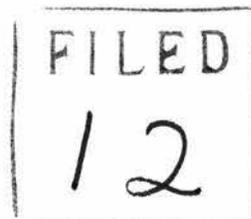


WITNESS FEES: A state witness, testifying as an expert witness, can only claim the ordinary witness fee, and cannot refuse to give testimony because he has not previously been tendered a fee as an expert witness.

January 24, 1949

Honorable Herbert S. Brown
Prosecuting Attorney
Grundy County
Trenton, Missouri



Dear Mr. Brown:

This department is in receipt of your letter of recent date in which you state that in the trial of a pending criminal case in your county you deem it necessary to call as expert witnesses two staff physicians employed at State Hospital No. 1 at Fulton, Missouri. You further state that you have contacted these two aforesaid physicians in regard to their appearance as expert witnesses for the state, and that you have been informed by them that they would so appear and so testify only after the guarantee by you of a fee for testifying as an expert witness. You also further state that you desire an opinion from this office whether or not these two aforesaid physicians may legitimately claim a professional fee for testifying as expert witnesses, that is, a fee greater than that paid an ordinary witness.

In the case of *Burnett v. Freeman*, 125 Mo. App. 683, Judge Ellison, who wrote the opinion in this case, stated: "Whether a physician could be allowed to charge for his services as a witness as an expert has been a question upon which the courts have entertained widely divergent views.* * *"

Judge Ellison then proceeds to give a lengthy and thorough summary of decisions relating to this point as of the time at which the decision was rendered, which was May 20, 1907. We do not deem it necessary to induct here all of his discussion. His conclusion, as found in this aforesaid opinion, is as follows: (l.c. 687)

"After consideration of the question in all its bearings, we have arrived at the conclusion that a witness called to testify as an expert, whether as a physician or in any other branch of knowledge, may be compelled to state his opinion upon hypothetical or other questions involving his professional knowledge, without compensation other than the witness fee taxed to the ordinary

witness. It is a duty he owes to the State in aid of its orderly existence and in return for which he enjoys its protection and the administration of its laws in his behalf; not least of which would be the compulsion of other experts, whether they be the man who practices a profession, the artisan, the artist, the tradesman or other person to come to his aid when needed in litigation in which he might unfortunately be involved. Indeed, in this very case the plaintiff invoked the special knowledge of his professional brethren in aid of the price he charged for the attendance upon the court, and there was no thought of it not being their bounden duty to give to the court and jury, in his behalf, the benefit of their information derived through the experience and study of their profession."

In the case of State v. Bell, 212 Mo. 111, a case decided May 19, 1908, in which the issue decided in the Burnett case was also present, which issue is the same one that now confronts you, Judge Gant, who wrote the opinion of the court, took the same position which had been taken in the Burnett case. In discussing this point, Judge Gant said:

"Defendant also complains of the action of the court in refusing to require Dr. Schaffer, a physician and witness for the defendant, to answer a question as to whether a certain incurable disease after running six or eight months or a year, would cause paralysis. When this question was propounded to the witness he answered that that was specialized question and he expected to receive remuneration if he was required to give expert testimony. And the court sustained the witness in his refusal to answer until he had first received his fee for his opinion as an expert. In so ruling we think that the learned circuit court erred. Whether a physician called to testify as an expert may be compelled to state his opinion upon a hypothetical or other question involving his professional knowledge without compensation other than the witness fees allowed all other witnesses by law, has been a much mooted question.

