

>>Thank you. Good afternoon. I was starting to set up over here and then I realized that everybody is sitting at this side of the room. So I will just do it from here. But if you can't hear me or anything please just let me know and I'll either sit down and be close to the microphone or stand over there after all. So my subject is billing and collecting. Getting paid for what we do. Which is a subject near and dear to my heart. This is a great profession we get to do interesting work. We get to right wrongs. We get to solve difficult and challenging problems for people. We can be the wise advisor in a person's life and it can be pretty rewarding. But we also need to get paid for what we do. This is after all a profession. A profession is – a professional is someone who gets paid for doing something. And so unless we're independently wealthy we need to have a good system and a good approach to actually getting paid for what we do. And that's what I'm here to talk about. So I'm one of those lawyers who started off at a big firm. Where we had all business clients and I had no responsibility for dealing with clients even as a midlevel associate maybe dealing with clients about the cases but not about payment. About what they had to pay – never sent a client a bill. You just got to do the work and get paid pretty well and don't have to be concerned about that. And then when I went out on my own I at first was uncomfortable talking to people about money. It's difficult for a lot of us to talk to people about money. But if you're going out as a lawyer on your own you need to get over that pretty quickly. And I certainly did. And now, you know, that needs to be a conversation happens very early in – when a client contacts you. They understand that this is how you make a living. They understand that they're going to have to pay for it. And there's no reason to shy away from talking about it.

So I've - I'm not the original presenter on this subject. It was a person called Ron Whitmer and he had a nice acronym that he used in here to deal with this subject. If the client has particular expectations about getting great work from us we have expectation of getting paid. And the acronym he used was CASH for each of these topics – OK? Or each of the parts of his presentation. So the first part of the acronym C – communication. Having excellent communication with clients. You – it used to be that you had to – you'd only – fee agreement required – a fee agreement requires- specifically required to be in writing was a contingent fee agreement. Now all of our fee arrangements are supposed to be in writing. And so that actually makes it easier – for you to dealing with clients and to communicate with them about the fees because you can say I'm required. The rules require me to do this and to have a fee agreement that sets out the expectations clearly from the beginning. It can be simply what you're going to charge and if you're charging by the hour what your hourly rate is. But it can say a lot more than that and it could be an opportunity to really set the expectation for the representation of the client. I have started to – I used to just have a simple fee letter. A three or four paragraph agreement or letter that would state this is my hourly rate. I'm going to represent you in connection with this matter. You'll pay a retainer of X thousand dollars. I'll draw on the retainer – explain how the ILTA account works. And have a signature line on there for them and they would sign on there and I'd have my agreement. I've more recently decided to start putting a little bit more in there about expectations. And I think it's a great opportunity again to just set forth the expectations of both parties. I include my responsibilities as well as theirs. I tell clients – and by the way I did not bring any materials. Feel free to email me and I'd be happy to send you a sample agreement or two. You can find me online I've got a website. But I write in there, my responsibility will be to advise you of your rights and responsibilities to reasonable consult with you about your objectives about which – the means by which your objectives will be accomplished. Keep you reasonably informed about the case, respond promptly to your requests for information. Be

candid with you about issues that arise, possible outcomes, estimated amount of my time particular tasks are likely to take. And then represent your interests in court and negotiate settlement when possible. And if advisable discuss with you courses of action, alternatives and consequences. Now I should have said my practice is mainly a litigation based practice. I do business litigation, divorce and family law. And so this – these are the term that I include in there. You would have obviously different things if you were doing business transactions or estate planning or something like that. For the client I've got in another place the clients responsibility to pay the bills promptly and to pay a retainer. But also I've included in here now – this is based on experience with some particular clients that it's the clients responsibility to discuss with me all relevant facts and not withhold important information about the case. Promptly provide me with documents and information when I ask for it. Tell me about any important changes or developments in the case. And to be completely truthful in testifying and in their financial disclosures. The – you do need to state in – if you get - asking for retainer and we'll get to that in the second part you do need to state the terms and you need to make that clear in your written agreements with your clients. So that's C. The next one is A in this acronym we have and that's advance. It is a very good practice and perhaps in almost every case you handle to get the client to pay money in advance. As money against which you can draw. Money you put in you ILTA account. Do you ask everybody for that? Well, maybe there are clients that you're particularly secure with or who you've represented before and were always good about paying the bills. But generally ask for a retainer – ask for an advance at the beginning. I have found – again I've learned a lot of things being in solo practice for the last 15 years have found out the hard way that it is much easier to get money out of people when they need you than it is to get money out of people when they no longer need you.

