

Letters to the Editor

Experts for the Poor

Dear Sir:

The Assigned Counsel Plan (ACP) of the City of New York is a system that provides defense services, through the private bar, to poor persons who are arrested and financially unable to hire their own counsel [1]. When the services of an investigator or another expert are required to adequately prepare a defense, the ACP attorney must make an application to the court for authorization to engage expert services. The ACP provides participating attorneys with a directory of investigators and experts available and willing to work on such cases. If the court approves, it will sign an order authorizing services pursuant to County Law 722-C or article 35 of the Judiciary Law. Counsel approaches an expert concerning availability or interest in a case prior to obtaining a court order authorizing services. The order must be signed and a copy sent to the administrator of ACP so that the expert can be paid. All experts and investigator must keep track of time spent and tasks completed on a special voucher and worksheet. When the case is completed, a copy of the voucher and worksheet, with a copy of the original signed order, must be submitted to the presiding judge for authorization of payment. The voucher must be notarized; must detail the time expended; must include the exact nature of the work performed; and it must include receipts for all reimbursable expenses. After the judge signs the voucher, it is sent on to the ACP for processing.

A compensation rate guideline for experts has been established on a maximum hourly basis. All rates are subject to the statutory maximums for total compensation. According to the current statute, the maximum total compensation is a mere \$300. Thus, it is possible for an expert to reach the statutory maximums within a few hours. The statute permits the maximum to be exceeded in an "extraordinary" case upon the specific authorization of the court. In an "extraordinary" case, the attorney will ask the expert for an affidavit in support of his payment requests. In homicide cases, preparation requires an unusual amount of time and the maximums are inevitably surpassed.

On May 23, 1994, *The New York Times* published a scathing report about the substandard legal services available to the indigent of New York City [2]. The article was devoted to a lawyer who slept during a trial and another lawyer who was convicted and disbarred for defrauding the plan. Needless to say, it created quite a stir amongst lawyers. Some claimed that the study was flawed and biased against a system that provides capable representation [3], while others felt that the article accurately represented the inadequacies of the ACP [4].

From a forensic pathologist's point of view, the article dismally failed to address the problems concerning the utilization and payment of forensic experts in criminal proceedings. Because the majority of forensic experts are civil servants who testify on behalf

of the prosecution, there are only a handful of qualified experts available to the defense. Such experts are required to spend inordinate amounts of time on difficult homicide cases only to encounter judges who later refuse to adequately compensate them.

In homicide cases, defense experts review investigative, police, laboratory, medical, and autopsy reports, as well as videotaped statements and crime scenes and Grand Jury and trial transcripts. Sometimes, it is necessary to inspect physical evidence at the Medical Examiner's or District Attorney's offices. The expert must also generate reports, prepare defense counsel, and create a list of questions to be used for direct and cross-examination. In cases that go to trial, defense lawyers need to consult with their experts several times regarding technical issues and strategies. The forensic expert might also be required to testify. Finally, the expert must prepare a detailed bill to be submitted to the 18-B Panel and presiding judge for approval. Reimbursement takes 3 to 12 months at which time the expert might find that his bill was cut drastically.

A disturbing pattern of payment has developed in the Boroughs of Bronx, Queens, and Brooklyn where the murder rate has been climbing in recent years. Some judges have disregarded the established guidelines set forth in County Law 722-C and pay experts a maximum total of \$300, except in "extraordinary circumstances." The statute does not define those circumstances and leaves the presiding judge to decide, case by case, if extraordinary circumstances are present and what compensation is appropriate. Even though payment guidelines were outlined in the administrative order by the Chief Administrator of the Courts in 1992, the cap of \$300 is unchanged and can be exceeded only by the discretion of the judge. If the judge refuses to exercise his/her discretion, no payment in excess of the statutory limit can be paid. Most forensic experts with doctorate degrees are paid \$75 to \$200 per hour. It is absurd to expect a forensic expert to analyze a complex murder(s), prepare defense counsel for trial, and testify in court in less than 2 hours. Any experienced professional knows that a great deal of time must be devoted to these cases. Even more time is required when a forensic expert must educate an inexperienced lawyer on complex medical/forensic issues.

