

Legal Ethics and Fee Arrangements

Michael Downey

November 2024

Connectivity/Technical Issues

Audio Issues – If you have audio issues on computer, please try accessing by phone at

(701) 801-6121

****No Access Code Required****

If problems persist, contact Paige Tungate at ptungate@DowneyLawGroup.com

Watch the slides at <https://join.freeconferencecall.com/downeycle>

Download the slides at <http://www.downeyethicscle.com/>

Questions – Please submit questions during the program by chat or during/after the program by email to Paige Tungate at ptungate@downeylawgroup.com

CLE Information

- *Kansas Credit* – If you are seeking Kansas credit, you will need to enter the two Attendance Verification Words and your Kansas Bar information into the Program Survey
 - Please complete the Survey *within this week*, so we can ensure you receive proper credit
- *Certificate of Completion* – Available through the Program Survey
- Three ways to access Program Survey:
 1. Link available in the *CHAT*
 2. Link available in *the slides* (here or at www.DowneyEthicsCLE.com)
 3. Link sent to you in an *email within 30 minutes* of program ending



<https://www.surveymonkey.com/r/fees1124>

What can make you WEALTHY but
also make you a NON-LAWYER?

Ethical (and Background) Issues Relating to Fee Arrangements

Basic Principles

1. Lawyer is fiduciary of client
 - Client controls results of representation – Rule 4-1.2
 - Refusal to settle is not “cause” to withdraw
2. Client has (absolute) right to terminate lawyer
3. Client has (absolute) right to terminate case
4. Lawyer’s financial interests are subordinate to #1-3

Rule 4-1.5(a)

A lawyer shall **not** *make an agreement for, charge, or collect* an *unreasonable fee* or an unreasonable amount for expenses.

Rule 4-1.5(a)

The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the **time and labor** required, the **novelty and difficulty** of the questions involved, and the **skill** requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will **preclude other employment** by the lawyer;
- (3) the **fee customarily charged** in the locality for similar legal services;
- (4) the **amount involved** and the **results obtained**;
- (5) the **time limitations imposed** by the client or by the circumstances;
- (6) the **nature and length of the professional relationship** with the client;
- (7) the **experience, reputation, and ability of the lawyer** or lawyers performing the services; and
- (8) whether the fee is **fixed or contingent**.

What is “Not Unreasonable”?

	1 hour, \$1M recovery	1 hour, \$0 recovery	1,000 hours, \$1M recovery	1,000 hours, \$0 recovery
Hourly - \$300 per hour	\$300	\$300	\$300,000	\$300,000
Contingent - 40%	\$400,000	0	\$400,000	0
Fixed - \$25K	\$25,000	\$25,000	\$25,000	\$25,000

Expenses – Rule 4-1.5 cmt [1]

Rule 4-1.5(a) also requires that **expenses** for which the client will be charged **must be reasonable**.

A lawyer may seek reimbursement for the cost of services performed in-house . . . or for other expenses incurred in-house . . . either

- by charging a reasonable amount to which the client has agreed in advance or
- by charging an amount that reasonably reflects the cost incurred by the lawyer.

Principles for Expenses

- Legal fees generate profits
- Expenses should not generate profits
- Expense billing often irritates clients

What Are “Unreasonable Expenses”

Generally a lawyer may not charge clients more than the lawyer pays for the expense

- Mark-ups on contract employees
- “Cash back” arrangements

Reasonableness Problems

- Charging more than **AGREED**
- **FRAUDULENT** time entries and expenses
- **OVERREACHING** fee arrangements
- Charging **services** as **expenses**

- Charging a lot for little gain/value/progress (*see* Rule 4-1.3)

Fee Agreement – Rule 4-1.5(b)

- The **scope of the representation** and
- the **basis or rate of the fee and expenses** for which the client will be responsible
- **shall be communicated to the client**, preferably in **writing**,
- **before or within a reasonable time after commencing** the representation,
- except when the lawyer will charge a regularly represented client on the same basis or rate.
- Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

Third-Party Payers – Rule 4-1.8(f)

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is **no interference** with the **lawyer's independence of professional judgment** or with the **client-lawyer relationship**; and
- (3) information relating to representation of a client is protected as required by Rule 4-1.6.

