

Expert Witness Travel Dilemmas: A Pilot Study of Billing Practices

Thomas G. Gutheil, MD, Frederick E. Slater, EdM, Michael L. Commons, PhD, and Eric A. Goodheart, PhD

A pilot study was performed, by questionnaire, on the strategies that expert witnesses use in calculating billing for travel on forensic cases. The authors tentatively conclude that as the complexity of the travel situation increases, a tendency toward redundant billing emerges. The results—the first of their kind—are presented with their implications for this and future studies.

Experts who work in a single location or who consult on only local cases need not deal with the complexities of travel that burden those experts who travel to other locations to examine litigants, appear for depositions or testify at trial. The traveling expert must resolve problems of both a logistic and a financial nature.

Payment for expert witness services, in general, is a somewhat taboo subject, as demonstrated by the fact that, with few exceptions,¹⁻⁵ almost nothing has been written about billing practices for these types of services. The financial principles governing billing for travel by expert witnesses also represent an unexplored territory. Expert witnesses appear reluctant to discuss this subject openly; presentations

at annual meetings of the national forensic organization, the American Academy of Psychiatry and the Law (AAPL), have discussed marketing but not billing dilemmas.

From the viewpoint of both the experts and those who employ them (attorneys and insurers), there are a number of possible reasons for this silence. In our culture, discussion of how much one makes is taboo for both employers and employees. Employers may prefer to keep their payment patterns secret and may not wish to reveal that they pay different witnesses different amounts for similar work.

For expert witnesses, the reluctance to discuss billing openly might also derive from the experts' fear that a discussion of fees that leads to a consensus may then lead to accusations of price-fixing and the involvement of the Federal Trade Commission. On a more personal level, experts may fear that disclosure of their

The authors are affiliated with the Program in Psychiatry and the Law, Massachusetts Mental Health Center, Harvard Medical School, Boston, MA. Address correspondence to: Thomas G. Gutheil, MD, 74 Fenwood Rd., Boston, MA 02115.

principles and practices of billing will expose them to accusations of greed or mercenary concerns. Finally, the psychoanalytic literature also supplies some dynamic explanations for why this silence might result from unconscious conflicts about money.^{6,7}

Presumably, the ethical goals of "honesty and striving for objectivity" articulated in the AAPL ethical guidelines⁸ are as applicable to billing as to testimony. Beyond ethical concerns, overbilling or any analogous exploitation drives up the cost of doing business, an undesirable end in itself. In any case, the subject calls for empirical study with the goal of understanding the principles involved. An ultimate result of increased understanding in this area might be a greater awareness of ethical principles in billing, enabling the experts to avoid exploitation of retaining attorneys and insurers.

Basic Billing Issues in Expert Travel

Although there are no articulated standards for billing practice, we hypothesized that experts would implicitly work to avoid obvious duplicative billing, such as charging both a day rate and an hourly rate to the same employer for the same activity. We also hypothesized that some respondents might avoid "nickel and diming" clients when small time units were at stake, others might emulate attorneys on the "strict meter" model, while still others might "round off upward" consistently in their own favor.

Central to negotiating such dilemmas are two issues. The first is the issue of the complexity of the billing task. If there is a

correlation between complexity and the tendency to engage in redundant billing, the point at which complexity becomes a significant factor needs to be determined. The second issue is the consensus of standards for billing. At this time, there is no generally agreed upon set of criteria for what constitutes inefficient, unfair, or excessive billing. It is thus difficult to determine at what point redundant billing can, in fact, be called excessive or unfair, as well as to determine when redundant billing is justifiable and when it is not.

We believe the first issue has a meaningful bearing on the second. Examining both issues should eventually lead to determining what is a reasonable, fair, ethical, or efficient procedure for charging while traveling on forensic cases.

In the absence of consensus, we propose three theoretical principles that might outline the ground rules for ethical billing practices. First, experts should work efficiently, avoiding wasted time. Second, experts should be paid for the time they work. Third, as a rule, duplicative or redundant billing should be avoided; that is, one should not bill twice or more often for the same unit, although there might be some disagreement over what constitutes a unit and to whom it should be billed. Ambiguity could also exist about whether one is charging for work, for time, or for work plus time in different scenarios. Finally, billing agreements may require negotiation and consent between experts and those who retain them, especially for such nontraditional arrangements as flat-fee contracts.

