

Opinion No. 66-136

December 12, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General Paul J. Lacy, Assistant Attorney General

TO: Mr. Edmund H. Kase III, Assistant District Attorney, Seventh Judicial District, County Courthouse, Socorro, New Mexico 87801

QUESTION

QUESTION

Are witnesses at a justice of the peace criminal case entitled to witness fees and mileage?

CONCLUSION

Yes.

OPINION

{*179} ANALYSIS

The Territorial Legislature in 1887 by laws 1887, Chapter 40, Sections 1 and 2, enacted the laws governing witness fees which are applicable in New Mexico to this date. In the New Mexico Code 1915 those Sections were grouped together as Sections 5898 and 5899. Again, in Compiled Statutes 1929 those sections appeared side by side as Sections 155-104 and 155-105. In the 1941 Compilation the compiler separated the two sections and denominated them as Sections 20-104 and 38-1907. This practice is continued to this day and the statutes are compiled as Sections 20-1-4, N.M.S.A., 1953 Compilation (1965 P.S.), and 36-19-7, N.M.S.A., 1953 Compilation. These two sections, which have existed without material change since enactment in 1887, provide as follows:

20-1-4. Witness fees -- Per diem and mileage -- Expert testimony. -- A. Witnesses shall be allowed fees for services in all cases, as follows: For attending any district court, referee, clerk, commission or the taking of any deposition, within one hundred miles from where the witness resides, for each day, five dollars; for attendance as aforesaid, at a distance more than one hundred miles, five dollars for each day; for each mile of travel in going to and returning from the place of attendance, eight cents.

B. The district judge in any case pending in the district court may order the payment of a reasonable fee, to be taxed as costs in addition to the witnesses fees provided for in subsection A, for any witness who qualifies as an expert and who testifies in the cause

in person or by deposition. The additional compensation shall include a reasonable fee to compensate the witness for the {**180*} time required in attendance and the necessary time required in preparation or investigation prior to the giving of the witness's testimony. The expert witness fee which may be allowed by the court shall be paid to only one expert witness unless the court finds that the testimony of more than one expert was reasonably necessary to the prevailing party and the expert testimony was not cumulative. Provided that the total expert witness fees which may be allowed by the court to the prevailing party shall not exceed one hundred fifty dollars.

36-19-7. Witness fees. -- When any person shall be summoned as (such) witness to give evidence beyond or without his proper precinct, before any justice of the peace within his county, he shall receive (\$ 0.50) fifty cents for each day's necessary attendance; and shall also receive for each mile of travel in going to and returning from the place of trial, five cents.

When the above two statutes are placed side by side, it is apparent that the Territorial Legislature fully intended that they be read together. The word "such" in Section 36-19-7, supra, clearly refers back and ties that section to Section 20-1-4, supra. Section 20-1-4, supra, is the statute under which witness fees and mileage are allowed to witnesses in both civil and criminal proceedings in the district courts. Since that section is broad enough to include the payment of witness fees in both civil and criminal cases in the district courts, we cannot construe Section 36-19-7, supra, originally enacted as a part of the same law which enacted Section 20-1-4, supra, to mean that witness fees are payable in a justice of the peace court in civil cases only. The fact that Sections 36-19-6 and 36-19-8, N.M.S.A., 1953 Compilation, the sections both preceding and following the section with which we are concerned, refer to civil cases does not require that section 36-19-7, supra, be so limited, since it is merely a fortuitous accident that the compiler placed these sections in conjunction one with another.

So far as the Attorney General Opinion issued May 8, 1916, as found in Attorney General Opinions 1915-1916, is in conflict with this opinion, it is overruled.