

Doing Forensic Work, II: Fees, Billing, and Collections

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Forensic practice fees, billing, and collection procedures are quite different from those in general psychiatry. Most forensic practices have far fewer “clients,” and individual bills are usually larger. Collections are usually better (and less frequently discounted) in forensic practice, and resolving billing disputes is far more straightforward. Medicare, Medicaid, other insurance coverage, provider networks and agreements, procedure codes, and diagnosis-related groups (DRGs) are all largely irrelevant in forensic work (although sometimes important to direct clinical services in correctional psychiatry or forensic treatment clinics). An understanding of the practicalities and ethics of charging and billing for forensic services greatly simplifies practice management. (*Journal of Psychiatric Practice* 2012;18:208–212)

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This is the second in a series of articles on the practical aspects of forensic work. This material generally assumes that the clinician is a private practitioner retained by an attorney, court, or other third party within the legal or judicial system (sometimes referred to below as the “retaining entity” or, less accurately, simply as the “lawyer”). This column deals with fees, billing, and collections. Those topics may sound a little unusual for this Journal, but they are nonetheless integral to any private practice.

Some time ago, a nice lawyer with whom I was working asked to meet over lunch to discuss his ongoing case and his outstanding bill. His office would supply the sandwiches, and I’d bill for my time.

The discussion began with a request for a supplemental report (that is, a report based on a review of additional records and depositions to follow up an earlier report I had prepared). New items had surfaced, he said, and the other side was making his job very difficult. The supple-

mental report was due in a week (he had known of that deadline for several months). He knew my schedule was tight, and he knew I usually required payment before releasing reports. But this was really important, he said, and “I’ve never failed to pay an expert.”

I can be a pushover, but I’ve been stung before. And as I entered the building, I’d noticed a very expensive car in his parking space.

By the end of the meeting, we had discussed the new situation and the deadline had been relaxed. I had agreed to review the new materials, discuss them with him, and write a report about my findings if warranted. And I had a check covering past billings and an appropriate deposit toward time to be spent on the upcoming review.

This well-disguised vignette is not a criticism of the attorney, nor is it about some sort of gamesmanship between forensic consultants and lawyers. Rather it exemplifies common issues facing forensic clinicians (and many other self-employed professionals) as they try to do their jobs and manage their practices at the same time. Fees paid to experts represent only a small part of overall litigation costs for the attorney or other retaining entity, but they’re how we pay our rent.

If the financial aspects of forensic practice were as simple and straightforward as the abstract of this article implies, there would be a lot more forensic psychiatrists. I’ve pointed out the importance of specialized forensic experience many times in these columns and elsewhere, as well as the fact that clinical training and practice are the foundations of quality forensic work.^{1–3} This column illustrates some practical billing and collection procedures and,

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perhaps more important, a shift in attitudes toward fees and billing associated with moving from general to forensic private practice.

A Few Principles

Be clear about your fees, who is responsible for payment, your billing schedule, and your expectation of payment. Make sure the agreement is documented (see below). Lawyers understand the value of professional time and expertise and the concept of hourly billing (and they tend to be far less neurotic about money than we mental health professionals are). Talk about fees early and whenever indicated for clarity, especially in your initial contact with the lawyer.

Recognize, but don't overestimate, your value. Consider factors such as your experience, your expertise, and fees charged by comparable colleagues. Forensic professionals usually charge more per hour for forensic services than for general clinical services (but not for forensic treatment services such as correctional psychiatry, psychotherapy, or hospital work). In general, forensic psychiatrists charge more than forensic psychologists, but less than many other forensic medical specialists. Actual rates vary with training, experience, reputation, geography, and personal preference.

Your charges should almost always be time-based. "Package" pricing is rarely a good idea, and "contingency" fees (based on case outcome or lawyer recovery) are unethical. Your hourly fee should be consistent. Discounting (or forgiving) fees is up to you, but increasing them for a big case or wealthy client may be unethical.

Watch for early portents of fee and collection problems. Be cautious if the attorney does not agree to a retainer (see below), is late with payment, wants a "quick" review or assessment, or does not send you all of the materials you need to do a proper review or evaluation. Don't believe lawyers who want a discount (or a free review) because they have "lots of other cases I can send your way." *That's a red flag for both business and ethics.* It's fine to discount fees or work *pro bono* (without payment), but do it because you want to, not because you think it will bring big bucks in the future.

Require a retainer or deposit against billings in most cases (especially for new cases, reports, and testimony; see below). Lawyers are accustomed to working with retainers. Promptly refund any unused portion of retainers or deposits if you're not entitled to them (for example, when a case is resolved before you do much work or are listed as an expert, or when the deposit exceeds charges).

