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WSSFC 2026

Plenary 6

Cash, Coin, Cheddar, Dough: Ethical Issues with Money & Billing

Presented By:
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About the Presenter...

Stuart I. Teicher, Esq. is a professional legal educator who focuses on ethics law and writing instruction. A practicing lawyer for over 30 years, Stuart's career is now dedicated to helping fellow lawyers survive the practice of law and thrive in the profession. Mr. Teicher teaches seminars, provides in-house training to law firms and legal departments. Stuart provides continuing legal education (CLE) instruction at law firm client events, and also gives keynote speeches at conventions and association meetings. Stuart helps lawyers get better at what they do (and enjoy the process) through his entertaining and educational CLE "performances". He speaks, teaches, and writes— Thomson Reuters published his book entitled, Navigating the Legal Ethics of Social Media and Technology. His most recent book is entitled, How to Stop Hating the Law: A Path to Hope for Miserable Lawyers. Mr. Teicher is a Supreme Court appointee to the New Jersey District Ethics Committee where he investigates and prosecutes grievances filed against attorneys. Mr. Teicher also served on the New Jersey Office of Attorney Ethics Fee Arbitration Committee. Mr. Teicher is an adjunct professor of law at Georgetown Law where he teaches Professional Responsibility, and for 15 years he was an adjunct professor at Rutgers University in New Brunswick where he taught undergraduate writing courses. He also taught both Professional Responsibility and Legal Writing at St. John's University School of Law in New York City.

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Cash, Coin, Cheddar, Dough:
Ethical Issues with Money & Billing
Seminar Written Materials

1. Introduction

Don't steal from your trust account.

There, I said it. Seminar over.

Well, not exactly. There is obviously a truckload more we can say about ethical issues with money, and many of them are far more complex than the usual admonition above. Today we'll talk about four topics: Whether lawyers can accept cryptocurrencies for legal fees, Fee splitting with other lawyers, when people fight over trust account funds, and the problem of the flat fee.

Rule 1.15 is the grandaddy of all rules. It addresses the most often discussed attorney obligation, the idea that we can't steal from our clients. So why do I call it the Pete Rose Rule?

We all know what happened to Pete Rose— he bet on baseball. After he was caught, was he suspended for a year? No. A decade? No. He was kicked out for life. And the powers that be in baseball did that for a reason. Their feeling was that betting on baseball was the worst thing you could do to the game. Sure, there are people who committed violent acts, or major financial crime— things that one might consider more heinous than betting on baseball. But that's not how the baseball authorities see it. To them, betting on the game is the one thing that you do that threatens the very integrity of the sport. As a result, they decided that the perpetrator deserved a lifetime ban.

That's why I call Rule 1.15 the Pete Rose Rule. Stealing from your trust account is the one thing that you can do that threatens the very integrity of the practice. It's the offense that guarantees a lifetime ban from our game.

But there's more to know about Rule 1.15 besides the maxim that we shouldn't steal from our clients. It's applicable to issues in the cloud, conflicts, and a whole lot more, all of which we'll discuss during this program.

A word about these materials: These written materials are not designed to be a recitation of everything we've discussed in the live program. You won't be able to follow along with the materials while I give the program. In fact, I try to write my materials with a completely different objective. I want to give you something that will provide some additional information than what you've heard in the program. Yes, I'll touch on some of the items we discuss, but you'll mostly find supplementary information in this writing.

2. It's not your stuff.

Rule 1.15 is really about holding other people's property. Basically, we are required to keep our client's stuff separate from our stuff.

> **WI Rule 1.15. Safekeeping property**
>
> **(b) Segregation and safekeeping of trust property.**
> **(1) Separate account. A lawyer shall hold in trust, separate from the lawyer's own property, that property of clients and 3rd parties that is in the lawyer's possession in connection with a representation. All funds of clients and 3rd parties paid to a lawyer or law firm in connection with a representation shall be deposited in one or more identifiable trust accounts.**

As you can see from the last section of the rule above, the rule doesn't just talk about keeping our property separate from that of our clients'. It also sets forth the requirements for our financial record keeping. As you're probably aware, each state has very particular requirements in that regard, so make sure that you check the specifics of the Rule 1.15 in your jurisdiction. If you

really want to be sure that you keep proper records, go check for a CLE course. Many jurisdictions have entire CLE programs dedicated to teaching lawyers the proper way to maintain their books.

