Expert Witness Billing Practices Revisited: A Pilot Study of Further Data

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This pilot study follows up an earlier study of the strategies and rationales by which psychiatric expert witnesses bill for their time on a case. Questionnaires were answered by participants at a workshop at the Annual Meeting of the American Academy of Psychiatry and Law (AAPL). In this follow-up, additional novel billing issues were addressed, some subtler than in the original study. In addition, responses to one question supported the previous finding that experts billed more reasonably when a case was simple. Additional issues included use of fee agreements and returning an unpaid-for case. The implications of these findings are discussed.

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Matters involving money often are treated as taboo in the contemporary social milieu and even within psychiatry itself. Indeed, a 1986 book on money as a clinical issue is entitled *The Last Taboo.*[1] The forensic literature also has paid scant attention to the study or discussion of this issue, which clearly merits exploration.

In an earlier pilot study[2] we examined the billing strategies and rationales of psychiatric expert witnesses by means of vignettes that posed travel billing dilemmas of increasing complexity based on a multiplicity of payment sources. In that earlier research, we found that as the billing situations increased in complexity, experts tended to bill increasingly redundantly, that is, to bill multiple retaining agencies for the same time spent.[2]

The study by Gutheil *et al.*[2] examined areas of billing that have been discussed publicly, for which most practitioners expect to bill. For example, everyone expects to bill for actual time spent examining a client, writing a report or giving testimony. This current study asks about efforts that may be associated with preparation to testify, but may be less well recognized as necessary. For example, to what extent do different experts bill for "thinking" about a case? When is doing library research an integral part of preparation? We term these *marginal areas* of the practice of forensic psychiatry; these billing matters are even more rarely discussed or examined by the forensic community than those we studied previously.

This initial descriptive pilot study, though small, is intended to point the way for more extensive investigation of these practical issues that should be of interest to the field as a whole, particularly to novices with little experience. Our profession also would benefit from more extensive discussion in open fora to promote a wider exchange of ideas on this often-taboo subject.

Materials and Methods

Questionnaires were filled out by attendees at a workshop on attorney-expert relations that took place at the 1999 Annual Meeting of the American Academy of Psychiatry (AAPL) and Law in Baltimore, MD. Subjects were instructed to refrain from using any identifying data and thus were guaranteed confidentiality. Subjects also were promised, as a kind of *quid pro quo*, the opportunity in the workshop to discuss each section of the questionnaire after it had been completed; the workshop thus provided a unique forum for open consideration of topics rarely covered either in presentation or in the literature.

The relevant part of the questionnaire queried respondents as to their billing practices in marginal

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areas of practice; most questions required a yes or no answer, followed by a solicited explanation of the reasoning involved. These questions included whether respondents billed for thinking about a case, for library use, and for initial contact; further queries addressed the use of fee agreements, return of a case when no retainer is forthcoming, use of day rates, and billing for case review during travel. We hypothesized that subjects (i.e., workshop attendees) were academically oriented forensic practitioners who attend AAPL meetings and who are interested in discussing these practical matters.

Results

The study yielded 37 questionnaires, representing about one-third of attendees. Because of time constraints, demographic data could not be gathered for this pilot study.

Data were analyzed as follows. To test whether there were significant differences in how often the experts surveyed said "yes" versus "no" in responses, the mean response was tested against the indifference point. That is, if "no" were coded as 1 and "yes" as 2, the indifference point between them would be 1.5. If the mean response by the experts diverged from this indifference point with a probability of at least .01 (using a *t* test), it was declared significant.

Although many subjects did not comment at all, some representative comments marked by particular clarity and detail were chosen to illustrate respondents' reasoning. Most such statements were chosen to illustrate the main statistical result of the answers, but an occasional "dissent" (i.e., a statement that ran counter to the majority) also was chosen to illustrate diversity of opinion. The results are presented with the statistically strongest results first.

