AUGUST 2009



I don't need to do any stinkin' timekeeping

Attorneys on contingency may not think they need to keep track of billable hours. Here are the reasons you should watch the clock.


Mortimer

MICHAEL MORTIMER

First things first, what's up with the title of this article? It's quite simple actually.

If you saw an article titled "Timekeeping and Billing Programs" what would you do? Admit it, you would leave this monument to good writing lying on the office restroom floor and head off to Starbucks for afternoon coffee.

While your restroom conduct would violate State Bar Rule 3.112c (look it up), I doubt anyone would rat you out. So I am left resorting to gimmicks to get your attention. (Sidenote: I feel so cheap, like the barker outside a certain type of business on Broadway, here in San Francisco.)

The goal of this article is to convince you to drop everything and concentrate on getting your new billing program set up and running. (This is so important that if a federal judge calls your office you have my permission to tell the judge you are very busy with other "stuff" and will get back to Your Honor when you have time. Then with a good slam so the judge hears it, quickly hang up the phone so he gets the message to not disturb you further.)

Teaser

As some of you know, I like to teach by example, otherwise known as supporting what I say with real life experiences, usually my own. Besides, evidentiary support for one's position is far more convincing than trying to baffle one with bull stuff.

The dollar benefit from my using billing software totals in the millions. What makes my experience unique is that the millions are *not* from hourly work, rather it's from using a billing program *on all my contingent cases*. With a billing/timekeeping program I have:

- Made hundreds of thousands of extra settlement dollars for myself and my clients;
- Placated otherwise angered clients who, for example, were mad that their net checks were barely 50 percent of the total settlements; and
- Defeated a $600,000 fee motion award by providing the court with detailed billings.

A little history

From what I have seen over the years, the general rule is that most plaintiff attorneys do not use billing software. Are the lawyers being remiss in their obligations by not using timekeeping programs? Using superficial logic, the answer is always going to be "no;" after reading this article the answer is "yes."

From a historical perspective, even with the advent of computers, plaintiffs' counsel have not rushed to use timekeeping software. This appears to make sense since 99.9 percent of plaintiff cases have been and are still handled on a contingent basis. In "no recovery, no fee" representation, plaintiff lawyers cannot be bothered with billing software nor will they hassle with keeping track of their labor.

Because most plaintiff lawyers have been "brought up" thinking that the only reason to use billing software is to send out monthly statements for services, the above appear legitimate bases to not give billing programs a second thought (nor to read this article).

Another reason plaintiffs' lawyers don't use billing programs is that timekeeping is a time-consuming hassle, especially if you don't do it much. No matter what the program, there's always going to be a learning curve before one gets moderately proficient at using timekeeping software.

Copyright © 2009 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



Perhaps the biggest hurdle toward good timekeeping habits is that the lawyer must discipline him/herself to make contemporaneous entries or at least at the end of each day (just like the big defense firms do).

Because there's no immediate or perceptible financial benefit for the lawyer's faithful timekeeping efforts (such as sending out hourly billings each month), it's difficult to discipline oneself to get used to dealing with timekeeping on a daily basis. IMHO this is the foremost reason plaintiffs lawyers have so easily granted themselves a dispensation from timekeeping duties; it's just so easy to put things off until tomorrow, to the next day, and then sometime after that.

The benefits (with war stories)

OK, enough chit chat. Permit me to convince you that using a billing program is essential in your practice, even if you have never had an hourly case and can't picture yourself ever sending an hourly billing to a client.

Disclaimer: Because of space limitations I can only provide the below information in abbreviated form. And I'll just lay these out as I think of them.

• **Contractual or statutory fees/costs:** Many times a plaintiff's case involves pursuit of a statutory claim that provides for fees and costs to the prevailing party such as in Labor Code wage claims or FEHA discrimination cases. Sometimes there's a contract in dispute where a clause provides prevailing party fees and costs.

In either of these situations you'd better have billing/timekeeping software to keep track of attorney time and costs expended in the case. If you are ever in the fortuitous position of making a prevailing party fee motion, you'd better have plenty of contemporaneous time records to back up your claim.

I don't like using scare tactics to convince anyone to do anything (except opposing counsel, of course.) But in my opinion, if you are plaintiff's counsel handling statutory discrimination claims, and you are not using a billing/timekeeping program, arguably you are walking into a malpractice trap.

