

## FEES FOR ON-CALL TESTIMONY

We recently sent out a "Help This Expert" email to our newsletter subscribers about the cost of and charging for 'on-call testimony'. Our readers have definite opinions on this! Below you will find the original emailed question followed by advice from the experts. In keeping with our policy of protecting the confidentiality of our expert community, names have been deleted.

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*Note from Meredith: Although this expert's question specifically addresses medical experts, I think the issue of "on-call" testimony could be disrupting to many practices. How do you handle this?*

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*Here's an issue that has been bugging me recently - when an attorney expects their expert medical witness to be available "on call" for testimony in court beyond one specific day, and sometimes for more than one week. For procedure-based specialties such as surgery, with operations scheduled days to weeks in advance, this can be extremely disruptive, not to mention potential jeopardy to patient care. Most of us do not have partners who can assume a full day's patient load on short notice.*

*Expert medical witnesses who have active medical practices cannot be expected to drop everything at a moment's notice and present themselves for court testimony. Attorneys clearly know this, yet continue to be unreasonable about it, especially once they have paid for trial testimony in advance.*

*Up to now, I have had one court testimony fee - if my testimony is confirmed for one given day, and a surcharged fee for on-call testimony beyond one given day. The surcharge is 25% of my baseline fee, but this is clearly insufficient to compensate me for disruptions to my office and hospital schedule that can last 3 to 4 days in one given week.*

*How do other expert medical witnesses handle this situation? I have discussed this with my surgical colleagues, many of whom will not commit themselves to more than one day at a time, and if they are not called that day, they keep the fee paid in advance, and require an entirely new fee if they are called on a subsequent day, subject to their availability.*

*Another surgeon requires a non-refundable "on-call" fee, entirely separate from the testimony fee. The latter is refundable if testimony is canceled or rescheduled in timely fashion, but the former is not. I like this idea, but the problem with this, as I see it, is that such an arrangement could subject the expert MD to disruptions of his OR schedule for several consecutive days, and still not be adequately compensated for his time.*

*Are we trying to have our cake and eat it too? How much can an attorney reasonably be expected to pay for "on-call" testimony for a procedure-based specialist, before refusing to retain on grounds of cost?*

**EXPERT RESPONSES:**

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My medicolegal services are provided hourly. Time and expertise are all I have to offer. My fee agreement (contract) addresses these issues. Don't like it don't engage me. On call, waiting around, travel, every hour is billed and always paid.

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Here's my 2 cents:

1. Under no circumstances should the expert (or his group practice) be at risk for losing money from his legal consulting practice. This means that whatever your client expects of you must be paid for in advance. You can stipulate in your professional services fee agreement that a certain amount be paid to you whether or not you are actually called to testify. This means you have a choice to make. Either cancel your patients, surgical block time, or whatever you usually do to generate income and calculate a fee to cover lost income based on this decision, or you tell your client that under no circumstances will you be available for court on your work days.

There may be no way for the attorney to know whether his case will even go to court. It could be settled at the last moment, a not uncommon scenario. The price he must pay for having your expertise on his side in the courtroom is tangible and you must be the one to determine it.

2. Your court time must be booked way in advance in order for you to block the time off your work schedule. If you are not called for legal work, you may be able to see some patients in the office at the last minute (most physicians have a waiting list of patients).

3. You must decide on the ethical ramifications of being paid to stand by (be on call) while generating patient-derived revenues.

4. The only analogy I can think of to help a lawyer understand how physicians generate income is to ask your client to imagine a day at work without billable minutes, i.e., no personal income generated. That's what a day of being "on-call" for a possible court appearance would amount to if you're in private practice.

5. Lastly, I wouldn't let fear of losing a client count too heavily in these kinds of decision. Your special expertise is your ticket to future consulting requests, and by following the above you are adhering to your own high standards.

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I simply charge for time expended, waiting or otherwise.

