

Witness Fees — Officials — Examiners — Per Diem—Expenses.

A state examiner appearing as a witness in the district court in a criminal prosecution on behalf of the county is entitled to actual expenses only.

November 13, 1928.

R. N. Hawkins, Esq.,
Assistant State Examiner,
Helena, Montana.

My dear Mr. Hawkins:

You have requested my opinion on the following question:

“Where it arises that an examiner from the office of the state examiner has made an examination of the cash and books of a county treasurer and submitted his report covering such examination showing a shortage or other violation of law and is later served with a subpoena to appear as a witness in court in a distant county at the instance of the county where the violation of law occurred, is he entitled to actual expenses plus a per diem from the county?”

Section 4936 R. C. M. 1921 provides as follows:

“For attending in any civil or criminal action or proceeding before any court of record, referee, or officer authorized to take depositions, or commissioners to assess damages or otherwise, for each day, three dollars. For mileage in traveling to the place of trial or hearing, each way, for each mile, ten cents; provided, however, that no officer of the United States, the state of Montana, or of any county, incorporated city or town within the limits of the state of Montana shall receive any per diem when testifying in a criminal proceeding, and that no witness shall receive fees in any more than one criminal case on the same day.”

It is evident that the intent of the legislature in enacting this statute was to prohibit a witness from drawing pay from the county as well as the state, and, in my opinion, this provision would apply to an examiner from your office. It is also evident that the per diem allowed as witness fees would not equal the regular salary of the examiner and, therefore, if it was to be contended that the examiner should not draw his salary from the state during the time that he is appearing as a witness for the county but should look to his witness fees for reimbursement that the examiner would be penalized to the extent of the difference between the witness fees allowed and his regular salary.

It is therefore my opinion that an examiner appearing as a witness in the district court in obedience to a subpoena on behalf of the county is entitled to actual expenses only.

Very truly yours,
L. A. FOOT,
Attorney General.