Warning: Don't think the solution is to take a couple days at the end of a case to conjure up some estimated time records. Judges can spot fabricated records from across the room (and so will opposing counsel). It's a fact that judges have rejected a motion for fees if the time records look fabricated, after-the-fact (meaning not prepared contemporaneous with the date of performance). In contrast, detailed records (not just brief summaries) legitimize your claims and judges are more likely to award the amount sought in your motion if the records look professional and complete.

• **Fee enhancement or multiplier**: A multiplier is where the court awards an amount in excess of your actual fees; this is a "reward" for your taking a risk in handling an important case on a contingency (public policy, civil rights). Judges also use multipliers to encourage lawyers in the future to take risky cases. Knowing a multiplier might be applied is a strong incentive to take risky cases. Some courts have applied multipliers of two to three times the fees requested in a plaintiff's motion.

The reasons stated above apply equally here when asking the court to use a multiplier to enhance the fees requested in your motion. Motions with detailed time and billing records get granted, sloppy motions unsupported by the record are denied or reduced.

• **Insurance defense**: I know a lawyer who worked only on plaintiff contingent cases. One time, however, I was able to refer him an insurance defense case (Cumis counsel). He did not have billing software so he had to manually complete his monthly bills sent to the carrier.

Since he billed close to $200,000 over 18 months, it was obviously worth the effort, but the task would have been far easier if he had a billing program. (Note: Some carriers actually require retained counsel to possess certain software, including a billing program. Imagine the embarrassment, and lost business if the lawyer had to 'fess up that he did not have the required software.)

• **Settlement enhancement:** I am always surprised at how many plaintiffs lawyers allow defense counsel to belittle the value of plaintiff counsel's services when the parties are talking settlement.

For example, if the defendants agree to pay plaintiff's fees as part of a settlement, defense counsel tries to argue that the fees should be 33.3 percent of the settlement amount, defense counsel assuming that 33.3 percent is the contingent fee the plaintiff will ultimately be paying the attorney. There is no basis to argue that the plaintiff attorney should not be paid a fair hourly rate based on the market, his or her years of experience and in a sense, whatever the market will bear.

Historically, defense lawyers try to pull that crap in court, arguing against a $500,000 fee request, for example, by saying counsel should be limited to a fee award based on the contingent fee the plaintiff will be paying the attorney. I am not aware of any court in California that has agreed with this argument.

What has always worked for me to defeat this defense strategy is submitting to the court detailed printouts of my time spent on a case (and an hourly fee for such services, typically $375). If I did not have those billings attached as an exhibit, the court most likely would accept defense counsel's one-third argument.

Here's another vignette: I represented some employees of a national high-end car dealership on wage claims. After defense lost a demurrer and a few preliminary motions, they filed a writ, which they also lost. Counsel finally threw in the towel and requested to settle. Counsel asked for the billing invoices so they could pay that separately from the settlement being paid to the employees.

Because I had billing software and had been entering my time, I presented a

Copyright © 2009 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



bill to the defendants that ended up with our being paid about $1,500 an hour for our services. I have no doubt that my detailed records legitimized our fee submission (that included work by two attorneys and a paralegal who we costed out at $80 an hour). The defendants paid the $60,000 without blinking an eye.

• **Track and recoup costs:** I am sure you all know that euphoric feeling when a case settles, and it's time to do the accounting and disburse funds. This is typically when plaintiff lawyers get sloppy and fail to account for all costs advanced in a case. The firm fails to make sure that all costs are paid back when the case settles. Everyone is too giddy to pay attention to detail.

When a case settles, this is not the time to be manually flipping through the case file in an attempt to determine what costs were advanced over the past two years, for example.

Besides, manually flipping through a file will result in you or your staff missing items. Anyone can catch the depositions, as those bills are big. But it's easy to not track or add up $500 in postage accumulated over a couple years during the life of a case.

Costs need to be noted in a billing program as they are incurred or come into the office. All billing programs have the capability of keeping track of costs. Just like your time, the key to using such programs is to enter the data as soon as possible after the information arrives in the office (e.g., bills in the mail).

• **Billings can defend against fee motions:** One time I had a difficult contracts case where both sides were using the court to wage a personal battle. At a point my client was willing to settle but a corporation VP who was calling the shots said he would have none of it. Since he was not paying the defense firm's fees and costs, it was no skin off his nose to just say "see you in court."