Rule 4-5.4(c)

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another **to direct or regulate the lawyer's professional judgment** in rendering such legal services.

Missouri Informal Opinion 2018-12

Question: May Attorney accept payment of a client's fee from someone other than the client? If so, to whom should Attorney refund any unearned fee at the termination of representation?

Informal Opinion 2018-12

Answer

Attorney must not accept compensation for representing a client from someone other than the client (including a co-client or indemnitor) unless Attorney complies with Rule 4-1.8(f). The client must give informed consent, the arrangement must not interfere with Attorney's independence of professional judgment or with the client-lawyer relationship, and the client's confidential information must be protected as required by Rule 4-1.6.

In obtaining the client's informed consent, Attorney should discuss with the client all information that will allow the client to make an informed decision, including, but not limited to: to whom any necessary refund should be issued at the termination of representation; that Attorney will follow the procedure in Rule 4-1.15(e) and Comment [8] for the handling of disputed funds if both the client and the third-party payer claim an interest in the funds; and the possible impact on the representation if the payer demands a return of the funds before the scope of the representation is concluded. If the fee arrangement creates a conflict of interest for Attorney, Attorney must comply with Rule 4-1.7(b). It should be noted that not all conflicts of interest are consentable. See Rule 4-1.8, Comments [11] and [12].

Missouri Informal Opinion 990130

QUESTION: Attorney would like to put a binding arbitration provision in Attorney's fee agreement providing that all disputes between Attorney and Attorney's client would be arbitrated. Is this prohibited?

ANSWER: Attorney may include a binding arbitration agreement in Attorney's fee agreements without violating Supreme Court Rule 4. However, under Rules 4-1.4(b) and 4-1.7(b), Attorney has an obligation to orally point out this provision and to explain it, to the extent necessary for the individual client.

Changing Fee Arrangements

ABA Opinion 458 (2011)

- Periodic, incremental increases in a lawyer's regular hourly billing rates are generally permissible if such practice is communicated clearly to and accepted by the client at the commencement of the client-lawyer relationship and any periodic increases are reasonable under the circumstances.
- Modifications sought by a lawyer that change the basic nature of a fee arrangement or significantly increase the lawyer's compensation absent an unanticipated change in circumstances ordinarily will be unreasonable.

Restatement of Law Governing Lawyers § 18

- (1) A contract between a lawyer and client concerning the client-lawyer relationship, including a contract modifying an existing contract, **may be enforced by either party if the contract meets other applicable requirements**, except that:
 - (a) if the contract or modification is made beyond a reasonable time after the lawyer has begun to represent the client in the matter (see § 38(1)), **the client may avoid it unless the lawyer shows** that the contract and the circumstances of its formation were **fair and reasonable to the client**; and
 - (b) if the contract is made **after the lawyer has finished providing services**, the **client may avoid it if the client was not informed of facts needed to evaluate the appropriateness** of the lawyer's compensation or other benefits conferred on the lawyer by the contract.
- (2) A tribunal should construe a contract between client and lawyer as a **reasonable person in the circumstances of the client** would have construed it.

Missouri Rule 4-1.8(a)

A lawyer shall not enter into a **business transaction with a client** or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Warning re: Conversion Clauses

Example: Matter is contingent, but if client terminates lawyer, lawyer is entitled to hourly fees

Problems

- Restriction on right to terminate lawyer
- Possible public policy concern on handling of terminated representation

Hoover Slovacek LLP v. Walton (Tex. 2006)

In this case, we must determine whether an attorney hired on a contingent-fee basis may include in the fee agreement a provision stating that, in the event the attorney is discharged before completing the representation, the client must immediately pay a fee equal to the present value of the attorney's interest in the client's claim.

We conclude that this termination fee provision is **contrary to public policy and unenforceable**.

