

# Obtaining and Using Defense Experts

Samuel P. Langholz  
State Public Defender  
321 E. 12<sup>th</sup> Street  
Des Moines, IA 50319  
(515) 242-6158  
[slangholz@spd.state.ia.us](mailto:slangholz@spd.state.ia.us)

## I. Right to Expert Assistance at State Expense

### A. Background

1. The Sixth Amendment of the U.S. Constitution provides, “In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.” *See also Gideon v. Wainwright*, 372 U.S. 335 (1963); Iowa Const. art. I, § 10 (“In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right . . . to have the assistance of counsel.”).
2. *Ake v. Oklahoma*, 470 U.S. 68 (1985) held that the Due Process Clause requires states to provide court-appointed psychiatrist in capital murder case where defendant’s sanity and future dangerousness were at issue, to “conduct an appropriate examination and assist in evaluation, preparation, and presentation of defense.”
3. **Iowa Code** § 815.7(5): “The expenses shall include any sums as are necessary for investigations in the interest of justice . . . .”

*Technically this statute and cases interpreting it only apply to non-contract attorneys*

#### 4. **Iowa R. Crim. P. 2.20(4):**

*Witnesses for indigents* Counsel for a defendant who because of indigency is financially unable to obtain expert or other witnesses necessary to an adequate defense of the case may request in a written application that the necessary witnesses be secured at public expense. Upon finding, after appropriate inquiry, that the services are necessary and that the defendant is financially unable to provide compensation, the court shall authorize counsel to obtain the witnesses on behalf of the defendant. The court shall determine reasonable compensation and direct payment pursuant to Iowa Code chapter 815.

- B. Indigent defendant bears the burden to show that the expert assistance is reasonably necessary to the defense – the assistance is relevant to the disputed issue and no other means exist for defendant to obtain evidence or assistance, and denial of the assistance will result in prejudice to defendant. *See State v. Leutfaimany*, 585 N.W.2d 200, 208 (Iowa 1998) (no abuse of discretion to deny request for forensic pathologist to determine whether death was actually caused by the gunshot to victim’s head); *State v. Coker*, 412 N.W. 2d 589, (Iowa 1987) (abuse of discretion to deny request for expert to assist in intoxication defense); *State v. Aguilar*, 325, N.W.2d 100, 102 (Iowa 1982).

“Although trial court should prevent random fishing expeditions undertaken in search of rather than in preparation of a defense, it should not withhold appointment of an expert when the facts asserted by counsel reasonably suggest further exploration may prove beneficial to defendant in the development of his or her defense.” *Coker*, 412.N.W.2d at 592 (internal citation omitted).

- C. Client may be entitled to expert assistance at state expense even if not represented by court-appointed attorney. *See English v. Missildine*, 311 N.W.2d 292 (1981) (holding that Sixth Amendment entitles indigent defendant to necessary investigative services even if third party retained private counsel to represent defendant)
1. But *Missildine* suggests its rule may not apply if: (1) defendant became indigent because of unreasonable expenditure of funds to retain counsel or (2) fee for private counsel should be reasonably expected to cover services
  2. Some judges will conduct an inquiry into the financial arrangements with private counsel and determine whether it is appropriate for the state, rather than the source of funds available for private counsel, to pay for the expenditure.

## II. Compensation of Experts in Indigent Defense Cases

A. **Key to Remember:** It is the defense attorney's responsibility to ensure that any experts hired have the appropriate court orders or other documentation to be paid. Especially when hiring expert from outside Iowa, who may not be familiar with our process, help them navigate the payment process – your or some other defense attorney may need them again in the future and we want them to have a positive experience with the State of Iowa. Think of yourself as an ambassador for the criminal defense community and for Iowa.

### B. Logistics of Payment:

1. **Two Methods:** 1) Direct Claim by Expert or 2) Attorney Pays Expert and Seeks Reimbursement

- a. First method is most common → Miscellaneous claim can be submitted immediately after services are completed rather than waiting until end of case; no need for attorney to front expense;
- b. Requirements of documentation are the same regardless of which method, except if seeking reimbursement, must include proof of payment.

2. Requirements

- a. Iowa Administrative Code §§ 493-12.7, -13.2(3)
- b. SF2231, passed in the current legislative session and effective July 1, 2012, amends section 815.4 creating some new procedural requirements related to expert witnesses:

#### **815.4 Special witnesses for indigents.**

1. An application for an expert or other witnesses under Iowa rule of criminal procedure 2.20 shall include a statement attesting that the attorney advised the indigent person of the application, the expected expenses, and the potential for reimbursement of the expenses pursuant to section 815.9.

