

OPINION NO. 67-092**Syllabus:**

Section 2947.25, Revised Code, provides for the payment of witness fees only to those psychiatric examiners who are not on the staff of a state facility or psychiatric clinic designated by the Department of Mental Hygiene and Correction. (Opinion No. 723, Opinions of the Attorney General for 1949, approved and followed.)

To: Everett Burton, Scioto County Pros. Atty., Portsmouth, Ohio
By: William B. Saxbe, Attorney General, September 25, 1967

Your request for my opinion poses the following question:

"It would be appreciated if you would furnish this office with an opinion as to whether or not following a finding or a plea of guilty in a criminal case and following the order of commitment to Lima State Hospital under Section 2947.25 Ohio Revised Code, the prosecuting attorney is required to pay a witness fee for expert testimony to those doctors who are on the staff of Lima State Hospital for their appearance at the hearing following such commitment.

"Please be advised that we are aware of the opinion Number 723 of the year 1949 but feel that this opinion does not answer the question raised in the preceding paragraph.

"It would seem that the crux of this matter is: Are the doctors on the staff of the Lima State Hospital required as part of their duties to give testimony to the Court relating to their examination of a criminal defendant in their capacity as a staff doctor."

Section 2947.25, Revised Code, provides in pertinent part as follows:

"After conviction and before sentence, a

trial court shall refer for examination all persons convicted under section 2903.01, 2905.01, 2905.02, 2905.03, 2905.04, 2905.07, or 2905.44 of the Revised Code, to the department of mental hygiene and correction or to a state facility designated by the department, or to a psychiatric clinic approved by the department, or to three psychiatrists. Prior to sentence the court may refer for such examination any person who has been convicted of any felony except murder in the first degree where mercy has not been recommended, or any misdemeanor involving a sex offense, or in which abnormal sexual tendencies are displayed, when it has been suggested 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 the 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 is a public record and becomes a part of the files in the case but shall 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." (Emphasis added)

It is clear that the express provision cited above which provides for the payment of witness fees to those psychiatric examiners who are not on the staff of a state facility precludes the payment to one who is a staff doctor at the Lima State Hospital.

In Opinion No. 723, Opinions of the Attorney General for 1949, to which you have referred, reference is made to the predecessor statute (which is substantially the same) as follows at page 399:

"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.'"

It is, therefore, my opinion and you are hereby advised that Section 2947.25, Revised Code, provides for the payment of witness fees only to those psychiatric examiners who are not on the staff of a state facility or psychiatric clinic designated by the Department of Mental Hygiene and Correction. (Opinion No. 723, Opinions of the Attorney General for 1949, approved and followed.)