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**MENTAL HEALTH:** Medical evaluation by a physician of choice.

**WORDS AND PHRASES:** "State."

**COUNTIES:** Obligation to enforce mental health code.

**PROBATE PROCEEDINGS:** Judicial determination of indigency and reasonable expenses.

Counties are the governmental units responsible for the conduct of commitment proceedings under the mental health code.

Counties are responsible to pay for the cost of securing an independent medical evaluation by a physician of an indigent.

The responsibility of determining indigency in a civil commitment proceeding rests with the probate court.

The responsibility for determining reasonableness of the cost of independent medical evaluations also rests with the probate court.

Opinion No: 4875

May 30, 1975.

Donald C. Smith, M.D., Acting Director  
Michigan Department of Mental Health  
Lewis Cass Building  
Lansing, Michigan 48926

You have asked for my opinion regarding the interpretation of two sections of the new Mental Health Code, 1974 PA 258. The sections in question are 463 and 522, which provide as follows:

"Sec. 463. (1) The subject of a petition in a hearing under this chapter has the right at his own expense, or if he is indigent, at the expense of the state, to secure an independent medical evaluation by a physician of his choice relevant to whether he requires treatment, whether he should be hospitalized or receive treatment other than hospitalization, and whether he is legally competent.

(2) Compensation for an evaluation performed by a physician shall be in an amount which is reasonable and based upon time and expenses." MCLA 330.1463; MSA 14.800(463)

"Sec. 522. An independent medical or psychological examiner appointed for an individual pursuant to this chapter shall, if the individual is indigent, be compensated by the state in an amount which is reasonable and based upon time and expenses." MCLA 330.1522; MSA 14.800(522)

You have posed the following questions regarding these sections:

1. Does 'expense to the state' mean expense to the Department of Mental Health?

2. Who is responsible for determining if an individual is 'indigent' in accordance with these sections of the Mental Health Code?

3. Who has the responsibility for setting 'reasonableness' limits on the cost and type of such medical evaluations?"

The word "state" is not defined in the Mental Health Code. It is clear, however, that the word "state" cannot be defined as meaning the Department of Mental Health, since the Mental Health Code uses the word "department" whenever it refers to the Department of Mental Health. See, e.g., MCLA 330.1400; MSA 14.800(400); MCLA 330.1500; MSA 14.800(500). It is necessary, therefore, to look further in order to determine the legislative intent in the use of the word "state" in the sections in question.

It is my opinion that, when the legislature used the word "state" to designate the body which would assume the costs of independent experts, it intended to refer to the constituent county of the State of Michigan where the probate court proceeding is held. In *In Re Morrison*, 43 SD 42; 177 NW 806 (1920), the South Dakota Supreme Court was called upon to interpret a statute which stated that in disbarment proceedings the costs were to be paid by the "state". The court held that the term "state" included the county where the matter was heard and that that county was responsible for the costs. Similarly, in *Cox v Bd of Commissioners of Anne Arundel County*, 181 Md 428; 31 A2d 179 (1943), the Maryland Supreme Court held that where a state gives a city or a county part of the state's police power that city or county is, to the extent it exercises such power, the "state".<sup>1</sup>

The civil commitment of the mentally ill is justified by the police and *parens patriae* powers of the state. *Donaldson v O'Connor*, 493 F2d 507 (5th Cir, 1974). The State of Michigan has traditionally delegated the power of civil commitment to the various counties. That the commitment process (as opposed to the treatment process) has continued to be fully delegated to the counties by 1974 PA 258 is clear from a reading of that Act. For example, commitment proceedings are instituted in the probate court of the county where the subject of the petition either resides or was found, MCLA 330.1400; MSA 14.800(400); MCLA 330.1434; MSA 14.800(434). The county prosecutor has the duty to participate in commitment proceedings except in cases where the petitioner has retained private counsel, MCLA 330.1457; MSA 14.800(457). If the subject of a commitment petition demands a jury trial, the jury is chosen from residents of the county, MCLA 330.1458; MSA 14.800(458).

It is therefore my opinion that the legislature intended that the counties were to be the responsible governmental bodies for conducting commitment proceedings. Since 1974 PA 258 contains no provision regarding state reimbursement of the counties for the expenses of commitment proceedings it can readily be inferred that the legislature intended that the counties would absorb those expenses. It would be anomalous to say that in one instance—the payment of expert witnesses—the legislature intended for the state to assume the costs instead of the counties.