1. *Do you bill for library research on the exact case topic?* Ninety-four percent said yes; six percent said no, a statistically significant result. Representative comments (entries in brackets are most likely transcriptions of illegible writing): "No. Feel this is just ordinary business; not their fault if I'm not up on the topic" (subject 14). "Yes, if prompted by this case. . . . Turn over materials" (subject 15). "Yes (data may be useful to final report/deposition/testimony)" (subject 19). "No—but I should" (subject 20). "Only if previously discussed with the attorney" (subject 29). "If the attorney agrees in advance, yes. This probably would go beyond what I think I should know" (subject 33). Authors' comments: Specific research on a topic, especially a rare one, can almost always be defended as an expense, though note the comments suggesting that the expert's knowledge should be assumed.

2. *Do you bill for library research in a general area that includes the case?* Sixty-eight percent of respondents said yes; 32 percent said no. Note that this response, though not statistically significant, provides an interesting complement to the previous query and trends in the same direction. Representative comments: "Only with prior authorization by retaining attorney (If they refuse I don't charge, but begrudgingly still do it.)" (subject 2). "No—but I should" (subject 20). "No—not appropriate" (subject 22). "Only if previously discussed with the attorney" (subject 29). "Yes, to some degree; if I feel I should know something I don't, I don't bill" (subject 30). "If I feel it's something I should know better, no" (subject 33). Authors' comments: Although attorneys routinely bill for any research they may do on a case, the forensic expert is supposed to know the general area under discussion as an element of the expertise. Yet to "bone up" on the area should result in being better informed, which is to everyone's advantage.

3. *Do you use a fee agreement or retention contract in any form?* Seventy-five percent said yes; 25 percent said no, a statistically significant result. Representative comments: "Verbal fee agreement (usually)" (subject 1). "No, but will start. . .have been cheated of thousands of dollars" (subject 19). "No, but I'm planning to" (subject 20). "Only when I'm working with the 'underfunded' side of the case, that is, plaintiff's atty." (subject 34). Authors' comments: A more extensive discussion of fee agreements can be found elsewhere.[3]

4. (A) *Assume the retaining attorney sends materials but no retainer for a long time. You don't read the case. The other side calls and promises instant retainer. What is the proper response and why?* A wide variety of responses occurred here that cannot be rendered appropriately by percentages. However, a clear trend was noted toward turning down the second attorney. Representative comments: "I'm sorry, I'm not available" (subject 5). "Call the original retaining attorney and tell him the situation and make a deadline for receipt of retainer" (subject 6). "If I've made it clear that 'no retainer, no contract'—then no problem—I'll send info back if not retained in timely fashion" (subject 12). " 'No' to second attorney" (subject 13). "Proper response is to demur [?] with other side, but call initial atty. and ask if he wants you to continue or

not (explain other offer, but not as a threat—a business concern). And, if so, please send the retainer" (subject 14). "I would never jump sides. I would call the first atty. and tell him/her. If it's a bad outcome, I voice my opinion, but I do not act greedy or whorish" (subject 15). "Call retaining atty. Won't take other side because I usually already know too much" (subject 18). "Don't take it—appearance of impropriety" (subject 20). "No retainer, not retained" (subject 23). "I would call first lawyer and say, if I don't get retainer within 48 h, I won't do case, return material[s] then take other side. If I [had] started to read info, I would not work for other side" (subject 36).

4. (B) *Is your answer different if you have already returned the case in disgust? Why or why not?* Seventy-four percent said no; 26 percent said yes, a statistically significant result. Representative comments: "Yes. Nothing happened. Why not take the case?" (subject 5). "Of course. Because that makes me free to enter the contract" (subject 10). "Yes—once you've returned the case, you're free game—as long as all materials from other side are discoverable" (subject 14). Note that these selected comments are from the *minority* opinion; changing sides was now acceptable after the case had been returned. Authors' comments: Although the point is not addressed in this study (but will be in a future one), a decisive element in such a situation is the question of whether any trial strategy (an attorney work product) has been disclosed by the first attorney, which should absolutely disqualify the expert from changing sides. Clearly, in any case, staying out of the second case with an opposing attorney avoids any semblance of wrongdoing.