I have found - again, I've flirted with being in solo practice for the last 15 years have found out the hard way that it is much easier to get money out of people when they need you than it is to get money out of people when they no longer need you. When the case is over, you're just one of possibly many creditors. You've got no particular leverage. And good luck getting paid. And we'll - I will get to that a little bit later because there are some things you can do, but much better - they know they have to pay you. They know that you're charging for your time or your services and get the money up front. Now I - in the divorce practice in particular, it can be difficult sometimes. It's expensive - that's an expensive proposition - how you're going to come up with the money. I actually have started using a service called Law Pay and it will enable you to receive payment by credit card into your IOLTA account, and the merchant fees get charged against your operating account. So there's no - it's not like when you get paid ordinarily by credit card where you get less than the amount. You get the full amount, and then you pay for it separately as an operating expense. I have found that to be - even though I end up getting a little bit less than my hourly rate - much better to get - a much better collection rate using that or offering that. And in my fee agreement, I actually put the website URL in there and explain to people how they can pay this way, and in my bills I do the same thing. So there are, you know, again talking to clients about money up front can be difficult, can make you feel squeamish and when you put out a big number like 5 or \$10,000 and you can see their reaction and you feel guilty and are you really worth this? And well, can't you do a little work now and get the money later? Or give them more time? You will learn the hard way if you do that if you don't get the money up front. So the amount of the retainer varies depending on the kind of work you're going to do. If I'm going to be filing an appearance and litigation, it needs be substantial. It's - you're stuck, it's hard to get out, you're committed to doing a certain - you're

committed to doing the work for this client. If it is - another thing I do is consultation with people in employment disputes. For that, I can usually estimate this is going to be two or three hours and I'll get a retainer worth two or three hours. So you - I think one other advantage of a retainer is that it has the client thinking at the very beginning about how much this is going to cost rather than having some sort of shock when they see your bill and see how those hours quickly add up. So it will scare some clients away. It may also - there are some clients out there who aren't always honest with you or might be manipulative. Early in my solo practice, I had a business client that I - who'd fired his previous lawyer - often a warning sign. When I called the lawyer for the files, he said make sure you get a retainer - perhaps another warning sign. I asked the client for a retainer and he seemed like a very nice guy, and he had - what sounded like some very legitimate complaints against his previous lawyer. He asked me, don't you trust me? How can we have this working relationship if you don't trust me? And I learned that I should not have trusted him. He ended up with at least one more lawyer after me. So don't be manipulated. You're worth it. You're providing a valuable service and people know they have to pay for it. So this is good to do at the very beginning of your representation.

>>David?

>>Yes?

>>Let me ask you a question on that point.

>>Yes.

>>A lot of clients will say, do you believe in my case? I need somebody who's going to believe me, and I'm curious at how folks react and respond to that.

>>Good question.

>>Yeah, I heard it this morning.

I know because you want to build in all those disclaimers and there are - and one thing I didn't mention about fee agreements - I do include in there a statement that I haven't made any kind of guarantee of the outcome. But I think you do have a responsibility in the beginning to be up front and honest with the client about the case. I actually have just started reading a book about alternatives to the billable hour and trying to figure out some ways to charge people other than just for the - by the hour.

>>Monthly.

(LAUGHTER)

>>I'm starting to think - yeah, monthly, right, right. But in that book, it actually had in the introduction it said something, like, you know, maybe the lawyer gives the client we've got about a 60% chance of prevailing. And the client goes back and tells his spouse - the lawyer said we'll probably win this, right? Or that you're advising a client on a settlement and it's a million dollar case and you're giving them a, you know, you're saying it - even if you - I would never give a percentage out - likelihood of outcome, but say you're doing that and you're giving odds of 9-1 or something. You're telling the client well, that

you ought to be willing to settle for something like \$900,000, right? You should discount it based on the likelihood that you may lose, but I think it's - it's difficult to - you really have to emphasize with clients the lack of any guarantee of the outcome.

