

MEMORANDUM

TO: Trial Court Chief Judges
Trial Court Administrators

FROM: Judge Stan Morris

DATE: August 3, 2005 1st amendment August 15, 2005, 2nd
amendment September 9, 2005

SUBJECT: Payment of expert witness fees.

Attached to this memo you will find a chart to be used as a guide to determine the entity responsible for payment for each category of expert witness listed. This is in response to questions that have surfaced now that HB 1935 (the "glitch bill") has been signed into law. As you know the question of expert witnesses to determine competence to proceed was the subject of several lawsuits which have recently become final. However, after July 1, 2005, amendments found in HB 1935 make it clear that those witnesses will be paid from the state courts system budget. Other classes of witnesses will also become a court obligation because the legislature amended section 29.004, Florida Statutes, which outlines the elements of the state courts system as follows:

"(6) Expert witnesses ~~who not requested by any party~~ are appointed by the court pursuant to an express grant of statutory authority."

Quite clearly therefore, the court system will be responsible for the payment of expert witnesses appointed by the court pursuant to statute to determine the competence of a defendant to proceed due to mental incapacity (section 916.115, Florida Statutes).¹ However, if the public defender hires a confidential witness to determine competence to proceed before suggesting that the court appoint another expert to make a further determination, the public defender will be responsible for that cost. Likewise, if the state attorney hires an expert for his or her own inquiry, that cost will be borne by that office. These costs are separate from costs associated with the defense of insanity, which would be paid by the public defender or court-appointed counsel.² Incompetence to proceed in juvenile cases will be paid under the same rules applied to adult competence except that in the case of a juvenile alleged to be mentally retarded, the Department of Children and Families will pay. Sec: section 985.223(1)(e), Florida Statutes. Experts needed when an adult is alleged to be incompetent because of autism or retardation, will be paid by the state court system.

Experts needed to determine issues related to involuntary commitment for mental retardation (section 393.11, Florida Statutes) will be paid by the state court system as will experts needed to determine the appointment of a guardian due to incapacity (section 744.331, Florida Statutes), except where the estate of the ward is available for that payment.

¹ When the defendant has the ability to pay, the state court system should still pay for those experts based upon the statute which does not distinguish between those who are indigent and those who can pay, and further based upon the logic that those witnesses are court witnesses. The payments associated with those experts should be taxed as costs at the conclusion of the case.

² If the court-appointed expert reports on insanity as well as competency at the request of the PD, the PD will pay that portion of the cost related to insanity.

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More problematic are Baker Act evaluations under section 394.467(6)(a)2, Florida Statutes. In Baker Act situations, the patient has been taken into a facility and a staff member has determined that the patient meets the criteria for involuntary commitment. Payment for that preliminary determination is the responsibility of the facility.³ Before the hearing on the matter, the patient has the statutory right to request an independent expert evaluation. This right arises after the professional at the facility has issued a certification and the involuntary commitment process has started. The statute says: "If the patient cannot afford such an examination, the court shall provide for one." Thus, the statute clearly evidences legislative intent that if the person is not indigent, this cost is not paid by the public. However, when the person is indigent, section 394.473, Florida Statutes, states that the expert should be paid pursuant to section 27.5304, Florida Statutes. That section provides for payment by the Justice Administrative Commission.⁴ As a person subject to Baker Act commitment, the patient has the right to the appointment of the public defender or court-appointed counsel, regardless of indigence. Both section 29.006, Florida Statutes, (public defender) and section 29.007, Florida Statutes, (court-appointed counsel) specifically reference mental health professionals appointed pursuant to section 394.473, Florida Statutes. Clearly these witnesses are defense witnesses; they are appointed only if requested by the patient and any report issued is confidential and not discoverable. See: section 394.467(6)(a)2, Florida Statutes. The language found in section 394.467(6)(a)2, Florida Statutes, {"the court shall provide for one"} does not transform what is essentially a defense witness into a state court expense when there is clear statutory guidance to the contrary.