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I, too, am a physician, who has a significant part of my practice devoted to surgical procedures. Although the overwhelming majority of the procedures are scheduled in advance, that advance scheduling can be 3-4 weeks in advance. Thus, my schedule and

those of my patients are planned weeks in advance. If I have to cancel a whole day or two, the doctor is absolutely correct, this is a significantly disruptive situation to the practice. The only way that I handle this is to tell the attorney that I need at a minimum a 24 hour "direct verbal contact with me " or the pre-paid testimony fee stands. If they do not give me the minimum of 24 hours notice and need to schedule me for another day then he will have to pay my full fee again. I have had this happen on several occasions. The attorneys are not happy to do this, but those are my rules and I stick to them. I had one attorney try to get me to come back the following day after my scheduled appearance was cancelled at the last moment and I told him NO. He could tell the judge that I have surgery that must be performed and I am unable to reschedule this procedure. I have never had a problem with the judge because of this situation. My experience is that the judge will permit the testimony to be given at a later date, more consistent with my obligations.

Doctors in practice all face this problem and there is no perfectly satisfactory solution.

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Sometimes attorneys tell me I will testify on one day and, due to trial issues, motions, other testimony, things get delayed. I simply charge the attorney for each day I am either in court or in the vicinity of the courtroom waiting to testify. If it takes one day of waiting and another day of testifying, they are billed for two days. I ALWAYS collect my testimony fee plus all expenses (travel, preparation of exhibits, etc.) and an allowance for 1-2 days of trial prep and meetings UP FRONT before I go to trial. This isn't exactly comparable to the MD's problem, but it may help.

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We require payment in full for scheduled testimony one week in advance of appearance. If the appearance is canceled (settlement, etc.), the fee is nonrefundable inside that week. If the appearance is re-scheduled, there is another full charge assessed.

Once or twice, we waived this requirement when the postponement was due to illness of the judge or one of the principal attorneys.

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More use of video evidence testimony to be used at trial would solve the problem.

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The answer is clearly to submit to a video deposition. Day and time set in advance.

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In answer to the question: How much should an attorney expect to pay for on call testimony? My answer is - a lot of \$. Well prepared cases should not require "on call" testimony, but it is not unusual. No expert should be kept on a string for weeks at a time for nothing. No attorney should expect to tie up an expert's time in that manner without having to pay for the "down time." This would particularly be true if the expert has to travel and incur the expense of a protracted hotel stay and time away from other duties. I

think this MD has a pretty good case for the advanced pay and potential refund method he has put forth. Time is, after all, money.

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I refuse to be on call. I make them commit to a specific day and they must also pay in advance. If they lose that day, then they can pay me for another day at the full rate.

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As long as there are some equally qualified/ dispute resolution-experienced experts who will accommodate the courts' and attorneys' expressed timeframes/ priorities/ needs despite the potential opportunity costs (and those are not all economic...), the attorneys/ courts will not likely change their demands.

However, the only power that we as experts seemingly wield in this "dance" is our level of fees/ charges. I suggest the expert first personally assess all of those opportunity costs and calculate whatever fee levels/ policies at which s/he would be willing to totally accommodate attorneys' normal and extraordinary "availability" requests. Then, survey other similar/competing experts' fee levels/ policies and then decide what changes, if any, s/he would be willing to make, and implement those.

Periodically, repeat the opportunity cost assessment/ competitive survey process, and re-make your decision...

Unfortunately, it's much easier to describe it than it is to do it...

One small such change I've made along the way is to raise my minimum fee for any testimony/ deposition to only 1/2 day (4 hours) increments and at a premium rate about a third or more above my normal rate; in addition, I charge for "wait" time (time spent in going to/ from the site or in being at the site, before being called to testify or be deposed). This greatly discourages attorneys from bringing me in for a long wait or a short depo or testimony unless it's crucial to their needs. It also sometimes gets a hostile response from the opposing attorney (who typically pays such fees, and in advance), but then that's what we're subject to anyway, and without the premium fee levels/ policies.

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Easy answer. If you want to be an expert, expect disruptions. Bill and get money up front for expected testimony for specific days. A competent lawyer understands and usually asks you to testify in AM so as not to go on past 3 PM on same day. If you go on in PM then assume it may go to next day. Judges understand this well and certainly work in scheduling with the doctors.

