ENVIRONMENTAL CLAIMS JOURNAL
https://doi.org/10.1080/10406026.2020.1843289

I Am Not Paying for That! Lawyers' Bills and the Clients Who Dispute Them

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ABSTRACT

The characteristics of environmental litigation — generally spanning several years, including many potentially responsible parties, complex fact patterns, commercial agreements, and lengthy operational histories — lend themselves to both unethical, intentional billing abuses and unintentional invoicing mistakes. The complexities of environmental litigation, however, do not relieve attorneys of their obligation to accurately bill their time. This puts environmental litigators in a difficult position to simultaneously succeed at litigation and manage their clients' largest concern — litigation costs. This article explores proper and improper billing practices, how computer-assisted e-discovery technology can keep litigation costs down, and how clear communication plays a key role in minimizing billing disputes.

Environmental litigation: a recipe for billing disputes

In the realm of legal services, the billable hour still reigns supreme. Yet, to say that this invoicing model is unpopular would be a gross understatement. The billing process is often a major source of conflict between lawyers and clients. The tension increases exponentially when an insurance carrier is added into the mix, especially in cases when *Cumis* counsel is appointed due to a conflict between the insurer and the insured.[1] In a *Cumis* counsel situation, the parties are often considerably suspicious of each other. The carrier representative has likely recommended her "panel" counsel to the insured, who has in turn rejected the recommendation. The insured often assumes the insurer is seeking a way to avoid coverage. Since the carrier is footing the bill, she may be leery that the counsel chosen against her wishes will use the situation to over-bill. This creates an environment where the parties are likely to argue about the scope of representation, the rates charged, and the need for experts. The carrier representative is further rankled each month when the bill arrives from counsel she did not select to

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[1] *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.* (1984) 162 Cal. App. 3d 358. In California it is codified in Cal. Civ. Pro. §2860 (Westlaw 2020).

handle the case. The carrier insists that counsel follow her company's billing guidelines and the insured refuses, claiming the guidelines are not applicable to *Cumis* counsel.

While many of the problems described are absent in non-*Cumis* counsel situations, billing disputes of any kind are often the lightning rod that can lead to the dissolution of the lawyer-client relationship or a perennially dissatisfied client. The primary difference between *Cumis* and non-*Cumis* billing disputes is that clients who retain counsel of their own selection are free to sever relationships with their attorneys at any time over billing disputes.

Inevitably, some of the most vexing billing problems arise in environmental litigation. Regardless of whether the contaminated site is large or relatively small, droves of potentially responsible parties will become involved either as original defendants or third-party defendants. These cases encompass complex commercial agreements, lengthy operational histories, and challenging fact patterns. Above all, environmental litigation is document-intensive and requires the efforts of large teams who can cull, review, and analyze the records to determine if defenses or counterclaims are available.

The complexity of large-scale environmental cases can sometimes lead to invoicing mistakes or even intentional billing abuses. However, none of the complexities presented by these cases nullify the obligation of counsel to accurately bill their time. It is therefore critical for attorneys to follow a consistent and systematic approach to billing practices to avoid creating the perception of foul play. At the same time, attorneys need to keep litigation costs down wherever possible. In document-driven litigation, predictive analytics technology makes this possible.

Billing disputes between lawyers and clients date back to the genesis of the legal profession, and those between insureds and *Cumis* counsel can be especially fraught. By following the billing practices roadmap below, insurers, their clients, and counsel will keep their professional relationships intact while simultaneously achieving the client's litigation goals.

What is proper?

Clients frequently question legal bills and request justification for billing entries. As a client's fiduciary, counsel are professionally responsible for ensuring clients understand their billing procedures and rates. Put simply, an attorney may not recover fees in excess of what was explained to the client and to which the client consents.

Proper billing practices serve a different function for the law firm and the client. For the law firm, the purpose of legal billing is to receive compensation for the services rendered on behalf of the client. This

purpose does not change when an insurance carrier is paying the bills and judicial opinions do not differentiate between proper billing practices for insurance carriers and individual clients. For the client, the purpose of a legal bill is to explain what legal services were rendered and why.

