

WITNESS FEE FUND PAYMENT GUIDELINES

NMSA 1978, §34-9-11 Jury and Witness Fee Fund &
NMSA 1978, §38-6-4 Per Diem and Mileage for Witnesses

I. PURPOSE OF GUIDELINES

The purpose of these guidelines are to define responsibility for the payment of witness costs and to provide direction for controlling witness costs.

These guidelines shall be used by the Administrative Office of the Courts (AOC) to determine witness cost incurred by district, metropolitan, and magistrate courts. These guidelines have been adopted by the Supreme Court for cases involving witnesses called by State agencies.

These guidelines apply to witness covered travel costs outlined in the Supreme Court Order NO. S-1-AO-2024-00001 and Mileage and Per Diem Act, incurred for in-person appearance in court. The jury and witness fund does not reimburse the payment of any investigatory costs or other expenses of witnesses during trial preparation.

These guidelines apply only to payments made from the jury and witness fund and do not affect other proceedings. AOC will authorize payments from the fund only for state witnesses or in cases where indigency has been determined based on New Mexico Indigency NMSA 1978, §31-15-7

II. GENERAL GUIDELINES

- A.** Payment shall be made for the travel costs of witnesses subpoenaed by the court, the prosecution or the defense and expert witnesses for grand juries, magistrate courts, or court expert. *See generally* NMSA 1978, §34-9-11
- B.** Definition of Witness of Fact or Character- A fact witness is called to testify to facts relevant to the case.
- C.** Definition of Expert Witness- An expert witness is called to testify to an opinion based on their knowledge, skill, experience, training, or education.
- D.** Cost Control for Witness Testimony:
 - 1. State officials, judges, district attorneys, and public defenders shall minimize expenses born by taxpayer dollars by obtaining witnesses in the most economical manner possible while not detrimentally affecting the integrity of the proceedings;
 - 2. This shall include the use of video testimony with court approval;
 - 3. The use of volunteer expert witnesses at no cost or for per diem and mileage is encouraged;

4. The use of state agency staff in expert testimony in lieu of private sector expert testimony is encouraged. The University Of New Mexico (including OMI), the Department of Health, the Department of Environment, and the Human Services Department are among the agencies whose staff may be appropriate as expert witnesses in certain proceedings. NMSA 1978, §29-3-4;
5. The use of in-state resident fact or expert witnesses is encouraged;
6. In accordance with state law, no agency may pay an expert witness for services not rendered. NMSA 1978, §13-1-158;
7. If a state agency is requesting an in-person appearance of a witness that must travel more than one hundred (100) miles round trip, the state agency must submit a Certificate of Witness to the presiding judge no less than ten (10) days before the hearing, unless good cause exists for an emergency request;
8. The state agency that is requesting an in-person appearance of a witness that must travel more than one hundred (100) miles round trip shall be responsible for canceling and notifying witness(es) if travel is not needed. Failure to exercise diligence in canceling and notifying the witness(es) may result in the state agency being responsible for the cost of the traveling witness(es);

III. DEFINITION OF WITNESS PAYMENTS

Witness travel payments shall be authorized for all allowable travel expenses charged by a witness who has been subpoenaed by the court, prosecution, or defense for the purpose of giving in-person testimony regarding what they had seen, heard or observed. The jury and witness fund covers allowable expenses, listed in the Mileage and Per Diem Act (Attachment A) during testimony for all state witnesses and for defense witnesses when indigency has been determined. For determination of indigency, see the public defender indigency determination standards and form available at local public defenders department offices or <https://www.lpdnm.us/links-forms/>

The types of proceedings for which witness travel payments are allowable are for in-person:

1. Grand Jury
2. Criminal Cases,
3. Civil cases provided free process as follows:
 - a) Children's Code, and
 - b) Mental Health and Developmental Disabilities Code.