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Although not a practicing physician, I do have similar problems with attorneys. I have a very active consulting practice and I travel extensively, sometimes for months at a time. Being "on call" for a trial would upset my practice in a similar way that the physician has described the effects that "on call" has on his activities in the hospital and the office. When a trial begins, I have a very simple way of dealing with these types of issues; my

contract clearly says that if called for testimony, I charge my fee for testimony. The attorney can decide if they want me to wait at my office or in the courthouse before courtroom testimony begins; as there is no financial benefit for me waiting at home, they, without exception, ask that I wait in the courtroom and I charge my testimony fee for that time. As with all things, this is made nauseatingly clear in my consulting agreement. If they choose to have me wait at a location other than at the testimony site, there is a possibility that, when called, I will be unavailable. To assure availability, pay for my time and have me cooling my heels in the courthouse. Full stop, no discussion. The attorney cannot determine when I am to be called for testimony except for perhaps one day in advance, so the best thing is to have the "pistol loaded and ready to fire" and not await for the British to arrive and then seek the ammunition.

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In my expert practice, I don't encounter what the MD has stated. What I do encounter is the following.

After packing the car at 4:00 PM today to drive to a venue for Deposition or Trial Testimony (scheduled for weeks) tomorrow, the phone call invariably comes in from my client's secretary. The words are generally the same, "Opposing counsel requested and was granted a continuance."

After losing several day's wages (due to three continuances in one case), I asked my client, a local prosecutor, (for future engagements) if it is appropriate to have a 48 hour cancellation clause in our agreement. He said "Yes" and with new clients this is discussed up front with them. The penalty is 4 hours pay if the cancellation notification is received in less than 48 hours.

The MD has to remember (as my CFO/CPA reminds me) that we are business people first; we are not bankers. While the State Bar Association here in wouldn't take action against "the continuance king", we can make sure that s/he gets the message. If you (the attorney) insist on being paid for your professional services, then your expert (whom you are depending on to communicate the relevant facts), must be afforded an equivalent level of respect by the counsels at both tables; no more, no less.

In the case with "the continuance king", the judge put his foot down after the third continuance was granted. Lack of preparation could no longer be excused. My client had me create two poster boards (no report) that were set up as exhibits when the infamous/shell-shocked opposing counsel walked into the courtroom. Before the judge and my client, he asked what was all that gobble-de-gook (just the relevant regulations in multiple colors and large fonts!). Opposing counsel asked for and was granted an immediate recess where a plea arrangement was made for the Defendant. A few minutes later, I went through the metal detector and all I saw was the beaming smile on my client's face. He exclaimed, "Thanks, Doc!" We had a cup of coffee, we returned to his office, and he gave me instructions on receiving "prompt payment" from his county. Before I turned the ignition key to head home, the payment process was walked through, and a full day's remuneration was received in just a few days!

The key issue for any expert is to be assertive. You are a professional and you expect to be treated like one. While "stuff happens", it doesn't mean that the expert has to "take the

hit" for the unexpected. A top-flight client will recognize what is going on and s/he will work with you (the expert) to ensure a reasonable degree of satisfaction.

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This a no brainer. I charge \$500 an hour and based on an eight hour day that equals \$4,000 for every day I am on call. Payable in advance and non refundable. I spell this out in my retainer agreement that an attorney is required to sign in the beginning and return to me with a non refundable retainer fee of \$5,000 before I begin work on a case.

This sounds like a plaintiff expert and one needs to understand that this is part of the investment that plaintiff attorneys have to make in their pursuit of large rewards. No sympathy here. I learned the hard way to run my forensic practice as a business first.

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I completely understand the dilemma since it occurs to forensic accounting experts, as myself, as well. Because I specialize in non-jury litigation, I have a little bit more control over when I will testify. I too charge a higher fee for actual court testimony time, with a minimum of 4 hours for morning or afternoon sessions. Usually, what happens is that the lawyer who hired me, uses me in most if not all of his divorce cases involving accounting issues, and will work with me as a "team". The lawyer has the ability to make a motion to the Judge that the "experts" be taken out of turn, or be heard if they are in the courtroom and ready, because it would otherwise cost the clients more fees. Usually, divorce Judges are very accommodating of this, and it is not unusual for the accounting experts, and for example the real estate appraiser experts to be heard one after the other, even though one is obviously working for the Petitioner and the other for the Respondent. Sometimes I will be "on call", but I stay in my office working and/or have my cell phone on me and my records in case I'm called. But this is not the norm, but the very small exception.