3. Don't Steal

Oh, and since it's mandatory that I mention this....don't steal. I know, it's an obvious point, but it needs to be said. Doing so would be dishonest and would violate a multitude of rules, including the aforementioned 1.15 and also Rule 8.4, Misconduct. That rule states:

> **WI Rule 8.4. Misconduct (in part)**
>
> **It is professional misconduct for a lawyer to:**
>
> **(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another;**
> **(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;**
> **(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;**

It's obvious that stealing is criminal and you'd therefore be hit with an 8.4(b) violation. But remember- it doesn't matter what happens in the criminal justice system. The world of attorney ethics has its own fact finding procedures. its own tribunals, and its own discipline. Thus, many jurisdictions have held that it doesn't matter if you've been arrested, charged, indicted or whatever else. You don't need a formal criminal violation in order to have a problem with 8.4(b). You simply need to have committed the criminal act.

Note another thing about this rule. Too often, when lawyers steal, they involve others in the scheme they've created, which means that you'll be hit with a violation of 8.4(a). That applies whenever a lawyer commits misconduct through the acts of another.

When it comes to stealing, there is something else that needs to be said. Far too many lawyers are getting in trouble for violations that have to do with Sex, Drugs and Money. That's what I

call “The Really Bad Stuff” and unfortunately, those are usually intertwined. We often see people stealing money from their trust account to support a drug habit…or alcoholics who make poor decisions and sleep with clients. It’s tempting to say, “this doesn’t apply to me,” but we all need to be on guard. There are a thousand stories in the archives of the disciplinary authorities across the country that describe the mistakes made by lawyers who once considered themselves to be immune to The Really Bad Stuff. Make sure you’re aware of the potential downfalls and you maintain a heightened state of awareness—stay away from the slippery slopes.

4. Fiduciary Duty

There is a key part of the commentary to the ABA’s Rule 1.15 that has an impact beyond the issues discussed above. Specifically, the comment states:

> **[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.**

I’d like to direct your attention to that first sentence. I’ve always wondered what was meant by the phrase, “fiduciary.” Like most of you, I’ve always generally understood it, but I didn’t know exactly what it meant, so I looked it up. Black’s Law Dictionary states that a fiduciary is, “A very broad term embracing both technical fiduciary relations and those informal relations which exist wherever one man trusts in or relies upon another.”[1] Obviously, that’s a pretty broad statement and because of its breadth, it didn’t quite give me any guidance regarding the practice of law. So I looked elsewhere and found a definition in the Restatements. You remember them from law

[1] Black’s Law Dictionary, 5th Edition (1979).

school, right? They are basically a summary of the law in a particular area. The Restatement got a bit more specific and it states:

> § 16. A Lawyer's Duties to a Client – In General
> To the extent consistent with the lawyer's other legal duties and subject to the other provisions of this Restatement, a lawyer must, in matters within the scope of the representation:
> 1. proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation;
> 2. act with reasonable competence and diligence;
> 3. comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client; and
> 4. fulfill valid contractual obligations to the client.

What I learned from the Restatement is that "fiduciary" encompasses, well…everything! It seems as though every important duty that a lawyer owes a client is somehow reflected in that restatement. The "consultation" aspect can be found in Rule 1.2 and 1.4. Competence comes from Rule 1.1, Diligence from Rule 1.3, Confidences from Rule 1.6, and Conflicts in Rules 1.7. Thus, the fiduciary duty really is broad, and you can see it reflected in particular ways throughout the code.

5. Fee Splitting with Lawyers

Here is the applicable rule regarding fee splitting:

> WI 1.5(e) A division of a fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:
>
> (1) the division is based on the services performed by each lawyer, and the client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement; or
> (2) the lawyers formerly practiced together and the payment to one lawyer is pursuant to a separation or retirement agreement between them; or
> (3) pursuant to the referral of a matter between the lawyers, each lawyer assumes the same ethical responsibility for the representation as if the lawyers were partners in the same firm, the client is informed of the terms of the referral arrangement, including the share each lawyer will receive and whether the overall fee will increase, and the client consents in a writing signed by the client.