Bill the person or entity who retained you. Your financial agreement *should not* be directly with a litigant or other client of the lawyer who retains you, even though the litigant may be the ultimate source of the lawyer's reimbursement. (This obviously does not apply when an insurance company or other non-attorney has engaged you, for example, for an insurance review or disability evaluation.) If payment is very late, think before allowing the lawyer or firm to blame a third party. There are exceptions, but remember that this is one of the reasons your agreement is with the attorney, not the litigant.

Fees or fee agreements may have to be approved by the lawyer's client or court before the lawyer can contract with you, or before payment is authorized, but your usual procedure should be to deal only with the retaining entity (e.g., the lawyer), and hold that entity entirely responsible for payment. Attorneys sometimes ask that you send your bill directly to a court, insurance company, or agency, but I recommend sending it to the lawyer who retained you, for him or her to forward for payment. This may be a little less direct (for example when working with government agencies), but the lawyer is accustomed to working with that system; you aren't.

Bill regularly, and don't let client debt get out of hand.

My very first forensic case involved consulting to a rural New Mexico court in a serious criminal matter. The judge who retained me (a fishing buddy of a lawyer-uncle at the time) was cordial and everything seemed to go smoothly. I reviewed the records, traveled a long distance to evaluate the defendant, communicated with the attorneys as directed by the judge, wrote a report, and returned for 2 days of testimony a few months later.

Not having read this article, I wasn't very careful in my agreement with the court. I didn't prepare the bill until the case was over. It came to

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\$3600. The time and charges were scrupulously documented, but it looked like a lot of money, so I arbitrarily cut the amount in half and mailed the statement.*

I didn't hear from the court for months. After a few queries, a small check arrived along with a letter from the formerly pleasant judge. He said that (1) the "large" bill had come as a surprise; (2) no expert is worth \$1800; (3) his county maximum for expert witness payments was \$375; and (4) I could take it or leave it. I took it.

A court order or government contract for payment does not guarantee you'll be paid what you bill, nor that you'll be paid at all (see above). This may be particularly problematic in small or rural communities with whom you have not worked in the past. To minimize problems, be sure the court order or agency contract specifies your hourly rate, any maximum or restrictions that apply, and who will actually pay your bill.

Be able to explain your fees to a jury. You will be asked about your charges during testimony. Simply be straightforward; don't apologize (unless you're gouging or doing something unethical). The lawyer who asked the question probably has an expert who is charging about the same.

Put It in Writing

I recommend that your initial agreement letter or contract include a separate summary of your standard fees and billing procedures, one that covers a wide variety of topics and circumstances. Then follow that summary to the letter. When your procedures vary, the probability of billing or collection problems increases. Your "fee sheet" should contain:

- *The person or entity responsible for the charges.* Be specific.
- *The services for which you will be charging.* Review time, interviews, conferences, report preparation, and testimony are obvious, but what about time spent waiting, unkept appointments, and travel (including time spent in hotels or waiting for planes)? Some experts charge different rates for different services, and they may or may not charge for travel and waiting. I charge all time-based

services at the same rate (since an hour spent reading records is just as long as an hour spent testifying). I also charge that rate for interim time, such as waiting, unless I fill it with some other income-producing or recreational activity.

- *Your hourly and daily rates.* A time and expenses fee schedule is the foundation for your compensation. I use a "day rate" (in my practice, 10 hours) as a maximum so that clients know they won't be unreasonably charged when I travel.
- *Standard additional charges,* such as travel expenses, courier charges, large amounts of copying or printing, or exhibit preparation. Don't abuse your expense rates; it's nice to have a maximum for hotels and food, for example, or to ask the lawyer for lodging suggestions in his or her city.
- *What's not charged.* Reassure the retaining entity that you don't "nickel and dime" your clients. Let him or her know that you don't charge for time spent working on other cases while traveling for the current one, or for time engaged in recreation (though I do charge for other "down" time spent away from home or office, up to the daily maximum). I don't charge for alcoholic beverages, and I have a reasonable maximum for meals and hotels. If you wish to charge for business- or first-class travel, make that clear in the fee sheet; otherwise note that you bill only for "coach" travel.†
- *The expected payment schedule.* Your fee sheet should specify your billing and collection practices, including any consequences of nonpayment (such as work stoppage or not being available to testify).

Things to Consider

In addition to the bullet points above, consider one or more of the following:

Requiring a partially or fully refundable retainer before beginning work. I find retainers very important for guaranteeing billings and stabilizing office revenues. In my practice, the retainer is refundable unless I have been listed as an expert in court papers or represented as an expert to the other side (at which point I consider my name to have been "used"

†You need not bill the lowest available fares, since business travel often cannot be scheduled well in advance and many trips are cancelled at the last minute. Just be fair and charge what it costs, no more and no less.