Nehad v. Mukaskey (9th Cir. 2008)

[I]t is generally held that a lawyer may not withdraw merely because a client refuses to settle.

and

[I]t is generally held that the lawyer may not burden the client's ability to make settlement decisions by structuring the representation agreement so as to allow the lawyer to withdraw, or to ratchet up the cost of representation, if the client refuses an offer of settlement.

In-Kind Payments

Missouri Rule 4-1.8(a)

A lawyer shall not enter into a **business transaction with a client** or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are **fair and reasonable** to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is **advised in writing of the desirability of seeking** and is **given a reasonable opportunity to seek the advice of independent legal counsel** on the transaction; and
- (3) the client gives **informed consent, in a writing signed by the client**, to the **essential terms of the transaction** and the **lawyer's role in the transaction**, including whether the lawyer is representing the client in the transaction.

Missouri Informal Opinion 2005-0041

Attorney A was asked to represent Client on separate felony matters.

Client's Mother and Father own property which is free and clear. [Mother and Father are willing to execute a deed of trust and a note payable on the property.](#)

Attorney A explained to Mother and Father that Attorney A does not represent them and that Mother and Father would execute the note payable and deed of trust. Attorney A would prepare deed of trust and note payable but would have Attorney B, from a different firm, review the documents with Mother and Father.

Legal fees for Attorney B would be advanced by Attorney A's firm but would ultimately be charged to Client. An employment contract outlining the above would be executed by Attorney A and Client.

Informal Opinion 2005-0041

Answer

ANSWER: Attorney A may take a deed of trust as long as Attorney A closely follows the requirements of Rule 4-1.8(a).

Although Attorney B may provide a second opinion regarding the deed of trust, Attorney B would not necessarily be viewed as independent counsel in light of the fact that Attorney A obtained Attorney B's services and will advance payment of fees. Attorney A is encouraged to read *In re Snyder*, 35 S.W.3d 380 (Mo. banc 2001), regarding this issue.

Informal Opinion 2005-0041 -- Answer (continued)

ANSWER: . . .

Because the deed of trust is not from Client, Attorney A must also follow Rule 4-1.8(f). Attorney A should explain to any third party who is providing consideration for representation that they do not have any right to information about the representation, that they have no control over the representation, and that what they say to Attorney A is not confidential.

In most circumstances when a third party pays, it is useful to have an agreement about what happens to the funds if: (a) the representation is prematurely terminated, or (b) the representation terminates normally, but there are funds left, or (c) the third party demands his or her money back while the representation is ongoing.

Contingency Fees

Contingency Fees – Rule 4-1.5(c)

A fee may be **contingent on the outcome of the matter** for which the service is rendered, except in a matter in which a contingent fee is prohibited by Rule 4-1.5(d) or other law.

A contingent fee agreement shall be

- in a **writing signed by the client** and
- shall state the **method by which the fee is to be determined**, including
 - the **percentage** or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal;
 - litigation and other **expenses to be deducted from the recovery**; and
 - whether such expenses are to be deducted **before or after the contingent fee is calculated**.

The agreement must clearly notify the client of any **expenses for which the client will be liable whether or not the client is the prevailing party**. . . .

Prohibited Contingency Fees – Rule 4-1.5(d)

A lawyer shall not enter into an arrangement for, charge, or collect:

- (1) any fee in a domestic relations matter the payment or amount of which is **contingent upon** the **securing of a divorce or dissolution of the marriage** or upon the **amount of maintenance, alimony or support or property settlement in lieu thereof**; or
- (2) a **contingent fee** for **representing a defendant in a criminal case**.

Also certain types of representations involving federal taxes, etc.

Expenses from Gross or Net Recovery?

Fees Before Expenses (Fees from "Gross Recovery")

Gross Recovery	\$90,000
- Attorney Fees (1/3)	\$30,000
- Expenses	\$6,000
Remainder (Client)	\$54,000

Fees After Expenses (Fees from "Net Recovery")

Gross Recovery	\$90,000
- Expenses	\$6,000
Subtotal ("net" recovery)	\$84,000
- Attorney Fees (1/3)	\$28,000
Remainder (Client)	\$56,000

Kansas Rule 1.5

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (f) or other law.

