

Forensic Psychiatrists' Fee Agreements: A Preliminary Empirical Survey and Discussion

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The author performed a preliminary empirical study of forensic fee agreements. A survey of forensic psychiatrists produced samples of fee agreements used for expert witness work. The samples were analyzed to determine patterns of usage, critical elements, styles of agreement design, and other observations. Despite uncertainties of payment in this field, a surprising number of experts do not use formal fee agreements. This and other results are discussed.

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[T]he expert should obtain a written agreement spelling out compensation expectations and outlining who is responsible for the expert's payment: the attorney or the client. A written agreement will serve to reduce misunderstandings.¹

In addition to its stimulating intellectual challenges and often fascinating clinical aspects, forensic psychiatry is also a way of making a living, with its own business components. As earlier empirical studies of billing practices have noted,^{2,3} the financial aspects of our work are neither often nor readily discussed, perhaps because of unconscious taboos about money and other factors.²

The usual source of forensic income for "private practitioners" (that is, those who are not on salary to a corrections institution, for example) is attorneys and courts, with the former predominating; thus, most practitioners must enter business dealings with attorneys and law firms as part of their actual practice.

The majority of those practicing attorneys who retain forensic psychiatrists usually understand and respect the expert witness relationship and its atten-

dant fees as legitimate and cost-effective business expenses and pay their invoices appropriately and even promptly. But as happens with all professions, forensic practitioners dealing with attorneys have sometimes encountered difficulties in obtaining fair payment for their services.^{4,5} These difficulties may be divided into several standard types.

1. **Cash Flow Problems:** Especially with plaintiffs' attorneys in smaller firms, the firm's own income may come in slowly and in small volume. This may leave the attorney short on cash to pay the expert in a timely manner.

2. **Disorganization:** There is no intrinsic gift for business management that comes along with an attorney's degree. Consequently, some attorneys are unable to "get it together" to handle effectively their own financial responsibilities, including expert fees. Those fees may thus be slow in payment.

3. **Narcissistic Entitlement and Other Pathology:** Sometimes the reasons for the slow or absent payment owe more to the DSM than to the CPA. Entitlement or, more rarely, outright psychopathy may lead a few attorneys to withhold payment for prolonged periods or indefinitely, so that nothing short of litigation will pry loose the funds.

4. **"Contingent" Fees:** While forensic psychiatrists are ethically barred from billing on a contingency

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basis,^{6,7} attorneys may refuse or withhold payment when the expert's opinion, objectively reached as it may be, is not in tune with their wishes; thus, they treat the cost of expert witness consultation as a contingency fee, contingent on agreement with their legal posture. This is the most venal form of payment difficulties for the forensic practitioner, since it attempts to corrupt the objectivity of the expert's opinion.⁴

An additional point should be made here. As the author's personal experience will attest, the refusal to pay an expert his/her legitimately contracted fees is *not* considered unethical for attorneys. This surprising finding appears to owe its basis to the notion that expert fees are purely business expenses, to be handled, if unpaid, through small claims court or similar means. No ethical duty to honor one's agreements with one's expert is formally recognized by the bar associations.

Use of Fee Agreements

Coupled with all the above difficulties, experts face the problem of a largely "feast or famine" business rhythm; as one senior practitioner has expressed it, forensic work "is a low-volume, fairly high-dollar 'business', with very few billing or payment [transactions] and few clients at any given point in time."⁸ The work is largely unpredictable as to new work, the pace of old work, and the payment for either.

To obtain an anchor in these seas of uncertainty surrounding forensic practice, some experts employ fee agreements or contracts to attempt to gain some measure of control over the payment process.^{7,9} This article presents the results of a preliminary empirical survey of fee agreements and their use by forensic psychiatrists.

Method

Members of the American Academy of Psychiatry and the Law (AAPL), the national forensic psychiatric organization, and members of the Program in Psychiatry and the Law, a think tank and clinical-forensic research unit at Harvard Medical School, were solicited in person and by mailings to submit their fee agreements, with actual fees redacted, for this study. Those solicitants who did not use formal fee agreements were asked to so indicate. No further attempt was made to select the submissions, except that tips were accepted referring to other practitio-

ners known to use such agreements; those practitioners were expressly solicited for sample fee agreements. Confidentiality was promised.

Results

A total of 20 submissions were received, some containing multiple elements. Of the 20, nine practitioners (45%), including some very senior members of AAPL, indicated that they did not use fee agreements. Some comments spontaneously provided by these non-agreement users were: "Use one if attorney provides one (occasional);" "I do demand a substantial retainer up front;" and "I give my fees verbally to attorneys, they usually put it in the retention letter to confirm my fees."

The remaining 11 actual contracts revealed the following patterns.

1. Retainers and Advance Payments: Ten of 11 contracts specified retainers. Two contracts specified estimates of the amount of expected work/cost involved in the case. Some agreements went on to describe the retainer as replenishable, to be supplemented as work progressed.

2. Standard Versus Different Fees for Different Services: Although this datum was necessarily rendered uncertain because of the rule that actual fees would not be disclosed, it appeared that at least three contracts billed at different rates for different activity (review, deposition, or trial); the remainder appeared to employ a standard fee for all activities.

3. Day Rates: Six contracts mentioned day rates for such activity as travel and court testimony; five did not mention day rates.

4. Travel: Travel in the sense of leaving the home state was specifically mentioned in seven contracts, not mentioned in four. Of those mentioning travel, five of the seven appeared to use a different fee rate or a day rate. Four contracts specified a travel retainer as a separate fee.

5. Expert Practice: Three agreements attempted to describe aspects of the expert's approach to the case. For example, two contracts specified what the expert finds useful to review and what the examinee should be told about an interview. One contract noted the possible need for psychological testing. One contract included the phrase, "It is not my intention to distrust you; it is my intention to be compensated for my time."

6. Level of Detail: This was clearly the most diverse stylistic variable within the fee agreements. The

shortest fee agreement was half of one page in three short paragraphs; the longest was two and a half single-spaced pages of smallish print. Cancellation policies were mentioned in only six agreements; one such agreement specified Eastern Standard Time, while another offered differential rates for different amounts of advance notice of cancellation. Interest rates to be charged on overdue accounts are explicitly provided in only three contracts. One contract identified activities which would *not* be charged for: alcoholic beverage and entertainment. Three agreements discussed why the agreement itself was felt to be necessary.

Discussion

An old joke defines a conservative as a former liberal who has just been mugged. In a parallel sense one might speculate that the forensic practitioner who is not using a fee agreement is one who has not yet been stiffed by an attorney. This appears not to be the case, since some practitioners who have been long in practice do not use them.

More to the point, we might speculate that the level of detail in a given contract may reflect the individual practitioner's experiences with reimbursement. Fortunately, as noted at the outset, most attorneys do pay appropriately for the forensic consultations they receive.

Abraham Halpern, MD,¹⁰ has suggested the caveat that if an attorney violates the fee agreement for expert services in a malpractice case, the expert should not take the matter to court until the statute of limitations has run out, lest the attorney argue that

a doctor-patient relationship existed and attempt to find malpractice in the expert's work. This tactic is just one of a myriad of possible vicissitudes that surround collecting one's expert fee from retaining agencies and individuals. This preliminary survey may begin the work of attempting to design ethical and clear agreements with our employers.

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