2. a. The court shall authorize the securing of a witness prior to the witness incurring any expenses.

b. The court shall either set in advance a maximum dollar amount of the claim for expenses or approve the final amount of the claim for expenses as reasonable compensation.

c. The state public defender shall only approve the claim for the expenses of the witness if the securing of the witness was authorized by the court and either the maximum dollar amount of the claim for expenses was set prior to the expenses being incurred or the court has approved the final amount of the claim for expenses as reasonable compensation.

3. A witness secured for an indigent person under Iowa rule of criminal procedure 2.20 shall file a claim for compensation with the state public defender as required by the rules of the state public defender, and the claim shall be supported by an itemization specifying the time expended, services rendered, and expenses incurred on behalf of the indigent person.

- c. Claim form submitted must include a court order:
  - i. Obtained before any expenses incurred (must not be time on itemization before court order date)
  - ii. Authorizing the expenditure of state funds for the expert
  - iii. Initial order approving must set a specific maximum fee (e.g., “not to exceed \$15,000”) or else a second order must be included approving the actual dollar value of the expense after it has been incurred.
- d. Must also attach attorney appointment order or approval order must include finding that even though counsel is privately retained, “funds are not available to the client to pay for necessary expert witness services.” Iowa Admin. Code § 493-13.2(3)(c)(2).
- e. Expert must attach itemization of services rendered, expenses incurred, dates on which services were rendered, time spent on each date, and the manner in which amount of claim was calculated. Iowa Admin. Code § 493-13.2(3)(c)(3).
- f. If expert is claiming lodging, meals, travel expenses, receipts must be attached.

- g. If any charge is a “minimum” charge (i.e., \$4000 for an entire day of testimony, regardless of actual time spent), expert must include a certification that no other services have been performed or charges made by the expert for any portion of that specific time. Iowa Admin. Code § 493-13.2(3)(c)(5).
- h. All Expenses Must be Reasonable: No Alcohol, First Class Travel, Entertainment Expenses

### III. Special Deposition Expense Issues

A. **Legal Standard:** When deposing another party’s expert witness, the party shall pay the expert for “the time reasonably and necessarily spent in connection with such deposition, including time spent in travel to and from the deposition, but excluding time spent in preparation.” Iowa R. Civ. P. 1.508(6) (emphasis added); *see also* Iowa R. Crim. P. 2.13 (providing that a criminal defendant may depose witnesses “in the same manner and with like effect and with the same limitations as in civil actions.”).

#### B. Defense Expert:

1. Prosecution is responsible for travel and deposition time and any travel expenses. Indigent Defense Fund will not pay.
2. But any time preparing for the deposition may be billed with other review and trial preparation expenses and paid by Indigent Defense Fund.

#### C. Prosecution Expert:

1. Defendant is only responsible for travel, deposition time, and any travel expenses.
2. Indigent Defense Fund will NOT pay for deposition prep time.

This also applies to **State Medical Examiner** and is consistent with State Medical Examiner’s Rules (Iowa Admin. Code § 641-126): Although the fee schedule in the rules includes “time spent reviewing case materials, preparing for deposition or court, testifying in deposition or court, and travel time,” Iowa Admin. Code § 641-126.3(1), these costs “are the responsibility of the county of appointment.” *Id.* § 641-126.3. The County of Appointment is defined to be “the county which requests a medical examiner to conduct an investigation, perform or order an autopsy, or prepare a

report(s) in a death investigation case. The request may be authorized by the county attorney or the county medical examiner.” Id. § 641-126.1.

3. Court-appointed counsel should remember that because Defendant/Indigent Defense Fund are responsible for paying a portion of prosecution expert witness’s time when depositing, counsel must get court order approving the expense, just as if you were hiring the expert for the defense. *This is in addition to your order approving the deposition expense (court reporter) at state expense.*
4. If depositing a prosecution expert, consider whether actually an “expert” or just a “fact witness”.
  - a. Fact witnesses are not entitled to be reimbursed for their time preparing for or attending a deposition, other than the five- or ten-dollar witness fee provided for by Iowa Code §§ 622.104 and 622.69. *See also Meyer v. City of Des Moines*, 475 N.W.2d 181, 192 (Iowa 1991) (citing *Snyder v. Iowa City*, 40 Iowa 646, 647-48 (Iowa 1875)).

*NOTE:* Expert witness fees discussed in *Meyer* and provided for under § 622.72 do not apply for expert witnesses in criminal cases. Iowa Code § 815.5
  - b. Peace officers are generally not eligible for even this witness fee unless they are off duty. *See* Iowa Code § 622.71.

**C. Questions regarding Indigent Defense Claims:** E-mail [claims@spd.state.ia.us](mailto:claims@spd.state.ia.us) for a written answer that can be attached to claim or contact Theresa Corsbie (Administrative Assistant) or Julie Miller (Assistant State Public Defender) at (515) 242-6158.