

**Opinion No. 43**

COURTS; Juries; discharged jurors, compensation for attendance—  
JURIES; Jurors; compensation if discharged before impaneling—  
JUSTICE COURTS; Juries; discharged jurors, compensation for  
attendance—Section 25-403, Revised Codes of Montana,  
1947

**Held: Persons summoned for jury duty before Montana Justice Courts are entitled to statutory per diem fees for each day's attendance before the court even though dismissed before actually participating in the trial of a particular case.**

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November 13, 1959

Mr. Leo H. Murphy  
County Attorney  
Teton County  
Choteau, Montana

Dear Mr. Murphy:

You have requested my opinion whether persons summoned for jury duty in the Montana Justice Courts are entitled to statutory per diem fees even though dismissed by the court during the selection of a jury panel.

I have your memorandum of authorities in support of your position that such persons are jurors in actual attendance before court within the meaning of the statutes and hence qualify for the statutory compensation.

Section 25-403, RCM, 1947, provides compensation for jurors in courts not of record:

"Jurors in courts not of record, in both civil and criminal actions, shall receive three dollars (\$3.00) per day, but in civil actions the jury must be paid by the party demanding the jury, and must be taxed as costs against the losing party. Jurors in coroner's inquest shall receive for their services the sum of three dollars (\$3.00) per day."

The general rule applicable in construing similar statutes is stated in 50 CJS, Juries, Sec. 208:

"Unless a distinction is made between 'service' and 'attendance' a juror is entitled to his per diem allowance for all the time he is necessarily in attendance on the court, whether or not during all of this time he is actually serving as a juror, or until discharged, although he is not called on to serve at all."

In Mason v. Culbert, 108 Cal. 247, 41 Pac. 464, the California Court of Appeals decided the same question on nearly an identical statute. The Court said:

**"A juror may be in attendance upon court without being impaneled to try any cause,** and for every day of such attendance the statute authorizes him to be compensated. The per diem provided by the statute is not intended to be in the nature of a salary

for the time that he is serving as a juror, or as wages for trying a cause, but rather as compensation for the time during which he is withdrawn from his ordinary avocation and in actual attendance upon the court." (Emphasis added) See also Jackson v. Baehr, 138 Cal. 266, 71 Pac. 167; Bloch v. Multnomah County, 25 Or. 169, 35 Pac. 30.

The above cases are indicative of the degree of jury participation which constitutes actual court attendance entitling a person to a day's compensation as a juror.

It might also be contended that a person cannot be a **juror** within the meaning of the statute without first being impaneled and sworn as such. However, our codes recognize persons as being **jurors** even though excused during the selection of the ultimate jury panel. For example, Section 94-7111, RCM, 1947, provides:

"A challenge to an individual **juror** is either—

1. Peremptory, or,
2. For Cause." (Emphasis added)

Further, an *Bouvier's Law Dictionary* (Rawles Revision) a juror is defined as:

"Any person selected and summoned according to law to serve in that capacity, whether the jury has been actually impaneled and sworn or not."

When a person is summoned for jury duty from the county, he is compelled to neglect his business often at considerable expense and inconvenience, to attend court in obedience to its order. During the time that such individuals are withdrawn from their ordinary vocation they are in actual attendance upon the court within the meaning of our statutes.

It is therefore my opinion that persons summoned for jury duty before Montana Justice Courts are entitled to their statutory per diem fees for each day's attendance before the court even though dismissed during the selection of a jury panel for the trial of a particular case.

Very truly yours,  
FORREST H. ANDERSON  
Attorney General