A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, and the litigation and other expenses to be deducted from the recovery.

All such expenses shall be deducted before the contingent fee is calculated. . . .

Fixed/Flat Fees

Rule 4-1.8(f)

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 4-1.6.

Where Do Fixed Fees Go?

- Jurisdictions disagree
 - Some jurisdictions (e.g., Illinois) – “earned upon receipt” and thus in operating account
 - Missouri’s position – Formal Opinion 128 (2010)
 - “We believe that all flat fees must be deposited into a lawyer trust account and promptly removed when actually earned, similar to prompt removal of earned hourly fees.”
 - After 2019, if a total flat fee is under \$2,000, may go into operating account
 - Remember commingling may result in suspension

Missouri Exception for Handling Fixed Fee of \$2,000 or Less

A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, except that **an advanced flat fee which does not exceed \$2,000 is exempted from this requirement** and may be deposited into another account.

Rule 4-1.15(c)

Retainers

“Retainer” Considered Ambiguous

Classic retainer – pay for availability

Example – “You pay me X, and I am your lawyer for the month/year.”

Earned when received

Security retainer

Charge against retainer on a monthly basis, and ask for additional funds as needed (“Evergreen Retainer”)

Hold to ensure final payment (“Security Deposit Retainer”)

Must hold in trust until earned

Advance Payment Retainer – Recognized under Illinois Rule 1.15

Missouri Formal Opinion 128

Discourages the use of “retainer” noting that the term “has taken on many meanings which are inconsistent with one another and which are confusing to clients.”

Solution

- Explain how funds will be used
- Realize generally funds are not “non-refundable” or “earned upon receipt”
- Try to avoid “retainer” when possible

Proper Amount of Retainer

- Consider fees that will be earned in first 60-90 days of matter
- Why? If work is done on January 1, client would likely be paying that bill in about March or April

Non-Refundable Fees

Missouri Formal Opinion 128

If the representation was **completed**, the attorney will not be required to refund any of the advance deposit or flat fee, assuming the amount charged was reasonable.

However, if the **representation ended before the representation was completed**, the attorney must analyze the factors set out in Rule 4-1.5(a) to determine the extent to which the attorney must **refund all or a portion of the fees** paid in advance.

In addition, because an attorney may not charge or collect an unreasonable fee, the attorney must determine that the fee was reasonable, even if the representation was completed.

MO Formal Opinion 128

“In these situations and others, the description of the fee as ‘nonrefundable’ is misleading. Rule 4-1.16(d) requires *any fee that has not been earned* to be refunded at the end of the representation.”

Missouri Rule 4-1.16(d)

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled **and refunding any advance payment of fee or expense that has not been earned or incurred.**

...

Important Warnings

- Fee is “**non-refundable**” or “**minimum**” – deceptive and violation of Rule 4-8.4(c)

The word NONREFUNDABLE should not appear in a fee agreement.

- Fee is “**earned upon receipt**” – also likely deceptive and a violation of rule 4-8.4(c)

An “INTAKE FEE” may be earned upon receipt in Missouri – see Formal Opinion 128.