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<sup>1</sup> Other cases which have interpreted the word "state" to mean, in part, "county" are *County of Spokane v Gifford*, 9 Wash App 541; 513 P2d 301 (1973); *Hale v Smith*, 254 Or 300; 460 P2d 351 (1969); *Sutton v Burnett*, 216 Ark 574; 226 SW 2d 544 (1950).

The conclusion that the legislature intended that the counties assume all costs of commitment proceedings is supported by the fact that the legislature did not appropriate to the Department of Mental Health or to any other state agency funds for the payment of expert witnesses in civil commitment proceedings. Const 1963, art 9, § 17 provides:

"No money shall be paid out of the state treasury except in pursuance to appropriations made by law."

The failure to make such appropriations is further evidence of a legislative intent that the costs of the expert witnesses be paid for by the counties.

Your second question relates to the responsibility of determining indigency in a civil commitment proceeding. It is my opinion that the responsibility for determining indigency lies with the probate court with which the petition for commitment is filed. 1974 PA 258 in effect requires the probate court to determine indigency with regard to each subject of a petition. That determination results from section 454 of the code, MCLA 330.1454; MSA 14.800(454), which requires the probate court to appoint legal counsel to represent the subject of a petition in all cases where an appearance of an attorney has not been filed on behalf of the petitioner within 48 hours of the filing of the petition. Subpart 5 of section 454 states that if the subject of the petition turns out to be indigent the appointed counsel shall be compensated from court funds. It is therefore obvious that the statute places a duty on the probate court to determine indigency in order to determine the manner in which appointed counsel will be compensated. The same determination of indigency would be applicable for purposes of section 463. The same conclusion can be reached with regard to section 522. See MCLA 330.1517(3); MSA 14.800(517)(3).

Your final question relates to the responsibility for determining reasonableness of the cost of independent medical evaluations. It is my opinion that the probate court has the power to make such a determination. If the independent medical expert testifies in a proceeding before the probate court, then MCLA 600.2164; MSA 27A.2164 would give the probate court the authority to regulate the fee of the independent expert:<sup>2</sup>

"(1) No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case. Any such witness who shall directly or indirectly receive a larger amount than such award, and any person who shall pay such witness a larger sum than such award, shall be guilty of contempt of court, and on conviction thereof be punished accordingly."

Even if the independent expert does not testify at trial, however, it is still my opinion that the probate court has the inherent power to control

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<sup>2</sup>The scope of the statute has been held to include allowance for cost of preparation of testimony, *Gundersen v Village of Bingham Farms*, 1 Mich App 647, 137 NW2d 763 (1965).

the reasonableness of any fees charged. As a general rule, courts have the inherent power to do all things that are reasonably necessary for the administration of justice within the scope of their jurisdiction, 20 Am Jur 2d, Courts, § 79, p 440. The consulting of independent medical experts is an integral and necessary part of the civil commitment proceeding. The effective administration of justice in commitment proceedings before a probate court requires that the court pass on the reasonableness of any fees which are to be paid by the county as a result of pending court actions.

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**POLICE OFFICERS: Witness Fees.**

**WITNESS FEES: Police Officers.**

Contracts with police officers may provide for time-and-a-half pay for court appearances by a police officer.

Opinion No. 4866

June 4, 1975.

Honorable Ray C. Mittan  
State Representative  
The Capitol Building  
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You have requested my opinion on the following question:

“Do Police Department contracts requiring payment of time and a half for three hours for each court appearance required of an officer conflict with the witness fee provisions of the statutes of the State of Michigan?”

The provisions for payment of fees for persons appearing on behalf of the People in criminal cases are contained in the Code of Criminal Procedure, 1927 PA 175, as amended; MCLA 760.1 *et seq*; MSA 28.841 *et seq*.

MCLA 767.36; MSA 28.976 provides as follows:

“It shall not be necessary to pay or tender any fees whatever to any witness subpoenaed on the part of the people of this state in support of any prosecution, but such witness shall be bound to attend as if the fees allowed by law to witnesses in civil actions had been duly paid to him.”

The payment of witness fees except as provided by statute is prohibited by MCLA 775.7; MSA 28.1244, as follows:

“Whenever any person shall attend any court of record as a witness on behalf of the people of this state, upon request of the public prosecutor, or upon subpoena, or by virtue of a recognizance for that purpose, and it shall appear that such person has come from any other state or territory of the United States, or from any foreign country, or that such person is poor, the court may, by an order to