In *Burnett v. Freeman*, 125 Mo. App. 683, the authorities on both sides of the proposition were carefully collated by Judge Ellison, and the conclusion was reached by the Court of Appeals that a witness called to testify as an expert, whether a physician or an expert in any other branch of knowledge, could be compelled to state his opinion upon a hypothetical or other question involving his professional knowledge without further compensation than that allowed by law to other witnesses. Said the court: 'It is the duty he owes to the State in aid of its orderly existence and in return for which he enjoys its protection and the administration of its laws in his behalf; not least of which would be the compulsion of other experts, whether they be the man who practices a profession, the artisan, the artist, the tradesman or other person to come to his aid when needed in litigation in which he might unfortunately be involved * * * *It should be remembered that the duty the expert owes to the State, as a performance of citizenship, rather than a rendering of service to an individual, pertains to an obligation to give the court the benefit of the knowledge he has in store at the time he is called upon. He cannot be required to especially fit himself for lines of inquiry. He should not be expected to make examinations, perform professional service and the like. For that is not the office of a witness. He could not be compelled to do that any more than an ordinary person, with no knowledge of the facts pertaining to a case, should be required to go and post himself so as to become a witness.' After a full consideration of the various cases and the very satisfactory opinion of the Court of Appeals, we think that the Court of Appeals reached the proper conclusion on this question and supported it by satisfactory reasoning.* * *"

In the case of *Klepper v. Klepper*, 199 Mo. App. 295, a case decided April 2, 1918, the court in ruling upon this point, states:

"Plaintiff complains of the court's ruling on her motion for suit money to enable her to make her defense to defendant's motion to modify the judgment. Plaintiff called as witnesses two real estate brokers who, at plaintiff's instance, had examined the property at Locust street and Garrison avenue above mentioned, and who testified as experts concerning the value thereof. It appears that for their services in making such examination and for testifying plaintiff, through her counsel, had agreed to pay each of them the sum of \$50; and there was testimony that this was the reasonable value thereof. It is contended that the court should have made an allowance to cover this expense and ought to have allowed a larger amount as counsel fees.

"These expert witnesses were not entitled to demand more than the usual witness fees for giving their testimony in the case as witnesses merely; and plaintiff could not make a binding contract to pay them more than the usual witness fees for services as witnesses (Burnett v. Freeman, 125 Mo. App. 683, 103 S.W. 121; State v. Bell, 212 Mo. 111, l.c. 126, et seq.). But they were entitled to demand reasonable compensation for services which the law does not compel them to render as witnesses for the usual witnesses fees, such as examining the property and gathering information and data on which the base their opinions as to its value (Burnett v. Freeman, supra; State v. Bell, supra). And for expenditures of this character, if reasonably necessary to be incurred and actually incurred in preparing her defense to defendant's motion, plaintiff was entitled to a reasonable and proper allowance.* * *"

In the case of Shelton v. McHaney, 343 Mo. 119, the court after discussing the facts in the case, which fact revealed the hiring of, and payment to, witnesses of expert witness fees, says:

"* * *These facts differentiate this case from the Missouri cases cited by plaintiffs,

viz., Burnett v. Freeman, 125 Mo. App. 683, 103 S.W. 121, 134 Mo. App. 709, 113 S.W. 488; State v. Bell, 212 Mo. 111, 126 (III), 111 S.W. 24, 28 (3); and Klepper v. Klepper, 199 Mo. App. 294, 300 (II), 202 S.W. 593, 595 (4,5), which are to the effect expert witnesses are not entitled to compensation in addition to regular witness fees for services as a witness but may legally receive such compensation for other services performed in connection with their testimony (see 70 C.J.,pp. 75-77, secs. 86-88).* * *"

Since the decision in the Shelton v. McHaney case, supra, there have been no subsequent decisions which alter the law upon this point.

CONCLUSION

In view of the unanimity of Missouri decisions upon your point of inquiry, we are of the opinion that an expert witness is in the same category as an ordinary witness, and that he cannot refuse to give expert testimony without previously having been tendered or guaranteed a fee as an expert witness.

It is our suggestion that in the case of the two physicians at State Hospital No. 1 in Fulton, Missouri, that you issue a subpoena for their appearance as witnesses for the state, that you tender them their mileage and one day's witness fees. If they refuse to answer this subpoena they can be proceeded against in the same manner that any witness may be proceeded against for refusal to answer a subpoena.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. Taylor
Attorney General