

The provisions of Section 25-404, Revised Codes of Montana, 1947, provide as follows:

"25-404. (4936) Witnesses' fees. 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."

Upon reading the above statute it becomes clear that the sheriff and probation officer must be considered as any other witness insofar as the seven cent per mile payments for mileage is concerned. Since a juvenile court is a court of record the general provisions of the statute with respect to mileage would apply to all witnesses be they public officers or not.

Whether or not these public officers are entitled to per diem is not as easily answered because of the proviso clause of the above quoted statute. The substance of the proviso as it affects our problem is that "no officer *** of the state of Montana, or of any county, *** shall receive any per diem when testifying in a criminal proceeding, ***." Clearly, the sheriff and probation officer are officers of a county of the State of Montana.

Sections 10-601 to 10-633, inclusive, of the Revised Codes of Montana, 1947, are the statutes pertaining to juvenile courts and proceedings against juvenile delinquents. The purpose of these statutes as set forth in Section 10-601, supra, is to treat any delinquent child not as a criminal but as misdirected, and misguided, and needing aid, encouragement, help and assistance. These statutes are in accord with the modern trend of the states to protect its errant children rather than to punish them as criminals as was done at common law. See 31 Am. Jur. 784. The court in juvenile proceedings acts more

Opinion No. 24

**Witness Fees—Mileage—Per Diem
—Sheriffs—Probation Officers
—Juvenile Proceedings—Statutes,
25-404, Revised Codes of Montana,
1947; 93-401-16**

Held: Sheriffs and probation officers may not be paid a per diem fee while testifying in a juvenile proceeding, although they may collect mileage.

June 20, 1951.

Mr. Robert Hurly
County Attorney
Valley County
Glasgow, Montana

Dear Mr. Hurly:

You have requested my opinion on the question of whether a sheriff and probation officer from an adjoining county are entitled to mileage and per diem fees while testifying as witnesses in a juvenile proceeding in your county.

in a paternal than in its judicial capacity. State ex rel. Palagi v. Freeman, 81 Mont. 132, 140; 262 Pac. 168. Thus, it may be safely said that juvenile proceedings are not criminal proceedings insofar as the child is concerned. On the other hand, juvenile proceedings may not properly be considered civil proceedings as the state is the moving party in the institution of the proceedings and is acting in its governmental capacity. Section 10-629, supra, makes it the duty of the county attorney to assist the probation officer in prosecuting all persons charged with violations of the Juvenile Delinquency Act. The county attorney does not "prosecute" the children as he does adult violators of the law, but the proceedings bear more resemblance to criminal proceedings than to civil proceedings. Juvenile proceedings may be said to be special proceedings, which are neither criminal nor civil.

Section 25-404, supra, was originally enacted in 1895 as a part of the Political Code. At that time Montana did not have a juvenile court and these so-called special proceedings were rare. However, the legislative intent behind Section 25-404 is clear enough. The Legislature intended that if a public officer were called upon to testify in a civil suit between private litigants that the public officer should be paid a per diem fee like any other witness. However, the Legislature contemplated that in criminal proceedings public officers would frequently be called upon to testify as witnesses because of information they had gathered in the performance of their ordinary duties. Further, the State bears the entire cost of criminal proceedings and since the State already pays public officers salaries for performing their official duties, the policy of the statute is that public officers should not receive additional compensation when acting as a witness. The legislative intent must be pursued, if possible. Section 93-401-16.

Therefore, it is my opinion that sheriffs or probation officers being public officers may not be paid a per diem fee while testifying in a juvenile proceeding, although they may collect mileage at the rate of seven cents (7c) per mile as provided in 25-404. While juvenile proceedings are not criminal proceedings insofar as the delinquent child is concerned, still such proceed-

ings are to be considered criminal within the purview of Section 25-404 as this statute pertains to witness fees for public officers.

Very truly yours,
ARNOLD H. OLSEN
Attorney General