

**Opinion No. 187.****Witness Fees in Insanity Case—Fees—  
Insanity—Public Officers—Offices and  
Officers.**

Held: The chief of police or any other officer of an incorporated city is not entitled to a witness fee for attendance in an insanity hearing.

March 8, 1944.

Mr. Horace J. Dwyer  
County Attorney  
Deer Lodge County  
Anaconda, Montana

Dear Mr. Dwyer:

You have requested my opinion concerning the following question:

"For his appearance as a witness at a sanity hearing, is the chief of police, or any other officer, of an incorporated city, entitled to a per diem fee?"

Section 4936, Revised Codes of Montana, 1935, provides:

"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, seven 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."

This section would not permit a witness' fee to an officer of an incorporated city in a criminal action.

In 28 Am. Jur. 662, the text states:

"A lunacy proceeding is a special proceeding, as distinguished from a criminal prosecution or a civil action under Code practice, but it is frequently stated to partake of the nature of a civil action in personam and to be adversary in character."

It is apparent from the foregoing quotation that the courts do not regard an insanity hearing to be a criminal case as commonly defined. However, an insanity hearing is of concern to the public. The public interest becomes manifest if a dismissal is requested. In 28 Am. Jur. 663, it is said:

"A proceeding to determine the lunacy of a person cannot be dismissed upon the motion of the complainant or petitioner without the consent of the court, committee, or examining board in charge of determining the question of lunacy. The reason for this rule is that a proceeding initiated to determine insanity is inherently dissimilar to a civil proceeding affecting a matter of concern to the plaintiff and the defendant primarily. The restraint of an alleged lunatic is of vital concern to the public generally, and once an inquiry of this character is instituted, the public acquires an interest therein which cannot be divested by the withdrawal of the person who initiated the proceeding."

The apprehension and commitment of the insane are to the best interest of the public and conducive to the public peace. It is in line with the duty of a peace officer to assist. For such work he should receive no extra compensation. The general rule for the compensation of a public officer is stated in 43 Am. Jur. 150:

"The compensation prescribed by law for the performance of the duties of a public office is presumed to be adequate, no more than the services are worth, and only such in amount as will secure from the officer the diligent performance of his duties. But whether it is so or not, a person who accepts the office undertakes to discharge those duties for the compensation thus fixed. He is generally obliged to look solely to it for his reward, and cannot seek additional

remuneration for doing what the law requires him to do.”

See also Volume 2, Report and Official Opinions of the Attorney General, page 209.

It is therefore my opinion the chief of police or any other officer of an incorporated city is not entitled to a witness fee for attendance at an insanity hearing.

Sincerely yours,  
R. V. BOTTOMLY  
Attorney General