To be viable, a bill for legal services must, at a minimum, clearly state what work was performed, how much time it took, who performed the service, and how the service helps the client achieve his or her end-goal. The bill needs to include enough detail for the client to determine whether the services merit payment. Certainly, clients will seek to reduce their bills if they are unable to determine the substance of the work performed; and the burden is on the law firm to demonstrate that every tenth of an hour spent on a task was reasonable, necessary, and merits payment.

Acceptable billing practices are not difficult to ascertain. Court opinions, treatises, law review articles, ethical considerations, and other reliable sources on this topic are widely available; and the standards do not materially fluctuate between the various forums.

For example, in California, Section 6148(b) of the California Business and Professions Code is an excellent resource. It states:

> 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. Bills for the cost and expense portion of the bill shall clearly identify the costs and expenses incurred and the amount of the costs and expenses.

The 2002 ABA Model Law Firm Policy Regarding Billable Hours describes the detail necessary for attorney billing.

> In recording and describing time, lawyers should put themselves in the position of the client receiving the bill, and ask "Does this give me the detail I need to evaluate the quality and quantity of the services provided?" Thus, sufficient detail must be provided. In the absence of further instructions from the client … meaningful but not exhaustive detail should be included. Thus, a 4.35-hour entry which says merely, "Research", or "Legal Research" or "Research Summary Judgment Brief" is insufficient. A more appropriate entry would be "Research statute of limitations issue under Alabama and New Jersey law for summary judgment motion."

Although preparing proper billing entries seems like a straightforward task, it is not. The best way for attorneys to ensure they are employing proper billing practices is to fully understand the common pitfalls of legal billing.

What is not proper?

A large majority of attorneys don't intentionally engage in unethical billing practices. They bill their time honestly and gradually succumb to the common pitfalls of legal billing.

Although published 25 years ago, Brad Malamud's 1995 *Defense Counsel Journal* article, "How Times Have Changed: A Systematic Approach To Billing," remains relevant.[2] Similarly, the 2016 *University of Arkansas at Little Rock Law Review* article, "Transparency on Legal Costs and Establishing Best Billing Practices Through Billing Guidelines: Fostering Trust and Transparency on Legal Costs,"[3] provides a comprehensive evaluation of best billing practices.

Both articles identify common billing "red flags" such as:

- Nonspecific billing descriptions;
- Block billing time;
- Time padding;
- Vague billing descriptions;
- Duplicative billing descriptions;
- Use of minimum or standard time increments;
- Excessive daily hours; and
- Weekend billing.

Both articles also identify several improperly billed tasks such as:

- Intra-office conferencing;
- Training;
- Clerical work performed by paralegals or administrative staff;
- Organizing files;
- Excessive research; and
- Billing to the wrong matter.

Additionally, insurance carriers' billing guidelines will often explicitly state that attorneys will not be compensated for carrying out secretarial functions, such as "file creation," "photo copying," "organizing files," or "setting depositions."

The complex and document-driven aspects of large-scale environmental litigation commonly result in vague billing entries, overstaffing, and block billing. There is a significant body of case law emerging from the Portland Harbor Environmental Litigation that clarifies what constitutes proper billing practices.[4] The Portland Harbor Environmental Litigation is one of the largest, if not *the* largest, environmental cases in history. The matter involves hundreds

[2] Brad Malamud, *How Times Have Changed: A Systematic Approach to Billing*, 62 Def. Couns. J. 583 (1995)

[3] Laura Johnson, Howard Tollin, Marci Waterman, Sarah Mills-Dirlam, *Establishing Best Billing Practices Through Billing Guidelines: Fostering Trust and Transparency on Legal Costs*, 39 U. Ark. Little Rock L. Rev. 1 (2016)

[4] *Ash Grove Cement Company v. Liberty Mutual Insurance Company* ("*Ash Grove I*"), 2013 WL 4012708. *Ash Grove Cement Company v. Liberty Mutual Insurance Company* ("*Ash Grove II*"), 2014 WL 837389; *Century Indem. Co. v. Marine Group, LLC.*, 2015 WL 810987.

of parties, an area comprising several miles of land, at least a century of disposals, more than a decade of litigation, natural resource as well as cost-recovery claims, and a remediation plan that may exceed $2 billion. Attorneys' fees in cases of this magnitude could easily exceed a million dollars.