5. (A) *Assume you use a day rate for travel. You arrive in a new city at 10 a.m. for a case, and return the next day, arriving home at 10 a.m. Do you bill one or two days? Why?* One day, 73 percent; two days, 27 percent, a statistically significant result. Representative comments: "One day only . . . [billing for two days] looks too greedy to me" (subject 10). "One day; essentially worked only one day" (subject 19). "Charge by the hour" (subject 20). "Day rate plus expenses. You can still earn from other sources[?] for the second day" (subject 22). "Two days. Bill total travel time only" (subject 26). "I would bill for two days because of overnight stay" (subject 27). "Assuming I'd be back in my office at noon, I'd bill one and a half days. If I was asked to reserve both days, I'd bill two days" (subject 34).

5. (B) *If you review that case between 8 and 10 a.m. in flight, do you bill for those two hours in addition, or do you subsume them under the day rate?* Subsumed under travel, 85 percent; billed separately, 15 percent, a statistically significant result. Representative comments: "That is free. I'll consider it being conscientious" (subject 10). "Never done this [at?] all, but would bill separately for intensive work" (subject 14). "I try to do the review before so I can bill for everything. If I'm honest and do work in transit[?], I won't double-bill (but I have not always been scrupulous)" (subject 15). "I subsume review time as part of daily rate similar to time spent conferring [with] attorney prior to dep[osition] or court appearance" (subject 27). "If charging a day rate they should be subsumed. I charge hourly [and] would charge full rate rather than ½ rate. If working on another case during flight, don't charge case I'm traveling for" (subject 36). Authors' comments: Here the sharp distinction between the two answers (favoring nonredundant billing) stands in contrast to the results in the previous study[2] in which complex travel dilemmas seemed to promote double billing.

6. *Do you bill for thinking about the case? Why or why not?* Fifty-seven percent of respondents said yes; 43 percent, no. Representative comments: "Yes. It's a major part of the work" (subject 2). "No. But most of my thinking is done while reading the chart and making notes" (subject 5). "No. I think about it way too much—they couldn't afford it" (subject 14). "Yes. Thinking takes time—my time is worth $" (subject 15). "Yes—uses time and professional skills (but not for [mus?]ing about it on the drive home)" (subject 18). "No. Hard to document bill . . . [for the] hours. I include that as part of total charge" (subject 27). "No. Difficult to record" (subject 32). "No, because I hadn't thought about doing it" (subject 37). Authors' comments: Although we did not define "thinking" as we were using it, the comments suggest understanding of the term to mean thinking as a sole activity, like rumination. The diversity of answers and rationales indicates that this is a subject worthy of active discussion.

7. *Do you bill for the initial contact with the attorney? Always or under certain circumstances? What are they? What criteria do you use to decide this?* Sixty-nine percent said never; 3 percent said always; 28 percent said sometimes. Representative comments: "I won't, because if I refuse the case, then I wouldn't seem greedy and if I take the case, I see it as a perk to 'sell'

[?] my practice and encourage referrals" (subject 10). "No—unless extended >15 minutes" (subject 13). "Yes. If I take the case, I log 'conference' [?] time" (subject 15). "No. Many attorneys do not bill for brief initial contact either" (subject 31). "If only fact-finding, no charge—if advice or resolution of problem, charge" (subject 12). "Time. If the initial conversation is going on too long, I'll cut it off, get preliminary records, and call back to discuss in greater detail" (subject 34). Authors' comments: Again, the variability of response is striking.

Discussion

Diversity of response may constitute the major finding of this pilot study of marginal areas with its relatively small "n" and varied questions. Strong trends were detectable in some areas but not others. Strong trends emerged, for example, in favor of billing for specific library research on the subject of a case, for use of fee agreements, and for subsuming billing for review of a case under billing for travel on that case when the review is done during that travel. Nontrends included thinking about a case and general library research.

The explanatory comments are quoted here at greater length than in our other pilot studies because much more consideration appears to go into the decision-making of these more complex and subtle case dilemmas. In addition, these comments provide valuable insights into our colleagues' reasoning that are not available elsewhere in any systematic form. These generalities aside, consider each of our findings in turn.

