to be present as a witness at such hearing, he is entitled to the same fee as any private person called as a witness therein.

2. When a doctor employed at the Lima State Hospital is called as a witness in a criminal case under Section 13451-20, General Code, and his presence as a witness is required in the discharge of his official duties, he is not entitled to witness fees.

3. When a doctor employed at the Lima State Hospital is entitled to witness fees as set out in paragraph one of the syllabus, he may retain such fee the same as any other witness.

Columbus, Ohio, July 14, 1949

Judge J. H. Lamneck, Director of Public Welfare
Columbus, Ohio

Dear Sir:

Your request for my opinion is as follows:

“Under Sections 13,441-4 and 13,451-20 of the General Code, Courts of Common Pleas have authority to commit certain alleged offenders to the Lima State Hospital for observation and report.

"Frequently, after such a report is filed, one of the doctors at the Hospital, in response to a subpoena, appears in court and testifies at the trial or hearing, as the case may be. I understand that it has been the practice of the superintendent or doctor at the State Hospital at Lima, who has knowledge of the facts and who testifies at the hearing or trial as an expert, to file a bill with the court requesting to be paid a fee as an expert witness.

"I am writing to inquire whether our Doctors at the State Hospital at Lima are entitled to be paid an expert witness fee for testifying, and if so, if they may retain the same."

I assume that the doctors mentioned in your request are those employed at the Hospital pursuant to Section 1890-11 of the General Code. That section reads as follows:

"The director with the advice of the commissioner, shall, subject to civil service rules and regulations, determine the number of officers and employees to be appointed and fix the salaries and wages to be paid in the division and at the various institutions under the control of the division. Such salaries and wages shall be uniform, as far as possible, for like service in or connected with the various institutions. In the selection of a superintendent for a state or receiving hospital, the director and commissioner shall consult with the advisory council before making any such appointment."

Section 3014 of the General Code, provides for the payment of witness fees in a criminal case. This section reads as follows:

"Each witness attending under recognizance or subpoena, issued by order of the prosecuting attorney or defendant, before the court of common pleas, or grand jury, or other court of record, in criminal causes, shall be allowed the same fees as in civil causes, to be taxed in only one cause, when attending in more causes than one on the same days, unless otherwise directed by special order of the court. When certified to the county auditor by the clerk of the court, such fees shall be paid from the county treasury, and, except as to the grand jury, taxed in the bill of costs. Each witness attending before a justice of the peace, police judge or magistrate, or mayor, under subpoena, in criminal cases, shall be allowed the fees provided for witnesses in the court of common pleas, and in state cases said fees shall be paid out of the county treasury, and in ordinance cases out of the municipal treasury, upon the certificate of the judge or magistrate, and the same taxed in the bill of costs.

"When the fees herein enumerated have been collected from the judgment debtor, they shall be paid to the public treasury from which said fees were advanced."

It will be noted that this section permits certain fees to be paid to "each witness" and draws no distinction between witnesses who are public officials and those who are not. In the absence of any regulatory enactment the general rule as stated by Weygandt, C. J., 132 O. S., 338 at page 339, would apply :

"In approaching this problem it is helpful to remember the general rule that when a public officer, in the discharge of his official duties, is not required to be present in person upon the trial of a particular case, he is entitled to the same fees as any private person if he is called as a witness therein. * * *"

See also 42 O. Jur. 26, 28 R.C.L. 662, 70 C. J. 71, 19 Ann. Cas. 168.

It therefore becomes important to inquire if these doctors mentioned in your request are required in the discharge of their official duties to be present upon the trial of any cause.

Section 13441-4, General Code, refers to the use of expert witnesses in insanity cases. This section reads as follows :