If you have questions respecting the chart or the payment of expert witnesses not addressed here, please call Greg Smith at 850-487-9383.

³ Any payment to the facility employee for testimony at the Baker Act hearing is not the responsibility of the state court system.

⁴ There may be some discussion between the PD and JAC about this statutory language because the statutes seem to say that the PD would not pay for the independent expert even if the PD was representing the patient.

WITNESS PAYMENTS		
CASE TYPE	STATUTORY REFERENCE OR COURT RULE	BUDGET TO BE CHARGED
<p>Adult Competency – Court-appointed expert agrees to evaluate defendant under section 916.115, F.S., or the Florida Rules of Criminal Procedure or any other relevant Florida law for determinations of competence to proceed</p>	<p>Section 916.115(2)(a)(1), F.S. Florida Rule of Criminal Procedure 3.211</p>	<p>Court- For experts appointed by the court unless the expert addresses issues related to sanity as an affirmative defense, in which case the court only pays for that portion of the fees related to competence.</p> <p>Public Defender- For experts retained by that office before the PD asks the court for a competence determination or for an affirmative defense of insanity.</p> <p>State Attorney- For any experts retained by that office to testify on behalf of the prosecution and appointed by the court in order to ensure that the expert has access to the defendant.</p> <p>JAC- For any experts retained by an indigent defendant who is represented by court-appointed private counsel or who is indigent for costs.</p>

<p>Baker Act Evaluations – Expert agrees to provide independent examinations of patients under section 394.467(6)(a)2, F.S. (patient in a treatment facility.) The state court system does not pay for the facility employee to testify in court.</p>	<p>Section 27.5304, F.S. Section 29.007(5), F.S. Section 394.467(6)(a), F.S. Section 394.473(2), F.S.</p>	<p>The patient pays for the independent evaluation Unless indigent. JAC or PD If the independent expert is appointed at the request of court-appointed counsel or the PD.</p>
<p>Developmental Disabilities – Expert agrees to evaluate defendants under section 916.301-916.304, F.S., the Florida Rules of Criminal Procedure and any other relevant Florida law concerning allegations of incompetence to proceed to trial due to retardation or autism.</p>	<p>Section 916.301-916.304, F.S.</p>	<p>Court</p>
<p>Developmental Disabilities Examining Committee – Expert agrees to act as a Developmental Disabilities Committee Member to determine mental retardation pursuant to section 393.11, F.S.</p>	<p>Section 393.11, F.S.</p>	<p>Court</p>
<p>Guardianship Examining Committee Expert agrees to act as a Guardianship Examining Committee Member in cases filed pursuant to section 744.331, F.S.</p>	<p>Section 744.331, F.S.</p>	<p>Court, if the wards estate cannot pay (See 744.331(7)(b), Florida Statutes)</p>
<p>Juvenile Competency – Expert agrees to evaluate juvenile defendants under section 985.223, F.S., Florida Rule of Juvenile Procedure 8.095, and any other relevant Florida law for determinations of competency to proceed.</p>	<p>Section 985.223, F.S. Florida Rule of Juvenile Procedure 8.095</p>	<p>Court- For experts appointed by the court unless the expert addresses issues related to sanity as an affirmative defense, in which case the court only pays for that portion of the fees related to competence determination and the balance is charged to the defense. DCF If the evaluation is related to mental retardation</p>

<p>Ordinary Witnesses, including, but not limited to, witnesses in civil traffic cases</p>	<p>Section 40.29(1)(a), F.S.</p>	<p>The party calling the witness if not indigent SA or PD</p>
<p>Traffic Court</p>	<p>Section 66, HB 1935</p>	<p>Party who secures the attendance of witness State Attorney If the witness required to testify on behalf of the prosecution</p>
<p>Local Ordinance Violations</p>	<p>Section 27.54(2)</p>	<p>County or Municipality</p>