

AAPL: Ask the Experts-2017

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Neil S. Kaye, MD, DFAPA and Graham Glancy, MB, ChB, FRC Psych, FRCP (C), will answer questions from members related to practical issues in the real world of Forensic Psychiatry. Please send questions to nskaye@aol.com.

This information is advisory only, for educational purposes. The authors claim no legal expertise and should not be held responsible for any action taken in response to this educational advice. Readers should always consult their attorneys for legal advice.

We begin by memorializing and celebrating the life of Robert Sadoff, MD, a founder of AAPL and its second President (1971-1973.) Bob co-authored this column from its inception in 2008 until the middle of 2015 when he stepped aside and Graham Glancy, MB, ChB, FRC Psych, FRCP took over for Bob who had pancreatic cancer. Bob authored, co-authored, or edited a dozen books about forensic psychiatry, and wrote more than 30 chapters in other texts. Legal and medical journals published at least 100 of his articles, and he lectured in every state in the U.S. and in 12 other countries. He somehow managed to find time for all, especially his family, who were extended AAPL family for all of us. He also was a Past-President of Magen David Adom, Israel's national EMS and blood services organization and through his work saved thousands of lives in Israel.

For anyone who had the honor and pleasure of knowing Bob, he will be sorely missed as a mentor, leader, teacher, and friend. The world is a dimmer place without his light, but we trust the knowledge he shared with so many of us will burn brightly and illuminate the path of truth and justice, for which he strived in all of his endeavors.

For a more detailed biography see: Journal of the American Academy of Psychiatry and the Law Online September 2008, 36 (3) 286-289;

Q.: If expert #1 feels she is charging a fair rate for her type of work and the economy of her area, let's throw out \$300 per hour, and an expert on the other side of a case is charging considerably more, say \$600 per hour, does that leave an impression with the lawyers, and potentially jury members, that expert #1 is worth less, or somehow less capable? When I was in Fellowship, I was cautioned about the tactic of trying to paint you as a hired gun by portraying your fees as "exorbitant." Twenty-five years later, I am actually wondering if the average juror

might not see it the other way, that an expert who charges a lower fee does so because she cannot get work otherwise?

My question is timely because I am involved in a high stakes civil case outside of my own state. I live in a low cost of living, semi-rural area, and most of my local work is criminal cases, much from Public Defenders. It's safe to say some experts on the opposing side are charging two to three times my hourly rate. I am actually feeling self-conscious about it. I have been told I am a high quality testifier, but quality or not, in my local area I would not get the kinds of cases I like with a higher fee. If I had thought more before taking this current civil case, I could have quoted them a higher fee. But honestly, that doesn't ring well with me. I probably undercharge for my credentials and expertise, but to jack my price up because the traffic can bear it just strikes me as wrong.

A. Kaye:

Rates and fees have always been a challenging area to discuss-along with sex and death, of course. You accurately point out the competing arguments of risking being called a "bought opinion" if your fees are too high or being seen as less competent if your fees are "too cheap." There are many business models to guide one in establishing a fee schedule. One way is go with what the market will bear, another is to determine the average price/rate and to act accordingly, a third is to always be the highest price (suggesting quality-think Rolls Royce,) and another is to think volume business by being the least expensive.

In discussions with colleagues, most seem more comfortable by being more centrist in rates and not being at either extreme. While there is a Federal prohibition to rate setting/fixing by a group, it is easy to find out what your colleagues usually charge.

Personally, I charge an hourly rate for all of my work, with the exception of depositions and trials. For that work, I charge for half or full-days, as my experience is lawyers and judges can't hold to any schedule and I don't want to lose that time. My rate is informed by my clinical charges, as I would be earning income from patients using that same time. But, my hourly forensic rate is higher, as it also reflects the increased value of my additional training, experience, and expertise in the field. I post my fee schedule and contract on my website, and I require payment in advance, barring special circumstances.

In Delaware, we have a joint committee of the Medical Society and the Bar Association and this Medico-Legal Committee has established a "guide" for expert witnesses that includes fees and covers conduct of both parties as well. I would be happy to share these documents with anyone who contacts me at nskaye@aol.com.

A. Glancy:

Thank you to the writer for raising this important issue. As forensic psychiatrists, we rarely discuss fees since we are somehow embarrassed or ashamed that we actually get paid for our work. A few years ago, when my knees were still intact, I used to run every morning with a neighbor who was a computer consultant. When I discussed fees with him, he was shocked and amused to hear my attitude to billing. He helped me realize that it was not unreasonable to get paid reasonable fees, commensurate with my expertise and experience. So, to all of you forensic psychiatrists, welcome to the real world, in which forensic psychiatrists are hardworking, highly qualified, ethical people who do very difficult work, and deserve fair compensation for that work.

For those of us who are not in salaried positions, setting fee schedules is very difficult. In certain cases, such as competency to stand trial, fee schedules are set by the state, and there is no room for argument. In other cases, it is important to establish a reasonable fee schedule. This should be set out in your retainer letter to the retaining party. This letter should include a clear statement of charges, not only for examining the evaluatee and writing a report, but for reviewing material, making phone calls, handling emails, and any travelling incurred by the case. If there is not prior agreement upon these issues, you may find yourself submitting an invoice at the end of the case and receiving a phone call from an outraged lawyer, who may claim (likely hypocritically) how surprised they are that you billed for all these other services.

It is advisable to stick to this fee schedule in all cases. It would raise eyebrows, and questions of ethical behavior, if you raise your fee simply because you know the evaluatee can afford it. In some cases, you may decide to decrease the fee, if you feel that it is a worthy case, and the evaluatee cannot pay your full fee, or in some cases where there is an important psycholegal issue to be litigated, which may set a precedent or enter into the law at a later date.

In general, it is my belief that we should charge at least equivalent to what lawyers bill. Generally speaking, your fee depends on years of experience and qualifications. If you are five years out of Fellowship and have not published anything, a reasonable fee would be equivalent to the rate that lawyers charge in similar circumstances. If, on the other hand, you are 25 years out, are widely published, and the president of AAPL, then you may likely double the aforementioned fee, again equivalent to the way that lawyers will bill their clients in similar situations. In my experience lawyers rarely quarrel with an established fee schedule. This is because they are aware of what similarly qualified lawyers charge in similar circumstances. Another point to bear in mind is that our involvement in the case may involve only a few hours, sometimes as few as two

hours to review some materials, whereas the lawyer is maybe billing one or 200 hours, due to their extended involvement with the case. This should be taken into account when setting fee schedules.

As has been mentioned previously in this column, charging contingency fees, even if the lawyer is working on contingency, is not ethical for the forensic psychiatrists, since this introduces a bias in that we may give an opinion that is not objective and almost but is rather designed to win the case and to get paid. Do not succumb to pressure from lawyers who may try to put you in this situation. You will not regret refusing the case, in favor of retaining your ethical values. Retainer fees are ethical and may actually decrease bias, in that they deliberate the reality of an expert providing an opinion that the lawyer may not want to hear, without the concern that the lawyer may not pay you if you provide an opinion that they do not want.

Take Home Points:

There is no shame in charging an appropriate amount for your time. Fee schedules and written contracts are strongly encouraged to keep things honest. Retainer agreements are common and help to protect all parties. To quote our dearly departed Bob Sadoff, MD, "a cleared check is the admission ticket to my entering the courtroom."