IV. PAYMENT LIMITATIONS (EXPERT WITNESSES)

If the trial court chooses to call an expert witness, payment of the expert witness fees shall be limited as follows:

- A.** In district court, the judge may order payment of reasonable expert witness fees in any pending civil case, in addition to per diem and mileage for an expert witness who testified in person or by deposition NMSA 1978, §38-6-4. The presiding judge or designee shall consult with the AOC in advance when a reasonable expert witness fee is expected to exceed five hundred dollars (\$500.00).
- B.** Payment Responsibilities regarding Expert Witnesses: Criminal Proceedings

The Agency that calls the expert witness shall be responsible for payment of the expert fees associated with the expert's opinion and testimony except for the following:

- 1. Preliminary Hearings and trials in Magistrate Court: The Agency must request approval of the expert from the presiding judge prior to retaining the expert or the Agency shall pay the fees of that witness. Since the purpose of a preliminary hearing is to determine probable cause, and not determine guilt or innocence, the need for expert witnesses for preliminary hearings and trials should be minimal and infrequently requested.
- 2. Criminal Grand Jury Proceedings: Whoever calls an expert witness shall pay the fees of that witness. The AOC shall pay for an expert who is called specifically by the grand jury and who conducts an examination testimony at the direct request of the jury. This request shall be made through the presiding district judge. The presiding district judge must approve the request as being necessary to the determination of probable cause before the AOC will pay for that expert. Since the purpose of a grand jury is to determine probable cause, and not to determine guilt or innocence, the need for an expert witness in a grand jury proceeding should be minimal.
- 3. Delinquency Proceeding: Whoever calls the expert witness shall pay the fees of that witness.

C. Payment Responsibilities regarding Expert Witnesses: Civil Proceedings

- 1. The agency that calls the expert witness shall pay the fees of that witness in the following types of proceedings:
 - a) Mental Health and Developmental Disabilities Code;
 - b) Alcoholism commitment proceedings;
 - c) Child abuse and adult abuse proceedings;
 - d) Child support cases;
 - e) Termination of parental rights and custody proceedings;
 - f) CHINS proceedings; and
 - g) Habeas corpus proceedings.

V. PAYMENT RESPONSIBILITY

A. Mileage & Travel Expenses

1. Ordinarily, mileage is paid for one round trip portal-to-portal. If a witness chooses to travel to court each day, the judge or his designee shall approve the lesser of the cost of mileage or the overnight per diem rate.
2. Mileage will be paid per Supreme Court order mileage rate for privately owned vehicles and at the DFA rate for privately owned airplanes. Driving mileage is calculated using Google maps, NMDOT or unless beginning and ending odometer readings are provided; air mileage is calculated using an official air map.
3. The cost of a travel by common carrier, e.g., commercial bus, train, or plane, may be reimbursed to the traveler. Reimbursement for any travel shall not exceed the cost of coach class commercial airfare.
4. Mileage shall be paid to only one person per vehicle.
5. Car rental expenses for a witness shall only be reimbursed upon prior written approval of the presiding judge or designee. See #2 of this section for mileage payments.

Documentation Required

A Certification of Witness form filled out and signed by the witness and the public defender, district attorney or attorney must accompany the reimbursement request with a copy of the subpoena attached. If reimbursing a traveler for airfare, bus ticket, etc., the original receipt must be attached. AOC will NOT accept travel agency invoices or credit card slips without the original receipt attached. Reimbursement for hotels and travel agencies must include a copy of the relevant subpoena, the Certificate of Witness form, and original receipts.

B. Per Diem Expenses

Witnesses shall be paid per diem expenses at the current DFA schedule for public employees:

1. For out-of-state witnesses, travel time is usually calculated in flying time rather than driving time. Exceptions may be made when the court is not located near an airport. For purposes of these guidelines, "out-of-state" means over 150 miles from the exterior boundaries of New Mexico.
2. When a witness is required to appear more than one day and they choose to stay somewhere other than the town in which the court is located, the presiding judge or their designee shall approve the lesser of the cost of mileage charges or the overnight per diem rate. If a witness must return to their place of residence and the mileage charges exceed the overnight per

diem rate, the attorney calling the witness must obtain prior approval from AOC.

C. Parking

Parking expenses are allowable if incurred while a witness is attending court and if parking is not provided by the court. Appropriate receipts must be provided to AOC for reimbursement.

D. Other Expenses

1. Per diem and mileage expenses shall be reimbursed pursuant to the DFA guidelines to public employees serving as security escort to the witness. A security escort is defined as any full-time salaried law enforcement officer, bailiff, correctional officer or security agent under contract to the state. This paragraph also applies to out-of-state security escorts.
2. When a prisoner is housed in a municipal or county jail in order to serve as a witness, the jail will be paid for housing the prisoner as long as the cost does not exceed the normal and customary cost of housing a prisoner in that facility.
3. If the person or agency who calls the prisoner witness causes that witness to spend more than three nights in the host jail facility, that person or agency shall pay for the additional cost, unless prior written approval, including the reason for the additional time requested, has been obtained from the judge to exceed the allowable time. The approval must be submitted with the voucher.