"In any case in which insanity is set up as a defense, or in which present insanity of the accused is under investigation by the court or jury, the court shall have power to commit the defendant to a local insane hospital, or the Lima State Hospital, where the defendant shall remain under observation for such time as the court may direct not exceeding one month; and the court may in such case appoint one or more disinterested qualified physicians, specialists in mental diseases (but not to exceed three), to investigate and examine into the mental condition of the defendant and testify as experts at his trial or other hearing. In case of such appointment the court shall forthwith notify counsel of the names and addresses of the persons so appointed. The expert witnesses appointed by the court may be called by the court and shall be subject to examination and cross-examination by the prosecuting attorney and counsel for the defendant. *The appointment of such expert witnesses, and their testifying as witnesses, shall not preclude the prosecuting attorney or defendant from calling other witnesses to testify on the subject of insanity.* Such persons so appointed may be required by the court to prepare a written statement under oath, concerning the mental condition of the defendant, and file the same in the case, but such report shall not be read as evidence except that it may be used by either counsel on the cross-examination of the witness who signed the same. The court shall instruct the jury in case of such appointment and testimony of such expert witnesses, that the credibility of such witnesses in common with all other witnesses in the case is for the exclusive consideration and determi-

nation of the jury. Such persons so appointed shall be paid a reasonable fee for their examination or service, and their reasonable expenses, the amount whereof shall be certified by the judge or court making the appointment, and paid by the county.”
(Emphasis added.)

Nothing contained in this section would require a doctor at the Lima State Hospital to attend a trial as a witness. The court may appoint qualified physicians, but this does not refer exclusively to doctors at the hospital. That part of Section 1344I-4 underscored gives the prosecuting attorney the authority to call other experts. However, there is no provision for the payment of these witnesses except under Section 3004, General Code. Therefore, since the doctors at the Hospital are not required in the discharge of their duties to be present at the trial they may be paid the same as any other witness.

A similar request was the subject of an opinion in 1938 Opinions of the Attorney General at page 596. Although that opinion does not so state, I believe the persons involved were doctors at the Lima State Hospital. The prosecuting attorney called them as witnesses and desired to know by what authority he could pay them. The opinion states, at page 598:

“Under the provisions of Section 1344I-1, G. C., you, as prosecutor, are not precluded from calling other witnesses to testify on the subject of the insanity of the defendant, but no provision is made under this section for the payment of such witnesses.

“I am presuming from your request that you have used the two medical experts as witnesses in the trial of a case. The expense of procuring these expert witnesses has not been otherwise provided for and you specifically have the right to procure other witnesses for the purposes stated in your request. Certainly, when the prosecuting attorney in the performance of his official duties, one of which is to procure evidence in criminal cases, believes that such an examination as given by the two medical experts referred to in your request is in the furtherance of justice, he may make use of the fund arising under the provisions of Section 3004, G. C.

“In specific answer to your request, it is, therefore, my opinion that where a defendant in a criminal case, upon arraignment on an indictment for arson, pleads not guilty by reason of insanity, and an examination of such defendant by medical experts for the purpose of informing the prosecuting attorney as to the sanity of such defendant, either before trial or for the purpose of testifying at the trial of such case, such a service is properly to be procured by the prosecuting attorney and the expense

thereof, not being otherwise provided by law, may properly be paid out of the fund arising under the provisions of Section 3004, General Code, when such expenses are incurred in the furtherance of justice."

The Superintendent of the Bureau of Criminal Identification and Investigation and the assistants and employees of such Bureau were the subject of an opinion of the Attorney General in 1942. (Opinions of the Attorney General for 1942, page 734.) Since this Bureau and its employees are under control of the Department of Public Welfare, in the same manner as the Lima State Hospital and its employees, I believe that opinion is in point. The syllabus reads as follows:

"1. The Superintendent of the Bureau of Criminal Identification and Investigation and the assistants and employes thereof may legally collect witness fees when subpoenaed to appear in court in a criminal case.

"2. Where the Superintendent of the Bureau of Criminal Identification and Investigation or one of the assistants or employes thereof is subpoenaed as a witness in a criminal case, the county in which the court issuing such subpoena is located is not responsible for the payment of hotel bills, meals and transportation expense incident to appearance as a witness pursuant to such subpoena, and such county is liable only for the witness fee mileage provided in Section 3014, General Code.

"3. Where the Superintendent of the Bureau of Criminal Identification and Investigation or one of the assistants or employes thereof appears in court to testify as an expert witness in a criminal case and the prosecuting attorney or one of his assistants certifies that the services or testimony of any of such persons is necessary to the proper administration of justice, the county commissioners, pursuant to the provisions of Section 2494, General Code, may allow and pay to any of such persons such compensation as they deem just and proper and the court approves.

"4. Where the Superintendent of the Bureau of Criminal Identification and Investigation or an assistant or employe thereof testifies as a witness in court pursuant to subpoena, the expense incurred on account of such appearance as a witness may not be paid from funds appropriated to such bureau for traveling expenses."