As discussed above, each billing entry must state what work was performed, how much time it took, and how the service benefited the client such that s/he can determine whether the service merits payment. Courts have specifically addressed billing entries for document review in environmental litigation.

In *Ash Grove I*, Judge Hernandez disallowed almost 300 hours of billed time relating to "document review." According to Judge Hernandez, the problem was that the descriptions in the statements did not provide the level of detail he needed to "determine whether the amount of time billed is reasonable for the described task."[5] Judge Hernandez reasoned that vague billing entries and block billing "pushes the analysis into the realm of speculation."[6] Plaintiff unsuccessfully argued that accurate costs for document review could be determined reasonable simply by dividing the number of documents reviewed by the time that it took to review them.

A March 25, 2016 California Bar Association Arbitration Advisory (2016-2) entitled "Analysis of Potential Bill Padding and Other Billing Issues" is consistent with the directives Judge Hernandez pronounced in *Ash Grove I*. The 2016 Arbitration Advisory recognized that, like in large environmental matters, there is often significant time billed for "reviewing documents." To ensure a client can determine "whether the amount of time billed is reasonable for the described work," attorneys should separate large documents or "document review" entries over an hour into distinct billing entries; include the document name or type in the billing entry; and include how many pages make up each document reviewed. For example, "7.5 h - Review documents" should be replaced by separate entries as follows: "Review a 197-page Phase II environmental assessment to defend expert deposition;" "Review a 78-page expert report on groundwater transport to prepare to take expert deposition;" and "Review a 93-page Phase I assessment to prepare for expert deposition." The foregoing examples give the client information to determine not just what the attorney was doing, but also the reason for the work.

Another common client complaint concerns overstaffing, such as multiple lawyers from the same firm billing for the same task. This may occur when a client is charged for multiple attorneys attending a court hearing, deposition, or teleconference. Generally, the more staff on a case, the higher the bills will be. The court in *Ash Grove II* analyzed the issue

[5] *Ash Grove I* at ω8.
[6] *Id.* at ω10

of overstaffing and reduced defendant's attorney's fees where multiple attorneys participated in a task by only allowing hours billed for the presence of plaintiff's lead counsel, the attorney with the highest billing rate. The court reasoned that, "[a] party is certainly free to hire and pay as many lawyers as it wishes, but cannot expect to shift the cost of any redundancies to its opponent."[7]

It follows that there are certain instances where it is proper for multiple attorneys to participate in a single task. The 2016 Arbitration Advisory recognizes that "overstaffing" is a factual determination for the law firm to justify given the complexity of a case, significance of the task, the litigious nature of the parties, the amount of money in question, and the levels of experience the client requires of its counsel. Law firms defending a client in environmental litigation matters should consider these factors. For example, in a case spanning several years and on the brink of trial, it is likely proper for multiple attorneys to work on a single motion for summary judgment regarding technical issues, such as Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") Section 107 and 113 cost allocation among parties or CERCLA's preemption of plaintiff's common law claims.

Similarly prevalent in large-scale litigation is block billing, where two or more billable activities are combined in a single time entry. An example would be 4.5 h for "Review expert report on National Contingency Plan compliance, research National Contingency Plan compliance, call with expert regarding the same." In receiving this billing entry, a client would be unable to determine how much time each task took to complete. Further, this entry provides an attorney the opportunity to "pad costs" — the act of overstating the amount of time spent for the services rendered.

In 2007, the Ninth Circuit Court of Appeals unequivocally condemned block billing and approved a 20% reduction of all fees that were block billed.[8] The court opted to adopt the "middle range," a 20% across-the-board reduction, based on a report by the California State Bar's Committee on Mandatory Fee Arbitration, which concluded that block billing "may increase time by 10% to 30%."[9] In other cases, payment reductions of up to 30% have been approved based solely on block billing. Courts have gone so far as to hold that an attorney's practice of block billing "lump[ed] together multiple tasks, mak[es] it impossible to evaluate [their reasonableness]."[10]

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[7] *Ash Grove II* at ω5

[8] *Welch v. Metropolitan Life Insurance Company*, 480 F.3d 942, 948 (9th Cir. 2007). The court also imposed a 20% across-the-board reduction of hours billed at quarter-hour increments, rather than tenth of an hour increments, because it resulted in a request for excessive hours.