*I told you we can be neurotic.

in the case, for which I want to be compensated). Sometimes the case is resolved after a few hours of review, or my services are no longer wanted. In such situations, so long as I have not been “listed” (and sometimes when I have), I promptly refund the unused portion of the retainer.* I suggest keeping retainers and deposits in an account separate from your other revenues, so that they are not inadvertently spent before they have been “earned.”

Requiring a deposit against billings for testimony, travel, and/or reports. Deposits are important, and they are not quite the same as retainers. Some attorneys, especially ones with whom you have never worked, who are on tight budgets, or who live in other states, are riskier than others with respect to paying their bills, particularly once they have gotten what they need from the expert. Many cases are resolved soon after reports are received or depositions completed. With no disrespect intended to the many reputable retaining entities with whom I work, I like to hold the money myself.

Further, as a practical matter, many experts travel for cases. Travel expenses are not inconsequential; you can't afford to “float” them for very long, much less do without reimbursement altogether. I often tell lawyers that I can't leave the office until an appropriate deposit has been received.

Finally, there's the concept of “testifying under a bag of money.” If a lawyer owes an expert a substantial amount, there is at least an appearance of potential for coercion, which undermines one's credibility (that is, the idea that the expert will testify to please the lawyer or win the case in order to get paid). Appearance or not, if the expert's bill has been paid and a deposit received against the time and expenses of testifying, then the expert has no financial incentive to testify inappropriately. I like that.

Consequences of nonpayment. I suggest noting in the fee sheet that you may cease work if bills are substantially in arrears or deposits are not received. This may include not releasing reports or not being available for testimony (experts in most states can do that, since they are entitled to be paid for their time; subpoenaed fact witnesses cannot). Be reasonable and polite, but firm, in your wording. Try to prevent

problems by communicating clearly and acting early rather than letting payment problems go until the last minute.

Minimum hours for testimony. Some experts charge for a minimum number of testimony hours in deposition or trial (often half a day) regardless of the actual time spent. I don't. As I say above, time is time. If I can get to the testimony site, testify, and get home in a couple of hours, that's fine with me.

Charging interest on overdue balances. I don't recommend it. Do keep track of your accounts receivable and collections, but charging interest for overdue bills is a real hassle (and involves some legalities). Clear communication, understanding the recommendations discussed above, choosing clients wisely, and not allowing them to run up large bills solves almost all collection problems.

Money-Related Things to Avoid

Here are a few money-related things to avoid, or consider avoiding, in forensic practice.

Contingency fees and referral kickbacks (including “fee splitting”).[†] Don't just avoid them; never use them. They are categorically unethical for experts, and they may be illegal.

Letters of protection. A “letter of protection” is a guarantee from a lawyer that a clinician or other vendor will be paid for services rendered if the client's legal case is successful. Used mostly in workers compensation or personal injury cases, the lawyer promises a physician, therapist, chiropractor, or other practitioner who treats a client for an allegedly compensable injury or condition that the first dollars of any judgment or settlement will go to the clinician (even before the lawyer or client is paid). Such promises create a conflict of interest and are often tantamount to a contingency arrangement, since the clinician knows that his or her records, and often testimony as well, will influence the lawyer's case (and thus the clinician's compensation).

Those who wish to draw a distinction between letters of protection and contingency fees sometimes note that if the case is lost, the clinician can seek com-

*Prompt refunds build goodwill. Most lawyers are amazed to get money back from an expert.

[†]Yes, lawyers can engage in both. But you can't.

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pensation from the client himself (or his health insurance). That's pretty much bull pucky, in my opinion. The clinicians who do it know exactly what they're doing, and it's unethical from an expert witness standpoint (i.e., when offering opinion testimony).

Agreeing to wait for a settlement or verdict before getting paid (but not to depend on the settlement or verdict for payment). I never accept such arrangements. They are arguably unethical if entered into beforehand (cf., contingency fees); they are poor business in any event.

“Package pricing.” Some forensic professionals have fixed-price arrangements for frequently repeated services such as jail competency or disability evaluations. Although understandable, one should be careful that the “per-evaluation” rate doesn't create an ethics or credibility problem (for example, a temptation to perform fixed price services too quickly for consistent quality in order to make them more profitable). I strongly suggest that more complex cases, at least (e.g., those that may involve items such as future follow-up, testimony of some kind, or appeals)

be done on an hourly basis. This is particularly applicable to professionals in private practice, as contrasted with those who get a salary from an agency or other employer who negotiates a third party service agreement.

The Last Word

At some point, a lawyer or other retaining entity will fail to pay you. It may happen more than once, and the amount is likely to be substantial. These guidelines should make that less likely.

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