But to address the specific issue of the lack of consideration on the part of the lawyer, and I have had this, there is one answer to this: Don't work for that lawyer! If the lawyer who is hiring you to be the consultant and then the expert in the case does not respect your time, your schedule and the efforts you put forth on behalf of the case and the client, then he or she does not deserve to use you, period. If you follow this rule, soon you will have a group of lawyers that consider you part of their "team", that rely on your expertise, that respect you, and that in all cases try their very best to accommodate your schedule. Even if you are a medical expert, you should be able to develop relationships with the firms that hire you, and establish the guidelines under which you are able to work. If you sense that you are not being respected, then return the retainer, and get out of the case! There is plenty of work from people who are worth associating with. Very simple, the answer is simply "no", I won't work with your firm.

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I ask for a deposit of 1/2 in advance for each one or 2 day period requested. This is non refundable. Usually only 1 or 2 days are selected. [30 years experience] your quoted medical expert certainly laid the issue out well. I believe attorneys can make a good plan with a back- up plan without too much difficulty.

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This is a good question for any highly paid practitioner. It is definitely disruptive to a business to have to be "on call" and I think it is fair to bill for time spent "on-call" when other income could have been made during that time. Missed income is deadly and I can see how a surgeon or other medical practitioner could lose a bundle just being "on-call" when they could be producing income from patients.

On the other hand I can see the attorney's point of view that high "on call" fees would kick someone out of being on the case if lengthy "on call" periods were being factored in.

There has to be a balance on both sides - attorney and expert witness – and if getting the case is really important to the expert witness then arrangements can be made for coverage of their patients on on-call days. For expert witnesses that only take a couple of cases a year it is probably not a huge problem. But for a medical practitioner who is taking as many cases as they can get, it could become self-defeating to the income stream to have lots of on-call days where they could have been making substantially more money doing their doctoring instead of being paid for being on-call.

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A few lawyers will push the envelope as far as they can. so one approach is to require a significant fee to hold one specific day (say \$3,000). And the fee is due and owing if the date is cancelled within 30 days of the date for any reason by either party. No exceptions. No excuses. If you testify on that date the fee is simply absorbed into whatever your fee is to testify for a day. If the lawyer wants you to reserve two days then two separate fees are due and owing. If you don't force the lawyer to pick a specific day for your testimony the lawyer may happily string you along and simply call you when its optimum for the lawyer. If you force the lawyers hand with a mandatory minimum fee per each day they want you to reserve - guess what - they will figure out how to efficiently get you on the stand.

So in summary for the lawyer to reserve a date charge a stiff minimum fee which is due and owing if the date is cancelled within 30 days of the date for any reason. No exceptions. Call it a cancellation fee. Apply a separate fee for each date the lawyer wants you to reserve. If the date comes and you testify on the date then no cancellation fee is owing. Only your standard testifying fee. But if the lawyer asked you to reserve two days and you testify only on day one then charge your regular testifying fee for day one and charge the cancellation fee for day two. You will be amazed at how quickly the lawyer figures out how to timely get you on the stand. So what if some lawyer refuses to use you. You don't want to do business with a lawyer who is unfair.

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I am a forensic engineer and am not as subject to victimization as a surgeon could be. However, I have had experiences where vacation, other case trial, or professional conference schedules are in conflict with the desired trial appearance. When this occurs I suggest video-taped depositions ahead of time in lieu of live testimony at trial with my fees being paid before or at the time of the deposition. So far this has worked for me!

Experts probably cannot expect to command a premium testimony fee paid in advance unless they are prepared to honor the expectations placed on them in doing so. Videotaped depositions are possible after working hours on relatively short notice in most areas of the country! Court reporters might demand a surcharge for doing so!

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The attorney is put in a difficult position in scheduling experts, as often the attorney will not know precisely when the expert is needed for testimony, and thus the need for "on-call" status. However, one of the cost considerations associated with retaining certain experts is reserving their time. If the attorney is not on the hook for the cost of reserving our time, the attorney will have no incentive to be conservative about our "on-call" status.