[9] The State Bar of California Committee on Mandatory Fee Arbitration, Arbitration Advisory 03–01 (2003)

[10] Role Models Am., Inc. v. Brownlee, 353 F.3d 962, 971 (D.C.Cir.2004)

Given such universal condemnation, the use of block billing is a big red flag for the billing reviewer that the law firm failed to follow the rules.

Subpar billing statements and practices justifiably breed mistrust between the law firm and the client or carrier. Yet it is important to remember that mistakes in billing do not necessarily mean that the billing entry should not be paid or the attorney was trying to obtain compensation for improper work. The client or carrier may be willing to correct such mistakes if attorneys promptly address their concerns. Repetitive "mistakes," however, could result in a termination of the attorney-client relationship or disciplinary action by the state bar. Therefore, attorneys need to follow a clear process and conduct careful quality assurance reviews to ensure they are complying with proper billing standards and the applicable standard of care.

Law firms should embrace technological advances to keep legal costs down

One of the most expensive aspects of environmental litigation is discovery, which naturally involves extensive document review. A large case could require a law firm to review upwards of 10 million documents at the start of litigation to determine if defenses or counterclaims are available. The legal bills for document review alone could be in the millions. The Portland Harbor Environmental Litigation is a perfect example. Due to the mass adoption of technology, personal computing, and the Internet, information once solely available in hard copy is now electronically stored. Lengthy, document-driven litigation puts law firms in a difficult position. On one hand, law firms are working to protect their client's interests — which involves reviewing each document available to them — while managing the client's largest concern to control costs. Some law firms respond by hiring droves of associates to focus on document review, and others ask their assigned attorneys to review each document line by line.

There is, however, a better solution — computer-assisted e-discovery technology. Courts have recognized the shortcomings of law firms' past methods and have endorsed computer-assisted or predictive analytics systems. In fact, "… parties can (and frequently should) rely on latent semantic indexing, statistical probability models, and machine learning tools to find responsive documents."[11] Although judicial interest in computer-assisted discovery technology stems from a distrust of the accuracy and completeness of prior methods, it also keeps document review

[11] *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency*, 877 F. Supp. 2d 87, 109 (S.D.N.Y. 2012).

costs down and allows the attorneys assigned to the case to focus on case strategy, motion practice, and client communication.

The decision to utilize technology to sift through discovery leads another issue regarding what computer-assisted e-discovery technology platform the law firm should use. There are numerous factors to consider when evaluating and selecting an e-discovery culling and review platform. The main factors to consider are:

- Should the law firm bring the platform in-house or contract with a third-party vendor;
- The platform's ease of use;
- Availability and willingness of the company to provide technical support;
- The platform's capabilities (i.e. how it handles duplicates and "near duplicates," its search capabilities, and its use of analytics to develop search terms);
- Pricing structure;
- The platform's ability to limit classes of users' access to certain fields/documents; and
- The platform's ability to "batch out" documents for assignment, alleviating the burden on the supervising staff.

The first consideration, bringing the technology in-house or hiring a third-party vendor, will likely be the biggest issue. There are pros and cons to each. Bringing the technology in-house requires teaching attorneys, which likely includes some technology skeptics, how to use the software. Hiring a third-party e-discovery vendor is generally more expensive than bringing the technology in-house and will require client input and a bid solicitation process in order to find the most cost-effective vendor. Bringing the platform in-house allows the law firm the client hired to protect their interests by retaining control over the document review process. By contrast, outsourcing the document review and collection process permits attorneys to focus solely on legal arguments and strategy. Whether a vendor or in-house system is the best fit for a firm, computer-assisted e-discovery software reduces the need for firms to staff cases with numerous associates, predictably leading to higher document review bills.

Even where a law firm regularly employs e-discovery technology to keep costs down, there is plenty of room for a client to become disgruntled about bills. In environmental litigation, invoices associated with document collection, review, and analysis are typically sent to a client in the early stages of litigation because the Federal Rules of Civil Procedure, specifically Rule 26(f), requires parties to meet and confer "as soon as practicable" to

consider discovery issues, such as preserving discoverable information and developing a discovery plan.