In 2019 the American Bar Association gave us Opinion 487, which addresses fee sharing, but that opinion talked about a twist on the issue. Here's the link to the entire opinion if you want it:

https://www.americanbar.org/content/dam/aba/images/news/2019/06/FormalOpinion487.pdf

Let's review what the opinion held:

Here's a hypo which illustrates the scenario that was before the drafters. Obviously, I made up the facts below, but the root issue was the one evaluated in the opinion.

> Your client went to Times Square for New Year's Eve and they heard Post Malone sing. But he was so bad — as you would expect, because he stinks — that the client received massive ear canal injury. It's a new phenomenon called post-Post Malone earbone Syndrome. They hire you to sue the company that puts on the New Year's Rockin Eve program. Your client signs a contingency agreement and you begin the representation.
>
> At some point during the litigation, your client decides that they want to hire a different lawyer. It turns out that their cousin just started her own firm, and the client wants to give the cousin the case. You haven't done anything wrong, they just decide to move the file to a different lawyer. There is no termination for cause, in fact, they end the relationship without cause.

In that case, it's accepted law that the fired lawyer is entitled to receive payment for the reasonable value of their services when the matter is finally resolved. The problem arises, however, when the first lawyer's fee agreement with the client is silent about situations like that. The agreement might allow the client to dump the lawyer, but it might not explain that the client is liable for the reasonable value of services performed. The opinion explains,

> The client may be aware of the right to terminate a lawyer's representation at any time but may not be aware that termination does not necessarily extinguish an obligation to pay prior counsel for the value of the work performed – the quantum meruit claim – or in some cases a termination amount specified in the predecessor counsel's fee agreement. If the predecessor counsel was not terminated for cause, that lawyer may be entitled to payment for the fair value contributed to the case before being terminated. Op. 487 at 3.

This can be costly to the client— they are now on the hook to pay the contingency fee to the new lawyer and the fee in quantum meruit to you. The problem is that they might not realize it if the fee agreement doesn't address those situations. The client might have no idea that both fees are due.

Thus, the issue that the opinion deals with is, "does anyone need to inform the client about these two fees, and if so, whom? The answer to the first part of the question is, yes, someone needs to inform the client. That's because the rules about fee agreements are about full disclosure.

When we address contingency agreements, Rule 1.5 (b) and (c) are the key rule sections that a lawyer must comply with.

> (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.
>
> (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 paragraph (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. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

The opinion explains that, even though the rule doesn't come out and say it, the point of these sections is to ensure that "the client has a clear understanding of the total legal fee, how it is to be computed, when it is to be paid, and by whom." Op. 487 at 2. It's

about ensuring full disclosure to the client. So, yes, the client needs to be told about the two fees that will be due. And the drafters put the obligation of disclosing that information on Lawyer #2.

The opinion held that the succeeding lawyer has an obligation to inform the client about the two fees that will be due. The opinion states, "a contingency client should be advised by the successor attorney of the existence and effect of the discharged attorney's claim for fees on the occurrence of the contingency as part of the terms and conditions of the employment by the successor attorney." Op. 487 at 1.

There's one more issue that the opinion addresses, and that's about fee sharing. The drafters said that, even though the two lawyers seem to be sharing a fee in the same case, they aren't and Rule 1.5(e) doesn't apply. The opinion explains that the rule on fee sharing applies when two lawyers handle a case at the same time. Specifically, the opinion states:

> Rule 1.5(e), "is designed to regulate fee-sharing between lawyers in different firms who handle a case simultaneously. Comment 7 to Rule 1.5 underscores this reading. It states:
>
> > A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. *A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well,* and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1. (Emphasis added in the opinion.)