We lost at trial. Soon thereafter the Defendant moved for $600,000 in fees and costs. One of their main arguments was that we had not conducted formal discovery in the case, which they claimed indicated that we knew the case was meritless. Therefore, the defendants were entitled to their $600,000 in fees and costs.

We countered that the litigation was a "documents case" where little would be gained by depositions. And since we were in federal court the parties had an extensive Rule 26 exchange of over 2,000 documents.

To counter defendants' argument that we did little work on the case (again, because according to defendants we knew the case lacked merit), we submitted our billing and timekeeping records that had over 200 pages of detailed entries. (Because there was a prevailing party fee provision in the statute, not California, I made it a point through the life of the case to keep extremely detailed records in the event a judge might see the records some day.)

I am sure the judge was impressed with the entries in the timekeeping records. Many entries were made in the dead of night and on weekends, indicating hard work on the case. Individual entries included my detailed thought processes, case cites and matters warranting further investigation.

I can't second guess the District Judge's ruling that *denied* defendants' entire $600,000 fee motion, but I have to wonder how the judge would have ruled if I did not enter the detailed billings as an exhibit to support my statements about how much effort we had put into the case. I think the billings influenced the judge significantly.

• **Your personal log and diary:** This is an unconventional use of a billing program, but I like doing it. What I do is open a new client matter in the billing and timer program. I am the client, and I am the attorney in the case. What I am doing is using my billing program as a phone log, daily diary of events as they occur and to see how I am spending my time.

Because I am using the program as a log, I make entries very detailed. Later I can use the program's search feature to look for the information I need.

Recommended program – RTG Bills

Back in 1993-1995 our firm used Timeslips and Tabs3. After the firm disbanded I went looking for a billing program that did not cost $500 to $1,500.

For about two years whenever I had time I would use the Internet to look for a billing program that was easy to use, feature-rich and inexpensive. It was a long road to where about ten years ago, via a Google search, I found a program called "RTG Bills."

I am not going to review the program since the point of this article was showing you why as plaintiff counsel you still need to use billing/timekeeping software, *daily*! I will mention, however, the main things I like about RTG Bills. And consider this: Since finding RTG Bills I have not ever seen a reason to look elsewhere for an alternative to the program, I like the program that much. So RTG Bills has kept me happy for 10 years. In your search for billing software you can take that fact into consideration, or not.

Here's a quick list of what I like about RTG Bills ("RTG" is the developer's initials).

• Established company. RTG Software has been on the Net since 1996. That's ancient times in Net years.
• Support: Excellent. The online help is thorough.
• Low price ($95); $15 for each additional timekeeping attorney.
• FREE upgrades for first year, then $20 for upgrades after that.
• Easy-to-use interface. And it's difficult to hurt your data.
• Backups – Can be done with a couple clicks.
• Editing of records allowed, spellchecking too (so we don't look like morons).
• 45-day FREE trial of the ***full program***, NOT a scaled down demo.
• Immediate download available. No need to wait for a CD to arrive in the mail.

Copyright © 2009 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



That's a handy way to do things. Try out the software for 40 days, then contact RTG and purchase the program before the program deactivates.

Here is a link to RTG Bill's Web site: http://tinyurl.com/billingprogram

Conclusion

I have shown you a number of ways that using billing/timekeeping has been financially beneficial to my office. If you reap the benefits of any one of the listed uses then it will have been worth the effort to train yourself to use these kinds of programs.

Additionally, I have done all the research for you and provided information on what in my opinion is an excellent timekeeping/billing program. Since the cost of RTG Bills is so low there's no excuse for failing to make the investment in the software.

Matter of fact, don't take my word for it. Log-on the RTG Software site and download the FREE 45-day demo. Within 10 minutes of reading this paragraph you can be tinkering with the program on your computer. How cool is that? Very!

Michael Mortimer is a federal court trial lawyer in San Francisco. He is author of two upcoming books Welcome To The World Of Big Time Litigation *and* In Camera Guide For Lawyers, From Underwear To Appellate Briefs. *He teaches torts, contracts and civil procedure. He designed and maintains his Web site www.employlaw.com He is a graduate of UC Berkeley. You can email Michael Mortimer at sanfrancisco@att.net.*

Copyright © 2009 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**