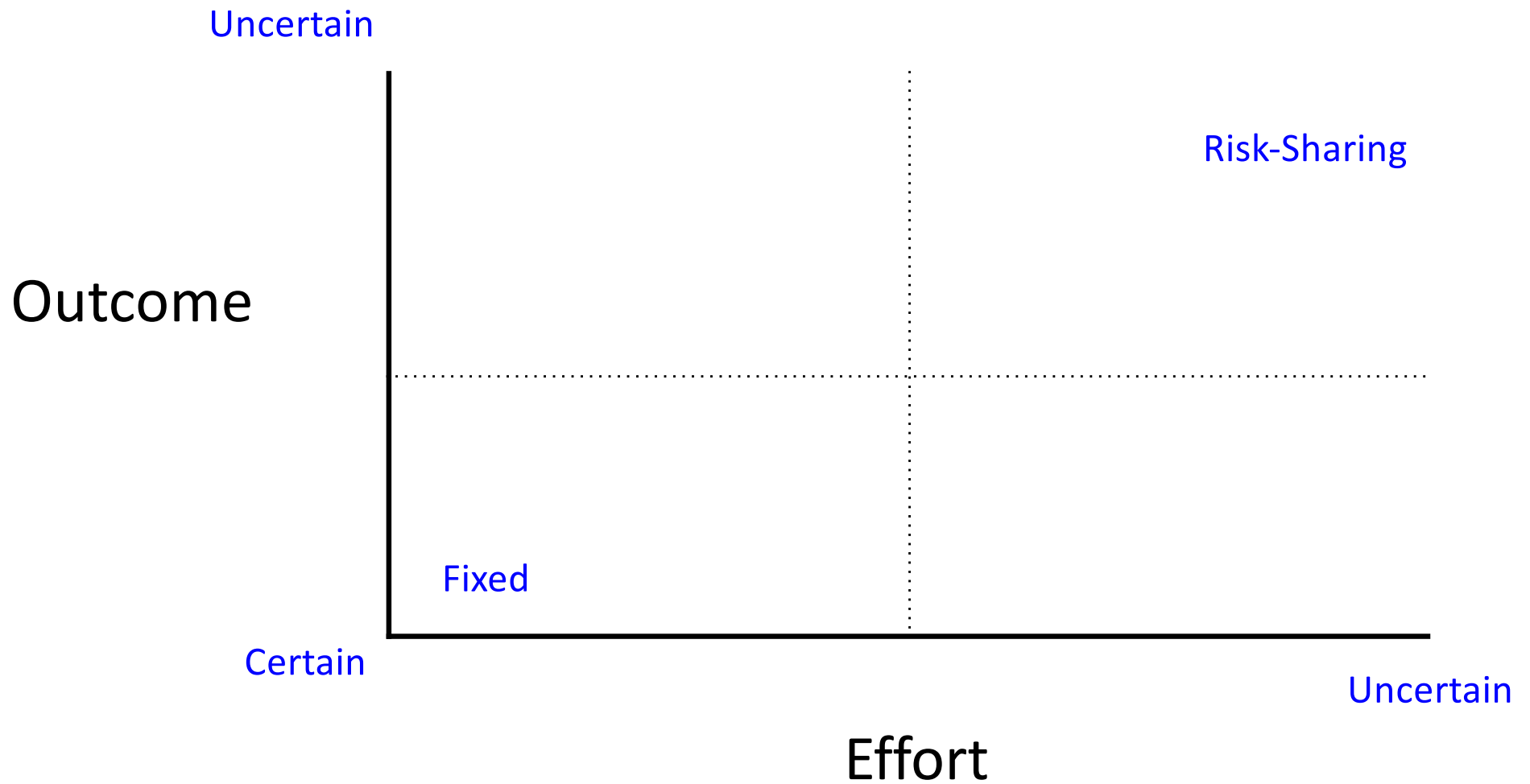
Rule 4-8.4(c) prohibits conduct involving “dishonesty, fraud, deceit, or misrepresentation”

“Better” Fee Arrangements

Key Information

- How much will representation “cost” (including how long will it take)
- What are likely outcomes
- Consider “value” of representation – does client understand cost and potential benefits?

Assessment for AFA



Types of Alternative Fees

- Fixed or flat
- Time-based (hourly or otherwise)
- Contingent
- Asset-based
- “Value”

Types of Time-Based Billing

- Regular
- Discounted
- Blended

Other Adjustments

- Task-billing
- Capped – not to exceed
- Hybrid – mixture of fee arrangements
- “Collar” – time reviewed, and client and lawyer “share” benefit or detriment (“True up”)
- “Hold-back” – some fees held back until resolution

“Limited Scope” – Rule 4-1.2(c)

A lawyer may **limit the scope of representation** if the client gives **informed consent** in a **writing signed by the client** to the essential terms of the representation and the lawyer's limited role. Use of a written notice and consent form substantially similar to that contained in the comment to this Rule 4-1.2 creates the presumptions:

- (1) the representation is limited to the lawyer and the services described in the form, and
- (2) the lawyer does not represent the client generally or in any matters other than those identified in the form.