For these reasons, it is my opinion that when a doctor employed at the Lima State Hospital is called as a witness in a criminal proceeding and is not required in the discharge of his official duties to be present at such proceeding, he is entitled to the same fee as any private person called as a witness therein.

Section 13451-20 General Code, reads as follows:

“After conviction and before sentence, a trial court must refer for examination all persons convicted under sections 12413, 12414, 12415, 12423-1, 13023 or 13043 of the General Code, to the department or to a state facility designated by the department, or to a psychopathic clinic approved by the department, or to three psychiatrists. The court, in its discretion and prior to sentence may refer for such examination, any person who has been convicted of any other felony except murder in the first degree where mercy has not been recommended, when it has been suggested or appears to the court that such person is mentally ill or a mentally deficient offender or a psychopathic offender. Reference to the department, clinic, or psychiatrists shall be for a period of not more than sixty days.

“The department, clinic, or psychiatrists shall make a careful examination of such person and furnish to the court a report in writing of its or their finding as to the mental condition of the person at the time of examination, together with such recommendations, suggestions, and opinions as may be helpful to the court, which report shall also contain the names and addresses of the parties making the examination. Such report shall be a public record and become a part of the files in the case but not be spread at large upon the journal. A certified copy of such report shall be served upon such person and his attorney of record within three days after the filing thereof with the court. If any psychiatric examiner or psychologist not on the staff of any such psychiatric clinic or the department or a state facility designated by the department is so appointed, the cost thereby incurred shall be determined by the court and allowed and taxed as costs and paid in the same manner as witness fees in criminal cases.

“The court shall conduct a hearing thereon not earlier than ten days nor later than thirty days after the service of such copies of the report. Both the state and such person or his guardian or next friend shall have the right to appear in person or by counsel at such hearing, to subpoena, examine and cross-examine the examiners making the report regardless of the part of the state in which the examiners may live, and to produce witnesses, both lay and expert, as to the mental condition of such person. In the event and to the extent that no subpoenas are issued for the examiners to appear at the hearing, the report or such part of it as was prepared by the examiners for whom no subpoena was issued, shall constitute prima facie evidence.

“If upon consideration of such report and such other evidence as shall be submitted, the court shall find that such person is mentally ill as defined in section 1890-19 of the General Code or is a mentally deficient offender or a psychopathic offender as defined in section 13451-19 of the General Code, the court shall

enter such finding on the records and shall impose the appropriate sentence for the offense of which the person was convicted; and at the same time court shall enter an order of indefinite commitment of such person to the department of public welfare, during the continuance of which, the execution of sentence shall be suspended. Thereupon such person shall be sent to an appropriate institution designated by the department. If the department, because of lack of facilities, fails to designate an appropriate institution, such person shall be sent to the institution to which he would have been sentenced had he not been adjudged mentally ill, a mentally deficient offender or a psychopathic offender under the provisions of this act. Every order of indefinite commitment hereunder shall show the offense of which such person was convicted and the minimum and maximum penalties therefor. Certified copies of said order and the reports of the examiners, unless submitted by the department, shall be sent to the department. Every order of indefinite commitment shall constitute a final order. The provisions of law relating to motions for new trial, bail and appeal on questions of law shall be applicable to such cases.

Any finding under the provision of this act that a person is mentally ill, a mentally deficient offender, or a psychopathic offender, shall constitute a final order."

Under this section it would seem to be the duty of doctors at the Lima State Hospital if the person convicted were committed to that hospital, to examine the person and if necessary to testify as a witness. Therefore, since it might be necessary under this section for the doctors, in the discharge of their official duties to be present as witnesses, they are not entitled to be paid a fee. Thus, in 42 O. Jur., 26, it is stated as follows:

"If it is the legal duty of a public officer to be in attendance upon the trial of a case in his official capacity he is not entitled to witness fees. This right is often regulated by statutes which are generally sustained, even though the right to fees is entirely withdrawn."

See also, Opinions of the Attorney General for 1941, page 438.

Your second question, i.e., if the doctors are entitled to such fees may they retain the same, is disposed of under the same reasoning. Thus, if the doctors are entitled to the fees, they may retain them; if they are not so entitled, they may not retain them.

Respectfully,

HERBERT S. DUFFY,
Attorney General.