The drafters mentioned an interesting policy reason for refusing to apply Rule 1.5(e) here as well. They explained that:

> ...the client's rights to discharge her lawyer may be adversely affected if the client is required to enter into a fee sharing agreement under Rule 1.5(e). Requiring the predecessor and successor counsel and the client to agree on a proportional fee division may hinder the client's right to terminate a counsel by making the process of finding a replacement more difficult and protracted. A simple fee negotiation between the client and successor counsel would turn into a three-way debate. Op. 487 at 4

As we saw above, there is another way to share a fee- not just by paying a "proportional fee" but there could be some other sharing arrangement when two lawyers assume "joint responsibility" for the matter. But the drafters explained that that is not applicable as well. There was a practical and policy justification for their decision:

> When a client discharges a lawyer and hires a new one, there is no "referring counsel" and there is no simultaneous representation of the client. Joint responsibility in practice does not exist because predecessor counsel has been replaced. To require "joint responsibility" under Rule 1.5(e) in these situations as a pre-condition of paying the predecessor counsel's fee claim is not realistic and ultimately burdens the client's ability to discharge the first lawyer and find replacement counsel. If the successor counsel would be responsible for the errors or omissions of a discharged predecessor, he or she would at best be reluctant to accept the engagement.

6. Fights

Here's the applicable part of Rule 1.15. We'll go over a hypo during the program and we'll see how it's applied...and the pitfalls:

> (e) Prompt notice and delivery of property.
> (1) Notice and delivery. Upon receiving funds or other property in which a client has an interest, or in which a lawyer has received notice that a 3rd party has an interest identified by a lien, court
> order, judgment, or contract, the lawyer shall promptly notify the client or 3rd party in writing. Except as stated in this rule or otherwise permitted by law or by agreement with the client, the lawyer shall promptly deliver to the client or 3rd party any funds or other property that the client or 3rd party is entitled to receive.

(2) Accounting. Upon final distribution of any trust property or upon request by the client or a 3rd party having an ownership interest in the property, a lawyer shall promptly render a full written accounting regarding the property.
(3) Disputes regarding trust property. When a lawyer and another person or a client and another person claim an ownership interest in trust property identified by a lien, court order, judgment, or
contract, the lawyer shall hold that property in trust until there is an accounting and severance of the interests. If a dispute arises regarding the division of the property, the lawyer shall hold the disputed portion in trust until the dispute is resolved. Disputes between the lawyer and a client are subject to the provisions of SCR 20:1.5(h).

7. The Rest of the Rule

We might get to talking about the rest of the rule and comment, but chances are that we won't have time. Regardless, I thought I would give those missing clauses for you, in case you were an ethics geek like me and you wanted to read them.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

COMMENT [2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

8. The Important Formalities of Rule 1.5

There are many ways to get in trouble when practicing law, but there is one category of offenses that leads you to the proverbial door exiting the practice a bit quicker than others. Money.

Sure, we all know that messing around with your trust account (and violating Rule 1.15) will lead to disbarment in a flash. But there are other rules that deal with money that can be perilous as well, such as Rule 1.5.

Rule 1.5 imposes formalities on our relationship with our clients and their money which can create havoc for the lawyer. The rule is a little deceiving because the formalities sneak up on you. In fact, the first portion doesn't appear to have much detail at all— it talks about the factors that should be considered in order for a fee to be considered "reasonable."

SCR 20:1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee ninclude 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.

Rule 1.5(a) appears to be a menu of sorts— a list of factors that could be assigned varying weight when determining the reasonableness of a fee. There doesn't appear to be a sense of dangerous rigidity that I alluded to at the beginning of this section. But a review of the following section reveals the sense of formality that could cause problems for lawyers:

WI 1.5(b)

(1) 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 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 as in the past. If it is reasonably foreseeable that the total cost of representation to the client, including attorney's fees, will be $1000 or less, the communication may be oral or in writing. Any

changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.
(2) If the total cost of representation to the client, including attorney's fees, is more than $1000, the purpose and effect of any retainer or advance fee that is paid to the lawyer shall be communicated in writing.
(3) A lawyer shall promptly respond to a client's request for information concerning fees and expenses.

Here we have a mandate to "communicate" the fee and expenses, and that it be done within a reasonable time after starting the representation. Thus begins the list of formalities with which a lawyer must comply. For instance, must that communication be in writing? If your jurisdiction follows the bargain struck in the ABA version of the rules, then no. It's preferred, but not required. Of course, one should consult the rules in your jurisdiction because that's been changed in many states and a writing is often required, not just preferred. My feeling, for those of you keeping score, is the following: For the love of everything holy— do me a favor and put it in writing, okay? How else can you safely document that you communicated the necessary information?