There are different ways to handle this situation, with the bottom line in each being the expert should not lose out at all. First - the expert can demand full testimony pay for each day he or she cannot do his or her regular work because of the "on-call" status needed for testimony. Thus, if the expert usually gets paid \$3,000 per day to testify, the attorney would pay \$3,000 for the "on-call" days as well. This would be similar to going to court and waiting around to be called, being paid for all that time. Second - the expert can make an accounting of the money he or she actually is losing by being on "on-call" status (i.e., missed appointments, procedures, etc.) and bill the attorney for those missed financial opportunities (referred to in economics as "opportunity cost"), with the expectation the attorney will sign the check before the expert takes the stand. Third - the expert can bill a given amount for being "on-call" that is intended to compensate for the missed work generally (e.g., if the expert usually makes about \$2,000 per day in her practice, being "on-call" would cost the attorney \$2,000 per day to reserve that time). This way, the expert would not need to make an accounting of the actual missed work, but rather could use an average daily amount, which may be far less than a day of testimony). Fourth - the expert can bill as in the third one, but discount the amount for any work she is able to do while "on-call," thus essentially mitigating the lost opportunities.

My personal belief is the 4th option is most fair to both sides. We get paid for our time. When "on-call," the attorney is saying, "I need you at a moment's notice, so don't schedule anything else that conflicts with this." But they do need to pay for our time.

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As an expert witness who (in a prior life) was himself a trial lawyer, I have found that judges and opposing counsel generally are very accommodating of an expert's schedule. It may not be ideal, but your lawyer, more often than not, can get the court and other lawyers to juggle schedules to have you testify at a convenient time -- even if it means taking evidence out of order. Now, your lawyer may have reasons (some valid) for not wanting to do that; but it ought to be explored. Beyond that, both parties simply need to be reasonable. A lawyer cannot expect an expert to hold an entire week open in order to be available at the precise moment that is optimal for the lawyer. On the other hand, an expert who has other professional responsibilities cannot expect that he/she is not going to have to make some compromises if the extra income from doing expert work is desired.

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I find the concept of being "on- call" is too logistically, and financially difficult.

In my experience, most attorneys are able to stipulate to the court which days their experts are available.

I practice EM and FM, and I can only arrange coverage for a specific day, esp. if travel is involved. I charge a non refundable retainer when this is scheduled ( air fare paid by the attorney), with a sliding scale for refunds, based on how long before the trial I am advised that it is canceled or postponed.

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My response is totally different for surgeons versus non-surgeons, which is: The surgeon is available, based on the best available scheduling information at the time, and that's it. If I had scheduled surgery and the doctor is off on some trial, I'm not only angry, but I'd throw big fit...there are plans made for recovery, transportation, rehab schedules, getting back into surgery rotation, etc. This is the primary vocation for the surgeon and he or she had better be focused on the medical issues, not a trial. I'm not paying the doctor to testify, I'm paying the doctor to be a doctor.

For those of us non-medical related, we can and should be flexible...I set aside time...keep close tabs on the attorney and work accordingly. If need be, possibly consider a day rate for waiting around if court time is so uncertain. I will not jeopardize my work, but neither do I give away my schedule. Nearly all trial lawyers are good at evaluating the "order of appearance" and usually respectful of schedules.

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Every seasoned expert has to deal with this situation from time to time. However, it is rare that an attorney has absolute control of the situations that occur in and outside the courtroom. To be fair, the attorney has to deal with jurors that show up late (delaying trial), over dire issues, expected & unexpected motions, problems with witnesses, testimony that goes on longer than expected and the list goes on and on.....

Unfortunately, anyone who gets involved in this business must understand that customer service is as important to the success of the business as is the credibility of the expert. Therefore, I believe that if a client made an informed decision to retain an expert and ultimately relies upon him/her, that expert should make every accommodation possible. This doesn't mean you work for free, but certainly other business interest belonging to the involved expert should not take precedence over the client in their most crucial time of need. Let's be honest, these attorneys and their clients pay top dollar for the experts work. Therefore, to ensure I am not abused by the client or the court, I charge a flat appearance fee, per day (whether I testify or not) and a cancelation fee when appropriate. With that said, I jump through every reasonable hoop to accommodate my clients. I am not one for being an advocate for attorneys in general, but fair is fair.