The library research queries showed a clear consensus that specific research related to a case was viewed as a billable expense (several respondents stressed the importance of checking with the attorney first). The authors view this as a reasonable rationale.

The finding of a clear majority who favored fee agreements (75%) stands in some contrast to another study[3] in which only 55 percent used them. That other study involved solicited fee agreements from senior members of AAPL collected and analyzed by one of us (T.G.G.); this selection process, wherein a solicited subject might have sent back a note that he or she did not use fee agreements, almost certainly influenced the result. Three subjects in this study noted that they planned to use fee agreements in the future. This may be the result of recent discussions of this topic in the literature.

The question about accepting employment by the second attorney to contact one was the most interesting and received the most varied responses and rationales. A clear trend favored not "jumping sides," as one respondent put it; even though the hypothetical scenario itself did not include any reading of the case, respondents felt that some contamination might be presumed to occur or might appear to have occurred (avoidance of appearance of impropriety). Most respondents would not change their answers even if they had already sent back the case; a minority felt that to take the other side under that circumstance was acceptable, as the selected comments suggest. Some respondents used the offer from the "other side" as the stimulus to issue an ultimatum to the first attorney.

The day rate scenario (billing for 1 day versus 2 days) supports the findings of the earlier review[2] by illustrating that—in a simple situation—experts generally described billing nonredundantly, but redundant billing increased with increasing complexity. A strong majority favored not billing separately for case materials reviewed on flight to that case; this last result runs directly counter to the earlier study, in which more redundant billing was supported by the modal response (Ref. 2, questions 4 and 5, pp 24-25). There appears to be no obvious way to account for this difference.

Billing for thinking about a case is an entry sometimes seen on attorneys' bills but rarely on doctors' bills. Here, as elsewhere, some subjects noted they would bill if specifically allotting time for the thought; others noted that case-related thought most often occurred during other forms of work on the case, such as reading documents.

A clear majority declined to bill for the initial contact with the attorney; those who did or sometimes did often related this decision to either the length of the call or substantive content: was actual work done during the initial contact, such as decision-making, or giving of advice, such as whether the attorney should take the case.

Ethics Issues

Although ethics questions might be extracted from almost all of the questions in the study, three issues stand out as particularly important: the question of billing for thinking about a case, the question of "double billing" (billing twice for what are essentially the same hours), and agreeing to work for the

other side of a case after being contacted but not paid by one side.

Billing for the time the expert spends in case analysis is not inherently problematic, but most of this process goes on during case review, discussions with attorneys, etc. as some of the study responses suggest. The authors suggest that the ethics question arises when the issue is separate billing for thinking alone, unaccompanied by other case-related activity. The argument could be made that part of your value as a professional is your thoughts, ultimately expressed in your opinion; those thoughts come from training and experience as well as case review. But that training and experience are intrinsic to what you offer as an expert; you probably would not bill separately for a course that you took, even if it bore on the case in question, since continuing your education or increasing your knowledge is part of your professional mandate.

The issue of double or redundant billing was first identified in the earlier study[2] when subjects resolved the most complex travel dilemmas (travel on one long trip to two consecutive cases in different cities) by redundant billing: charging *all* expenses to *each* of the two law firms involved, rather than allocating or dividing the costs in some equitable way. This surprising response was the most ethically suspect of the responses described in that study.

In this study's Question 8, in which a hypothetical opportunity was presented to bill redundantly—to bill separately for reviewing a case on the trip to that same case—a markedly different result appeared; 85 percent of subjects rejected redundant billing. The gratification one might feel from this result is somewhat dimmed by the fact that this was an extremely simple issue in contrast to the complexity of the previous study's example; hence, the question of redundant billing remains an unresolved issue, clearly meriting future open discussion.

This pilot study is intended both to pave the way for more extensive research into these practical areas and to open discussion of topics rarely openly addressed in the forensic community. The authors welcome discussion and correspondence about these issues.

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