

## KEEPING ACCURATE TIME RECORDS

By Franklin R. Garfield

It is the rare attorney who will never have a fee dispute. A recent case emphasizes the importance of keeping accurate and contemporaneous time records.

In *Taylor v. County of Los Angeles* (June 10, 2020), an attorney, Traylor, who represented a grieving family in a wrongful death action for a month in September, 2016, filed a lien for \$308,000 in attorney's fees after the case was settled by subsequent counsel for \$7 million.

In support of his claim, Traylor submitted two invoices with a one-line entry for "legal research and investigation" that were internally contradictory claiming Traylor's total hours as both 130 and 180.

In January, 2019, after repeated requests to show his work, Traylor eventually submitted a third invoice for 200 hours along with a three-page itemization. However, Traylor never turned over his files.

The appellate court noted that Traylor made three different claims about his 2016 time on the case: 130 hours, 180 hours and (after he heard about the \$7 million settlement) 200 hours. The court labeled this a "triple inconsistency."

Noting that more than two years had elapsed between the work Traylor allegedly performed in 2016 and the itemized billing record he submitted in January, 2019, the court concluded: "The reasonable inference is Traylor's itemization was not contemporaneous record keeping but a time reconstruction after a delay of years."

The court affirmed the trial judge's award of \$17,325 based on three factors: First, there was no record of the hearing so the appellate court assumed the trial judge's calculation method was correct. Second, Traylor never turned over his case files, leading to the inference that he had no case files and did no work.

Third, Traylor never explained the discrepancies in his supposed record keeping.

Based on the foregoing, the appellate court concluded that the trial judge's decision to give Traylor something rather than nothing was "a discretionary act of grace."

While the facts of this case are extreme, all lawyers would do well to learn (or relearn) the importance of keeping contemporaneous time records and sending itemized bills.

Lawyers are not required to keep contemporaneous time records. They can testify from memory to the number of hours they devoted to a case. However, even though testimony based on personal knowledge can be relevant and admissible, it may be of poor quality: Delays in record keeping diminishes accuracy. The *Taylor* court noted: "If you are a month late, it is hard to

reconstruct a bygone day in six-minute intervals. Now increase the delay to two years. . . . Unless you kept detailed contemporaneous records according to some reliable method, common experience will lead observers to regard your tardy and self-serving six-minute claims as largely fictional.”

The *Taylor* court’s opinion reminds practicing lawyers that contemporaneous time records are the key to accuracy, and that accuracy is a professional virtue and a systemic concern.

The court’s second admonition focuses on the importance of time records that are itemized.

To begin with, lawyers are required by statute to itemize the time they spend on a client’s matter and the related charges. Section 6148 of the *California Business and Professions Code* states in pertinent part as follows: “(b) All bills rendered by an attorney to a client shall clearly state the basis thereof. Bills for the fee portion of the bill shall include the amount, rate, basis for calculation, or other method of determination of the attorney’s fees and costs.”

Moreover, depending on whether a lawyer elects to keep time in tenths of an hour or quarters of an hour, services rendered should be broken down as far as possible. Lawyers should avoid block billing.

Block billing is uniformly disapproved because it allows a lawyer to conceal the time spent on each task, and prevents the determination by the client and others of whether individual tasks were performed within a reasonable time. There are commentators who contend that block billing violates Section 6148’s requirement that all bills rendered to a client shall clearly state the basis thereof. The basic rule is that courts have wide discretion to assign a reasonable percentage to the block billed entries, disregard them altogether, or determine that other evidence is sufficient to substantiate the hours aside from the block billing entries. In *Bell v. Vista Unified School Dist.* (2001), the Court stated that “the trial court *should* exercise its discretion in assigning a reasonable percentage to the entries, or simply cast them aside.”

In a mandatory fee arbitration, it is the lawyer’s burden to provide additional support for the services included in block billing, which may include testimonial and documentary evidence. After consideration of such additional support, or lack thereof, arbitrators may assign a reasonable percentage to the block-billed entries, disregard them altogether, or determine that other evidence is sufficient to substantiate the hours aside from the block-billed entries. Arbitration Advisory 2016-02 (Replaces and supersedes Arbitration Advisory 2003-01).

Clients are statutorily entitled to itemized bills that inform them with respect to the time and charges attributable to each service rendered. From a lawyer’s point of view, keeping contemporaneous time records and listing each service separately minimizes the possibility of a fee dispute and maximizes the lawyer’s ability to defend the billings if there is a fee dispute.

*Franklin R. Garfield has arbitrated attorney-client fee disputes for over 40 years.*