Methods

There were 23 participants, including a number of senior AAPL members and members of the Program in Psychiatry and the Law, who were asked to fill out a questionnaire. That questionnaire presented a series of hypothetical airplane travel situations and associated billing choices. Respondents who had not encountered a particular situation were asked to imagine their best responses and to justify them.

The questionnaire asked about minimal billing units, billing standards, day rates, and how those were applied and whether respondents rounded off amounts upward or downward. Although what constitutes a "day rate" may be idiosyncratically defined, some of our examples allowed inferring how this was calculated. Several possible theoretical billing "sites" emerge from standard travel: the cost of the ticket for each leg of the trip; an hourly rate or day rate for the actual time spent "away from home"; actual travel time during the flights; and the time involved in reviewing case materials, either for the current case or for a later case. Situations of progressively greater complexity were presented.*

Results

All 23 respondents filled out a major portion of the questionnaire. However, not all respondents answered all queries. A detailed question-by-question analysis

is available from the authors. The general results follow. Respondents generally avoided duplicative billing when responding to straightforward travel billing problems. As the complexity of the problem increased, however, a tendency to bill redundantly was observed. Indeed, from the answers given it was not always possible to know whether the redundancy was recognized in a given answer, a finding that suggests that there might be disagreement over what constitutes redundancy.

The Problems in Increasing Order of Complexity. Problem 1: "On three separate occasions within a week you review case materials on the same case for 22 minutes each. Your usual custom *re* billing for this time is: A, Bill separately for three half-hours. B, Save up and bill for one hour (66 minutes). C, Save up and bill for one hour or fraction [thereof]. D, Other." Respondents were asked to explain their reasoning and to justify it (i.e., to answer the query, "Why is this approach reasonable and fair?").

Respondents used seven different strategies for billing, varying as to time unit used, rounding up or down, separating the charges or saving them up. Strategies ranged from highly redundant to minimalist, with actual billed-for time ranging from two hours to 45 minutes. The modal answer (14 out of 23 respondents) was to save up 66 minutes and bill for one hour, rounding down. All but one (22 respondents) tended to avoid redundant billing.

Problem 2: "What is the (smallest) unit of time you bill for? At what point do you move to the next billable unit? How do you round off,? i.e., what is your rule?"

* The original questionnaire is available from the authors. The authors invite interested readers to administer the questionnaire to suitable respondents and to report back their own results. We hope that such a process will encourage more open discussion of the subject.

I do/do not bill for half hours. Do you ever change your billing rate? Explain your reasoning.”

Minimum billing units ranged from 6 minutes or less to 60 minutes. The modal response (8 respondents) was to use 15-minute units and round up to the next unit at the midpoint or beyond. Nine respondents stated their systems were subject to change, and eight stated that theirs were not. A simple majority of 12 respondents demonstrated a tendency to avoid redundant billing. Rounding rules for this group were irregular.

Problem 3: “You spend a large part of a day waiting in the courthouse to go on for trial testimony. During this delay you review the case materials ‘one more time.’ Regardless of day rates or court time, do you bill separately for this review time? Explain and justify.” Respondents were queried (on a seven-point scale from “never” to “always”) as to whether they billed for this review time regardless of day rates. Sixteen indicated “never,” but four billed separately for this time, demonstrating a tendency to engage in redundant billing.

Problem 4: “You fly out of your hometown for a distant case at 6 p.m. Tuesday; talk with the attorney in the distant city hotel for four hours; testify most of Wednesday; fly back and arrive home at 6 p.m. Wednesday. Do you bill (would you bill) a day rate: A, for one day; B, for 1.5 days; C, for two days; D, Other. Explain and justify.” The modal answer (13 respondents) was to bill for 1.5 days; these respondents billed for consultation time separately (meeting with attorney). Five respondents billed

one day and two billed two days. The overwhelming majority of respondents (18 respondents) demonstrated a tendency to avoid redundant billing.