Many judges who engage in dramatic bill-slashing are former prosecutors with reputations for being hard on crime and defendants. In some instances, full payment for defense experts was approved only when the prosecution won its case. In contrast, when the defense won, some judges penalized experts by cutting their bills. When experts appealed these reductions, they often had to contend with skeptical judges who demanded to review confidential files and privileged communications between expert and attorney. The message is clear that defense experts have no guarantees that they will be compensated for their services. Invariably, competent experts refuse to work for the defense, further limiting defendants' access to medicolegal counsel.

These concerns have been raised with administrative judges, the Assigned Counsel Plan, and legal aid societies, but, nothing has been resolved. Many judges still refuse to specify an hourly rate for experts and any caps on how much they are willing to spend in the court order. One can speculate that judges do not want to make expert fees an issue that might be grounds for appeal. For these reasons, many forensic experts have already begun to boycott 18-B cases which will further compromise the criminal justice system.

It is obvious that the judiciary controls the purse strings of the defense. Because judges have been reluctant to pay, some professionals have overcharged knowing that judges will reduce their bills substantially. This conflict has created a vicious cycle that adversely affects the legal representation of indigents.

Because the majority of criminal defendants are indigent minorities, the current system promotes discrimination and racism. In the event capital punishment returns to the State of New York, it is conceivable that innocent individuals will be condemned to death because they have received inadequate medicolegal representation. It is imperative that a change in the statutory cap for forensic and legal services be made by lobbying the legislature. Until then, the courts are bound by the present fee guidelines of compensation. The conflicts will continue as long as the crime rate remains at epidemic levels and the constitution guarantees defendants the right to counsel. The problems are not unique to New York City and exist in other jurisdictions. It is imperative that this political, legal, and medical controversy be addressed in the near future.

Mark L. Taff, M. D.

References

- [1] Assigned Counsel Plan, *Providing Investigatory and Expert Services for the Assigned Counsel Plan*, Assigned Counsel Plan, New York, NY, June 1, 1994.
- [2] Fritsch, J. and Purdy, M., "Lawyers for New York Poor: A Program with no Monitor," *New York Times*, May 23, 1994, pp. A1, B4.
- [3] Campriello, A. V., "Legal Aid for Poor, Despite Flaws, Works Well in Most Cases," *New York Times*, June 3, 1994, p. A26.
- [4] Guggenheim, M. "A System in Collusion," *New York Times*, June 3, 1994, p. A26.

Commentary on "Death Investigation After the Destruction of Evidence" (*J. of Forensic Sci.*, Vol. 39, No. 3, May 1994, pp. 863-870)

Dear Sir:

In the case report by Drs. Danto and Streed, they determined the gunshot wound was a contact wound because soot was deposited in the ear and part of the sideburn area. The soot depicted in Fig. 2 most likely represents gunpowder and soot deposited from the

barrel-cylinder gap of a revolver supporting their conclusions that the weapon was the .32-caliber Harrington and Richardson. Measurements from the barrel-cylinder gap deposit to the contact entrance wound can give an estimate of the barrel length [1].

Sincerely,

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Reference

- [1] Di Maio, V. J. M. *Gunshot Wounds, Practical Aspects of Firearms, Ballistics, and Forensic Techniques*, Elsevier Science Publishing Co., Inc., New York, NY, 1985, p. 61.

Author's Response

Dear Sir:

I am writing to respond to the letter of Patrick E. Lantz, M. D. in response to the article entitled *Death Investigation After the Destruction of Evidence* (*J. Forensic Sci.*, May, 1994), opining that barrel length can be determined by measuring the barrel-cylinder gap deposit from the distance of the contact wound entrance. I believe that to be true but we knew the distance as two guns were found at the death scene. What was needed was to establish whether it was a contact wound as there was no body to examine, only photographs. Thus, measuring the width of gun powder soot from the side burn to the anterior half of the right ear gave us a soot pattern which could be replicated. Test firing the same model revolver gave us the opportunity to establish closeness of revolver to the skin of the deceased and we then established it was a contact wound.

A photograph of the bullet, resting on some paper toweling made it possible to find a duplicate towel so as to count the background squares and by measuring each one and multiplying by the number of squares occupied by the bullet we could determine length and width of the bullet. It was a .32 caliber bullet and with canolures it was made for revolver ammunition. Thus, we ruled out the .32 caliber Berretta pistol as the death weapon.

Had the actual revolver been available for inspection it could have been examined for blood splatter inside the barrel. Such a positive finding would have been consistent with a contact wound, the kind seen in a gunshot suicide.

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