The temporal requirement in 1.5(b) is also a dangerous formality. What exactly is a "reasonable" time after the relationship has commenced? That invokes the two most often used words in the ethics world— *it depends*. It depends on the circumstances of your individual lawyer/client relationship. Practice note: if it seems that there is a relatively long period between the commencement of your relationship and the communication of your fee document, the reason for that delay. It might be a reasonable delay under the circumstances, but always remember that someone looking at the facts later might not appreciate why that seemingly long delay was actually a reasonable period of time. If you write a memo to the file, however, that would go a long way in justifying your actions. And here's a tip for every memo to the file that's written in for proverbial CYA purposes— it's important that the memo be written by you near the time that you committed the act. It's not a requirement, but it's far more persuasive to an ethics investigator if you show that

you considered, researched, and memorialized what you thought to be a calculated ethical decision at the time you made that decision, as opposed to the time you got questioned for making that decision.

The requirements of our fee agreements take on a whole new level of formality when we get to contingency agreements. For that we need to review Rule 1.5(c):

> (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 paragraph (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. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

There appears to be universal acceptance that a fee agreement in contingency matters must be in writing. That's why 1.5(c) said that it "shall" be in writing. You'll recall that the earlier section we reviewed (Rule 1.5(b)) said that our fee agreements would "preferably" be in writing—but now you can see that the "preferably" language is reserved for hourly or flat rates, not contingencies. The reason for these increased requirements in contingency matters is because of conflicts.

A contingency agreement, at its heart, contains an inherent conflict of interest. The idea that a lawyer's fee will be dependent upon the amount of the award received by the client pits the lawyer's interest against that of the client. Sure, those interests could be aligned, but they aren't always. A lawyer might be compelled to advise the client to make some tactical decision in a matter that is more likely to benefit the lawyer, rather than fulfilling the best interest of the client. That compromises the lawyer's loyalty to the client— the main issue in conflicts of interest. It's that

very real danger that motivated the drafters to impose more formalities on fee agreements in contingency situations.

9. Taking Bitcoin for your Fee

Can lawyers accept cryptocurrency as a fee?

Probably yes.

I'm a firm believer that there is no better way to understand the depth of a matter than reading an advisory opinion about the topic. Maybe I should be clearer— you should read the beginning of most advisory opinions. That's because, oftentimes, the drafters of the opinion do a great job of explaining the problem they are facing (in the beginning of the opinion) but not so great of a time giving actual guidance (the balance of the opinion). It's commonplace for them to "punt" because they can't usually say "do this." The answer far more often is "it depends." It's with that disclaimer that I attach Nebraska Opinion 17-03.

After reading the opinion you will say three things: (1) That was a pretty good, concise explanation of what Bitcoin is (2) That was a pretty good explanation of the ethical concerns involved in this issue, and (3) Wow, they didn't punt. Nebraska actually said that lawyers can accept cryptocurrencies.

10. Generative AI and the Billable Hour

Every few years, the legal ethics world revisits the same question: is the billable hour dying? Generative AI has revived that conversation with renewed urgency, and lawyers across the internet are again proclaiming that hourly billing is finished. That proclamation is wrong. More than wrong, the move away from the billable hour is likely to create the very problems that attorneys are trying to avoid.

Understanding why requires starting with the rule that governs attorney fees. Rule 1.5(a) prohibits a lawyer from making an agreement for, charging, or collecting an unreasonable fee. The rule then identifies eight factors relevant to the reasonableness determination: the time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; the likelihood that the representation will preclude other employment by the lawyer; the customary fee in the locality; whether the fee is fixed or contingent; the time limitations imposed by the client or the circumstances; the amount involved and the results obtained; the experience, reputation, and ability of the lawyers performing the services; and the nature and length of the professional relationship with the client. Time and labor required leads the list, and that placement is not accidental. It reflects the foundational premise of attorney compensation that has governed the profession for generations.

Rule 1.5(b) addresses the communication of fee arrangements. It requires that the basis or rate of the fee and expenses be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. The requirement applies whenever the lawyer has not regularly represented the client. Rule 1.5(b) is a transparency provision, but its practical significance is substantial. An attorney who makes a fee arrangement without specifying its basis leaves the client without information necessary to evaluate what they are being asked to pay.

