

**LETTER OPINION**  
**95-L-217**

September 19, 1995

Ms. Patricia Burke  
Burleigh County State's Attorney  
514 E Thayer Ave  
Bismarck, ND 58501

Dear Ms. Burke:

Thank you for your August 18, 1995, letter concerning reimbursement for prosecution witness fees.

Previously the North Dakota Supreme Court paid prosecution witness fees by authority of a general administrative order of that court. However, since July 1, 1989, this office has administered the prosecution witness fee reimbursement fund. The payment of prosecution witness fees are governed by N.D.C.C. §§ 27-20-49, 31-01-16, and 31-01-18.

You raise several points in your letter which you wish to have clarified. I acknowledge that the prosecution of criminal cases is a difficult process. Recognizing that fact, our office has interpreted the prosecution witness fees as broadly as possible to effect the legislative purpose. Consequently in the past we have paid for expert witness fees when those witnesses have actually testified. Nonetheless, the statutes do not allow for reimbursement in excess of \$25 per diem for the witness's services in criminal cases. There is no distinction between expert and nonexpert witnesses. The only way to exceed \$25 per diem is to have N.D.C.C. § 31-01-18 apply. If that section is used however, the person must actually appear in the court proceeding to receive reimbursement from this office.

Because there is no distinction between expert witnesses and other witnesses, our office previously adopted a policy only to pay the increased fee, subject to budgetary constraints, in those cases when the witness actually appeared in a criminal court proceeding.

You make a case for eliminating the difference between the payment for expert witnesses for indigent defense experts versus what the state of North Dakota pays for prosecution experts. However, the payment for indigent defense experts is grounded in the constitution and we can only rely upon statutory authority given by the Legislature to pay for the prosecution's fees. The Legislature has determined that prosecution witness fees, to the extent that they

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exceed the rates allowed by statute, should be borne by the counties where the prosecution occurs. Thus, although it may be appropriate for the state to pay all prosecution expenses, the Legislature has made a determination that the counties should bear part of that cost.

You also raise a question about an alleged case where the failure to consult with the Attorney General office's prior to submitting a claim for witness expenses was given as a reason to deny those expenses. This office is not aware of any situation where the reason payment was denied was because the prosecutor did not consult with this office prior to incurring the expenses. Although we suggest that state's attorneys consult with our office to determine which fees would be payable should reimbursement be sought, to the best of our knowledge we have never denied a claim solely because someone failed to consult with us prior to incurring costs. I would agree with the implication in your letter that there is no authority to deny prosecution witness fees merely because someone did not seek authorization from this office prior to incurring the expenses.

I agree with you that we need to do more to assist victims in this state. Unfortunately my office is limited to the resources, including the budget, provided by the Legislature. I understand that the state's attorneys are also limited in what they can do by the resources provided by the county commissioners. Those constraints do not make our jobs any easier. To better balance those interests, I propose that you and other state's attorneys join with this office and the Association of Counties to develop a more equitable method of paying prosecution witness fees than presently exists.

Finally I am enclosing a copy of a memorandum which our staff uses to aid them in determining which fees can be paid by this office. I believe this memo will also be helpful to your understanding of the interpretation of the statute.

Because you have raised these questions and we have heard other questions concerning the authority of this office to pay prosecution witness fees, we plan to provide information to the counties so that they can more easily understand the rules under which we all must operate. We are currently developing a form to use to seek reimbursement. The form is structured to help persons seeking reimbursement understand what is reimbursable. We will provide the State's Attorney's Association with a draft of that form for comment before the form is finalized.

I hope this answers your questions and you have a better understanding of the constraints under which we operate.

Sincerely,

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Heidi Heitkamp  
ATTORNEY GENERAL

rms/vkk  
Enclosure