E. Payment Responsibility When Witness Not Used

The person or agency that calls the witness shall be responsible for notifying the witness of trial cancellations, continuances, resetting or settlements. If that person or agency fails to notify the witness, that person or agency shall be responsible for the per diem and mileage expenses of the witness; under those circumstances, AOC will not pay for the witness. In determining payment responsibility under this subsection, the one who called the witness must show that they were unable to contact the witness despite good faith efforts to do so, and a sworn statement to that effect must accompany the request for payment.

F. Processing of Vouchers

1. The Certification of Witness form is filled out by the expert witness and attached to the expert's bill for services. If the form is incomplete, it will be returned to the appropriate court for completion.
2. The presiding judge or their designee shall reject a voucher requesting payment from the fund for expenses that are not allowable expenses pursuant to these guidelines. The judge or their designee shall certify to the

accuracy of the form by signing the Certification Witness form or voucher. AOC may request reconsideration of the presiding judge or their designee upon approval of a voucher for expenses that are not allowable expenses pursuant to these guidelines within ten (10) days of the vouchers submission.

3. The agency that requested the witness shall prepare the necessary information and provide it to the court for preparation of the voucher; if a private attorney requested the witness, they must provide the necessary information to the court for preparation of the voucher. Court personnel shall review for completeness and accuracy and forward the form, the Order of Appointment, if applicable, all necessary receipts and prepared state voucher for each witness to AOC for payment. The court shall retain a copy for its files.
4. AOC will process the payment request and mail the payment directly to the witness for the magistrate courts, unless otherwise specified. Witness payments for the district courts will be returned to that district court for distribution to the witness.

Attachment A

DFA Travel Rule Updates

During the 2021 Legislative Session, travel laws were changed. DFA went thru the New Mexico Administrative Code (NMAC) Rule changing process to update the Rule to be in line with the laws. It was a 3 year process. The last modification to the travel rules were done in 2003. This will impact Title 2, Chapter 42, Part 2 Regulations Covering the Per Diem and Mileage Act

Here are the updates:

1. 2.42.2.7 Definitions
 - a. They added a definition of “attend”
 - b. The 35 mile radius has been increased to 50 miles in the definitions for “home” & “travel”
2. 2.42.2.8 Per Diem Rates Proration
 - a. The breakdown of specific partial day per diem rates is removed. The new rates will be set by DFA annually.
 - b. Special area defined as Santa Fe County, instead of Santa Fe.
3. 2.42.2.9 Reimbursement of Actual Expenses in lieu of Per Diem Rates
 - a. The dollar amounts that are currently listed is removed. DFA will set the amounts annually.
4. 2.42.2.11 Mileage-Private Conveyance
 - a. Mileage reimbursement rate was 80% of IRS rate from previous year as of January 1. Now it will be 100%. Essentially it'll increase from \$0.52 to \$0.66, a 20% increase.
 - b. Judicial agencies: There's a Supreme Court order in place to use \$0.52/mile. This would need an amendment if any other rate is to be used.
 - c. Rand McNally was removed & an electronic mileage calculator as approved by DFA was added. Google Maps can now be used to calculate mileage. Best route would need to be selected. DOT map & odometer readings also still acceptable.
5. 2.42.2.12 Reimbursement for Other Expenses
 - a. Currently says employees may be reimbursed without receipts for other expenses (i.e. taxi fares, parking fees, tips) in the amount of \$6/day or \$30/trip. Now, an itemized receipt is required.
 - b. The Lost Receipt Affidavit is not going away but it is to be used in hardship cases or if the receipt is damaged somehow. It should be a very rare occurrence. Emphasis is added on obtaining itemized receipts.
6. Effective Date
 - a. Today Jan. 16, 2024 is the effective date for these dates
 - b. DFA is setting March 1, 2024 as the required implementation date to allow agencies adequate time to accommodate these changes.
 - c. Early implementation is allowed however

Impacts to Judiciary:

1. Jury & Witness
 - a. Increased costs for mileage
 - b. Updates to Jury software needed
2. Courts
 - a. Slight increased costs
 - b. Contractors - if contracts stated a specific mileage rate, amendments might be needed
3. Travelers
 - a. Increased responsibility to obtain & submit itemized receipts
 - b. Increased emphasis on using state vehicles instead of personal vehicles
 - c. Emphasis on consistency.