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I have in my CV a stand-by charge that says I will charge 1/2 my normal 1/2 day minimum fee for every day they want me to be "on call".

Now thus far I have only charged my clients that charge for one day, even though they often keep postponing my testimony. But then I don't have surgeries to perform either. However, if a client was very abusive or demanding, I would certainly take full advantage of my policy.

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Your patients come first. The Court will take this into consideration. You must do what is in your patients best interests. PERIOD!

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The problem here is economic. The expert should charge what it costs him or her to be "on call". The lawyer can either schedule in a manner convenient to the expert, find another expert or pay the fee.

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Firstly, once you sign on to be an expert witness, you are the expert witness a record, unless dismissed by the attorney and approved by the judge. Therefore, you should have an airtight arrangement prior to engaging in any expert witness arrangement with any attorney. I have always been amazed that attorneys get paid for every single hour of their work, yet they expect us to sit around for a discount waiting for them to call us to stand. I suppose they don't consider that the work.

My arrangement have always been that I had set fee for courtroom testimony, and that at the applied to every day that I was asked to be in the courtroom whether I was on the stand or not. It did not alleviate the chaos they caused in my practice, but it did help financially offset my losses.

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The only "On Call" testimony I have ever experienced is limited to a 48 hour period during which the attorney has confirmed the exact date of trial and has scheduled me to testify in the second slot. This means that it is likely that I will get on the stand during the first day but have been warned that I might not get on until the second day. Since all my trials have been out of town, I simply schedule myself for two days (or three days if I have to travel and arrive the night before) and get paid in advance for the two days. If I am lucky and finish up in one day I will keep the advance payment or return some portion depending upon how much of the second day I can use after arranging for the revised travel times. Most times I have found that even finishing my testimony on the first day does not allow me any useful time the second day due to difficulty of scheduling my return flights and/or the lateness of the hour I land.

An equally difficult issue arises when I am scheduled for the first slot in a one day event and have accepted the advance payment for my time and expenses. Sometimes for reasons beyond the control of the attorney, my testimony is not completed in that day or goes well beyond the time of the last flight out. Not only does this play havoc with my next day's schedule but also makes collecting for another day's fee very tricky.

Bottom line I would recommend your surgeon's problem be handled by planning for (and getting paid in advance for) the worst case scenario and if things work out for the best, simply use the extra time as a paid vacation.

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I usually request that the attorney obtain a specified date and time of day --i.e. morning or afternoon. As for additional days or changes of dates, I charge full price for the original date and half price for every day after that I am "on call" along with additional transportation charges. If the trial extends beyond the originally scheduled days. Often I've appeared on scheduled date and time and been delayed by several days with returning each time. I have to charge the client for the additional time I spent in court . I'm attaching my Forensic Fee Schedule to give you an idea. My problem is clients who are not charged the whole fee up front but rather the retainer and one way or another, do not come up with the remainder at trial and then delay or not pay at all. Their attorneys, unfortunately, too often conspire with their client and I don't get paid without filing against the client for non-payment and that costs me for an attorney to represent my claim!

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I'm not sure if I can specifically answer this question, but I truly understand the issue this expert is relating, as I have experienced the same. This is how I work the issue.

1. Expert testimony sought - provide fee schedule for same. If less than 48 hours notice of a cancellation (even for on call), I keep 25% of the fee (I charge for 4 hours of testimony),

If less than 24 hours notice is given, I charge 50% of my testimony fee.

2. There are other solutions to this issue of face to face testimony, such as video testimony at deposition, which is also used at trial. A consideration for those tight schedules. The expert appears once.

3. I do not schedule more than 2 "on call" dates for testimony. Attorneys have a duty to their clients to get their act together and coordinate deposition and trial testimony. To do otherwise, will most likely compromise their case because their expert is more than irritated at their unprofessional behaviour and lack of consideration for time and efforts of their own experts.

There are many coordinating issues with deposition and trial testimony, I understand this, but it's not my problem that the attorney can't get it together and the surgeon's patients should not suffer. Perhaps these surgeons should schedule the testimony in the mid afternoon, so they can at least have a 1/2 surgical schedule.

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