Problem 5: “Assume you are flying to testify for one full day on a major case, Case A, in a distant city. You usually charge a day rate in such situations. You will review Case A materials on the early morning flight going out. Anticipating the long return flight and the imminent arrival at trial of Case B, you bring along Case B materials and read them on the flight back, returning late that night. Describe your billing practice below.” Respondents had the choice of allotting the charges—ticket cost each way, flight time each way, day rate, case review for Case A and Case B—to case A’s firm, case B’s firm, both, or neither.

In this problem, because tasks for separate clients occurred during overlapping time frames, redundant billing was difficult to avoid. The modal answer, chosen by eight respondents, was to define all charges separately and bill both cases for them, *regardless* of redundancy. This answer, by skirting issues of overlapping time and task, obviously produced duplicative billing. Seven more respondents, although resolving issues of overlapping time and task by defining certain tasks as mutually exclusive, still engaged in redundant billing.

The apparent dilemma for respondents was that holding review and travel as mutually exclusive when both tasks occurred during the same time frame might be seen as overcharging one case while undercharging another, either for review or for travel, or both. Another viewpoint

would hold that the return flight from Case A, inevitable in any event, was discretionary time that could freely be used for reading, sleeping, watching a movie—or review of case B; the case B review might then appropriately be billed to the case B firm. A total of 15 respondents engaged in some form of redundant billing. Of the remaining 8 respondents, 7, while engaging in minimally redundant billing, demonstrated tendencies toward reducing billing.

Problem 6: “You fly from home in Boston to Chicago on Case A on Thursday, then directly to Los Angeles on Case B on Friday, then home to Boston Saturday morning, arriving Saturday night. You do no extra case work on planes or in hotels. How do you bill?” Again, the charges from the previous example could be billed to Case A, Case B, both, or neither. Respondents could allot a day rate for three separate days.

This problem was the most complex. Additionally, respondents were implicitly given the option of charging a day rate on the return flight. Even respondents who had avoided duplication for previous questions became duplicative on this one. The modal response (13 respondents) was to bill *both* employers for *all* charges, ignoring redundancy. Fourteen respondents billed for day rate on Saturday, even though both cases had been concluded by that time. Eight respondents billed case A and B separately for tickets, flight time, and day rate for the day of the case, and charged no day rate for the return flight Saturday. Regardless of the respondents’ tendency to avoid or not avoid redundant billing, most respondents could be seen as undercharging one

case at the expense of the other. No respondent billed each case for each day’s charges and split the Saturday return flight—a theoretically equitable solution, since one could view Chicago as halfway to or from Los Angeles. This strategy would at least divide the payment burden equally.

In sum, of the 23 respondents, only 2 avoided redundant billing by absorbing some costs, 4 nominally billed redundantly, 14 billed redundantly (13 excessively); even those respondents who devised fair strategies with less complex problems were unable to avoid duplicative billing.

Conclusion

We expected, and found, disagreement and variation about what particular billing units other billing activities should exclude. For example, it was unclear who, if anyone, should be billed for work on a second case done on the return flight from the first case. Also, there was no definitive agreement about which costs are considered additional to other costs and which are subsumed within others. Additionally, our hypothesis that respondents would demonstrate a wide range of variability in billing models (small time units, “strict meter,” rounding upward) was borne out by our pilot study.

One tentative conclusion—that increasing complexity of task leads to duplicative billing as a response—is somewhat troubling but may reflect merely the difficulty in designing fair and reasonable strategies in the absence of any guidance whatsoever. This point may have practical implications in ethics complaints about billing practices.

These data are the first of their kind. No benchmark exists to determine whether our results are generalizable to the whole field of expert witnesses; whether experts actually bill as they report; or whether these results reflect standard practices, showing the variability one might expect from a heterogeneous group. The topic demands further research and open discussion of these issues in a suitable forum. While rigid guidelines for billing would likely be inappropriate and problematic, a greater openness and familiarity with the reasoning behind billing strategies would be useful to all.

This pilot study is a first step toward that goal. Subsequent studies will examine billing strategies in an explicitly ethical framework, correlate billing with expert demographics, and attempt to analyze the reasoning about billing in more detail.

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