Rule 1.5(c) governs contingent fee agreements. A contingent fee must be confirmed in a writing signed by the client. That writing must state the method by which the fee is to be determined, including the percentage or percentages to accrue to the lawyer in the event of settlement, trial, or appeal, the litigation and other expenses to be deducted from the recovery, and whether those deductions will be made before or after the contingent fee is calculated. At the conclusion of a contingent fee matter, the lawyer must provide the client with a written statement showing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination. Contingent fees are prohibited entirely in domestic relations matters and in criminal defense representations.

Those three provisions frame every conversation about how attorneys charge for their services. They also expose a significant flaw in the emerging discourse about AI-driven billing innovation.

The billing arrangements being promoted as transformative responses to generative AI are, in nearly every case, arrangements that have existed for decades under different names. Outcome-based fees are contingencies. Success fees are contingencies. Value billing, in which the client pays based on the benefit received rather than time expended, is a form of contingency thinking applied outside its traditional context. Project-based billing is flat-fee billing. Subscription legal services are retainers. The vocabulary is new. The structures are not. Rule 1.5 already addressed all of them, and the ethical requirements that apply to those arrangements did not change because the technology enabling them became more sophisticated.

The real problem with moving away from hourly billing in the AI era is that alternative structures expose attorneys to a reasonableness challenge they are not going to win. Consider what generative AI actually does to the time a matter requires. Work that previously demanded five hours now demands two. An opinion letter that once took a senior associate most

of a day is now drafted, researched, and refined in a fraction of that time. An attorney billing hourly faces a genuine reduction in revenue per matter, and that reduction is proportional to how effectively they use the technology. The attorney who uses generative AI well and bills hourly makes less money per file than the attorney who works slowly by hand.

The rational response, from a revenue standpoint, is to move to flat fees. Set a price for the deliverable rather than charging for the time it takes to produce it. A letter that used to generate $2,500 at $500 an hour over five hours could be priced at $2,000 as a flat fee. The client pays less than before; the attorney earns more per hour of actual work; the arrangement appears, on its face, to benefit both parties.

The arrangement collapses when a client challenges the fee.

A trier of fact evaluating the reasonableness of that $2,000 flat fee under Rule 1.5(a) is going to ask how long the work took. The attorney, assuming truthful testimony, answers: two hours, using generative AI. The trier of fact applies the first factor of the 1.5(a) analysis, which is the time and labor required, and concludes that two hours of work does not support a $2,000 fee. The fee is unreasonable. The attorney loses.

The argument that the flat fee should be evaluated against the value of the work product, or against what the same letter would have cost before AI existed, or against the client's benefit from receiving it, runs directly into the structure of Rule 1.5(a). Time and labor required is a listed factor. It does not disappear from the analysis because the attorney chose a different billing method. A trier of fact who knows that the work took two hours is not going to ignore that fact because the parties labeled their agreement a flat fee.

This is the trap that attorneys are walking toward with (mistaken) confidence. The billing innovation they believe will solve their revenue problem is the same mechanism that will expose them to fee challenges they cannot defend.

The hourly rate, for all its limitations, is the structure most naturally aligned with Rule 1.5(a). If generative AI reduces the time a matter requires, the attorney bills for less time. The bill reflects the actual labor. It is defensible in a fee dispute because its reasonableness is evaluated on its own terms. An attorney who spent two hours on a letter and billed for two hours at an established rate has a straightforward answer for any tribunal that examines the charge.

One structure warrants genuine reconsideration in the AI environment, and it is not a new one. The classic general retainer, in which a client pays a set amount to secure the attorney's availability and ongoing counsel across a range of matters, becomes more attractive and defensible as AI changes the per-matter time investment. The retainer is not keyed to any single deliverable. It compensates the attorney for being available, for maintaining current knowledge, and for the relationship itself. An attorney who uses AI to serve a retained client more efficiently is not exposed to a fee challenge based on time per matter, because the retainer was never structured around time per matter. The retainer may be the one billing structure whose underlying logic actually makes sense in a world where technology makes individual tasks faster.

The death of the billable hour has been predicted before, and it has not arrived. Generative AI is a reason to examine billing practices carefully, and it is a reason to understand what Rule 1.5 actually requires. It is not a reason to abandon the structure that remains the most defensible under the rule that governs every fee we charge.