Many attorneys view the Rule 26(f) conferences as a routine obligation that serves little purpose. However, a well-planned Rule 26(f) conference can reduce discovery, document collection, and document review expenses. Attorneys should utilize the Rule 26(f) conference to engage in meaningful discussions with their client and the opposing party's counsel regarding:

- Custodians of records and limiting those custodians;
- Custody control issues regarding data from former employees, affiliated companies, or other third parties;
- The cost of retrieving data;
- Record retention and disposal procedures;
- What sources of data are "not reasonably accessible;"
- The volume of data that is reasonable to review;
- Methods the parties might use to cull data, including date restrictions, search terms, and how to avoid duplication; and
- The timing and format of document production.

While a Rule 26(f) conference will provide a forum for all parties to better understand the document review-related issues that may arise in handling a complex environmental case, there will generally be the need for a protective order to safeguard proprietary information. This can be another source of billing frustration as it will likely require extensive negotiations. For example, the parties will need to negotiate a "clawback" provision providing procedures for returning privileged documents that may have been inadvertently produced with the millions of documents exchanged. The key to avoiding the frustrations caused by this process is to keep the client well-informed and involved, and garner his or her support.

The best tool for avoiding billing disputes — clear communication

As a fiduciary of a client, attorneys are required to keep their clients informed of all developments in a given cases. For example, the California Rules of Professional Conduct, Rule 1.4 require attorneys to "… reasonably consult with the client about the means by which to accomplish the client's objectives in the representation" and "… keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed …"

Although communicating case developments is one of many attorney obligations, engaging in frequent and consistent communication with a client helps avoid the tension and confusion that can stem from legal billing. Most importantly, an attorney can obtain buy-in from the client so there are no surprises when the monthly bill arrives.

A well-informed client coupled with detailed billing entries is the right formula for avoiding billing disputes. For example, a client who receives a bill for fifty hours of document review — even if separated into distinct billing entries, properly identifying how many pages were reviewed, and what the documents were — will be alarmed. To reduce the unease caused by large document review billing entries or a bill for a third-party document review vendor, attorneys should, at the outset of the case, explain that the litigation will be document-driven and require extensive document review. If and when large quantities of documents are produced, the client should be notified.

If a client is aware that success in the litigation will require extensive document review, is advised when the document review begins, and ultimately rubber-stamps a litigation strategy, there will be no reason for billing disputes and unnecessary tension.

Conclusion

Environmental litigation gives rise to conditions that can lead to billing disputes. Such disputes are a source of real and potential conflict that erode the relationship between attorney and client. Billing disputes do not benefit anyone and detract from the law firm's and client's mutual end-goal — a favorable litigation outcome. The legal and practical burden falls squarely on counsel's shoulders to follow readily available and clear rules on how billing should be properly done.

Notes on contributors

Fred M. Blum is a founding partner at Bassi Edlin Huie & Blum who has been litigating cases for more than 30 years. His complex litigation practice is concentrated in the areas of environmental, employment, and constitutional law. Fred also devotes large parts of his practice to business litigation, civil rights, and product liability matters. He has tried numerous cases in a wide variety of areas, including anti-trust, mass toxic torts, civil rights, and toxic property contamination. In representing individuals, government entities, or Fortune 500 companies, Fred has been uniquely successful whether acting on behalf of plaintiffs or defendants. He has obtained defense verdicts in mass toxic torts and property contamination cases as well as plaintiff verdicts in the multi-million-dollar range. Additionally, he has successfully litigated environmental matters ranging from CERCLA to RCRA, as well as trademark, unfair competition, and white-collar crimes. Fred has been

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Adding to his extensive litigation experience, Fred has specialized knowledge in the billing practices considered acceptable by insurers, insureds, individuals, and corporate clients. He has reviewed thousands of bills to determine whether they meet clients' requirements and keeps himself educated on the latest literature regarding proper billing practices. Fred also frequently serves as an expert in litigation where the fees of other counsel have been at issue.

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Jeremy's professional background includes serving as an attorney in the Office of the Chief Counsel at the State Water Resources Control Board. He also gained legal experience with a real estate development company, a construction firm, the Office of the Attorney General; and two law firms.