“Limits” on Engagement

- Stages of work
- Obligations to client

- Beware “unknown unknown” problem

Common Hybrid Fee Arrangements

- Modified hourly
 - Blended rates – multiple categories of law firm lawyer and staff (or all lawyers and staff) are billed at the same rates
 - Capped fee – fee will not exceed X
- Reduced hourly with contingent success fee
- Contingent with an initial flat (intake?) fee
- Flat fees with adjustment
 - Flat fee but shared savings versus hourly fees (if any)

Lauer v. Longevity Medical Clinic PLLC (W.D. Wash. 2016)

In the event of a recovery from a settlement or a judgment, Attorneys shall receive either

1) forty percent (40%) of all sums recovered or saved by settlement or judgment including a supplemental judgment with attorneys fees plus interest or

2) all hourly fees incurred up to the amount of all sums recovered and saved, whichever amount is greater.

Upheld as permissible.

Closing Suggestions

Billing Suggestions

- Maintain some record of (hourly) work done
- Prompt bills bring prompt payment
- Regular billing helps cash flow
- Regular bills warn of problem payers
- Even where client is not paying bills, sending bills helps show work done (and what lawyer has “earned”)

Suggestions for Getting Paid

- Vet clients carefully
 - Will they pay
 - Can they pay
- Explain engagement, including anticipated fees, preferably in writing
 - (Limited) scope of engagement
 - Consider alternative fee arrangements
 - Provide protections for lawyer like interest and withdrawal warnings

- Have client pay early
 - Advance of funds for fee (“retainer”)
- Handle advance payments appropriately
 - Missouri: in trust unless (a) flat fee of (b) \$2,000 or less
- Bill with some frequency
- Monitor payments
- Withdraw prior to critical period if not being paid
- Consider fee dispute resolution process
- Beware suing for fees

Thank you



Downey Law Group LLC

(314) 961-6644

(844) 961-6644 toll free

Info@DowneyLawGroup.com

Conclusory Matters

- **Questions** – If you have questions after the program, please email them to Paige Tungate at ptungate@downeylawgroup.com
- **Post-Program Survey** – A survey will be emailed to you about 30 minutes after this program. Also, here is the survey link:

<https://www.surveymonkey.com/r/fees1124>

- **Certificate of Completion** – Available through the Post-Program Survey
- **Kansas Credit** – If you are seeking Kansas credit, you need to enter the **two Attendance Verification Words** and your Kansas information into the Post-Program Survey. *Please complete this information in the survey **this week**, so we can ensure you receive proper credit*



<https://www.surveymonkey.com/r/fees1124>

Timed Agenda

3:00-05 Introduction

3:05-55 Discussion of ethical issues related to attorney fee arrangements

Future Programs

December 4 - Wednesday at 12:00 Noon CT - *Conflicts of Interest Update 2024*

December 19 - Thursday at 12:00 Noon CT - *Legal Ethics and Technology Update 2024*

January 8 -Wednesday at 12:00 Noon CT - *Legal Ethics Update 2025 - Part 1*

January 21 - Tuesday at 3:00 PM CT - *Addressing Bias - Ableism and Disability Discrimination*

February 6 - Thursday at 12:00 Noon CT - *Ethical Issues in Joining and Leaving a Law Firm*

February 19 - Wednesday at 12:00 Noon CT - *Privilege and Confidentiality Update*

February 27 – Thursday at 12:00 Noon CT – *Addressing Bias: LGBTQ+ and Gender Issues*

Special Co-Presenter – Sara Marler of Marler Law Partners

March 4 -Tuesday at 3:00 PM CT - *Legal Ethics of Lawyer Collaboration*

March 19 - Wednesday at 12:00 Noon CT - *Trust Accounting Quiz - With Prizes*

April 10 - Thursday at 12:00 Noon CT - *Legal Ethics and Client Development*

April 23 - Wednesday at 12:00 Noon CT - *Addressing Bias - Ableism and Disability Discrimination*