>>But it's not just that - I think over time experience tends to bring some light to this, but when the client starts talking to you in terms of you have to believe me, you have to trust me, you have to be an advocate for my case, you, you know, all they want to hear is rosy and we're going to win. I think that's a real red flag, and I think it's really problematic. No, it's - literally I had this conversation yesterday with a client because I tend to tell folks the range of what might happen. Here's what we need to work on. I don't know enough about your case yet - this is really the beginning. I don't know enough about your case yet to make a decision, but these are the issues that come up. And the client's response was you don't believe me do you? And the answer is it's not my job to believe you or not believe you. Right now we're too soon in the game. And if they keep pushing on that, I think that's somebody to walk away from. That's my personal opinion.

>>I think you're right, and I - you're bringing to mind a frank conversation.

>>It's a frank conversation - every conversation.

>>Yeah, and I think the thing is that a client who's taking that approach is going to - there's a risk of them hearing what they want to hear. So you told me we'd win this, and now we got this terrible result and - yeah. I think one thing with litigation as well, and I - this doesn't have so much to do with collection of fees but about client communications is that - in my experiences as a business litigator and a divorce litigator - it's rare that a client comes up at the end of a trial with a judgement with which they've - which makes them feel completely vindicated. There are so much compromise that goes into these decisions. That it really is good from the beginning to have a client thinking about the value of resolution and of settling and being - preparing them for that, you know, that at some point perhaps having to hold their nose and agree to something that isn't really what they want and understanding that they're unlikely to get everything they're looking for no matter how much they believe in their case. And I have found that too - and I talked to a client about the other sides - the virtues of the other side's case. I've had clients who act like I don't believe them or I'm not advocating for them when I'm just trying to give them advice and help them to understand it. Somebody had a question?

>>Yes, sir?

>>It seems to be a rather simplistic question, but let me say that I was in court once - in the family court settling, and there was what would be considered a high-power divorce attorney trying a case which I thought was rather routine. And part of her testimony was well, what have my fees been ma'am? And she said \$40,000. Well, I got a flavor for the case and basically how difficult the case - by sitting there listening to it and something that I would have probably charged 5 or \$6,000 to do - suits to nuts. My question you is how do you know what you're working for?

>>The question - I have to repeat this for the audience - who we can see them, but they don't know that - on the computer. How do you value what you're worth in terms of your fees? How do you make those estimates if you do?

>>Well, you mean some way other than an hourly rate? Or I mean, I think...

>>Something more so lawyers and charge 200, 250, 300, \$400 an hour.

>>Yes.

>>And I try cases against them all the time - and they're just - to me, you know, why wouldn't they be charging 125 or 150 or 75 - what makes him so different?

>>I think people will charge what they - what the - if there's a demand for their services because they're good, they can charge a higher rate. It's just - I think it's market forces. I also tell people - when I'm - I always tell clients that I can do a better job of finding them a lawyer than they will do themselves.

And I, you know, will find lawyers who don't - I have people that I refer cases to who don't - who do what I don't do - things that I don't do. And I usually tell them, often the lawyer with a higher hourly rate will do it more quickly because he or she will know the answers. They won't spend time learning the subject matter or researching something because they specialize in this area, they know it, they can deal with it more efficiently. So I suppose with a trial, it's hard to, you know, you're stuck there. I had a divorce trial that took eight days over about six months, and that, you know, I had no control over how much time that was taking. There was so much wasted time built into that.

>>The Fee Rule - 1.5 - has always had as its introduction the list of the factors that go into - more or less - setting you're hourly rate and I do think that one of them - that is, you know, is the fee customarily charged in the locality, you know, so that there's all these other things that your experience and how long - it's, you know, the time and labor required and how novel and difficult, but I think you also have to pay attention to what David is calling the market forces. You know, what are other people charging? If you're undercharging, maybe you should think about that, you know?

>>Did you have a question?

>>I did, and it sort of goes into that. I know it's, like, how do you determine the initial retainer? I mean, what factors would you use? Because, like, I never seem to get that rate.

(LAUGHTER)

>>So the question is how do you determine the initial retainer or how do you decide on an amount? I...

>>Badly.

>>That is difficult because if I'm taking on a divorce case and I ask for a \$5,000 retainer, I know it's going to cost more than that. But I also don't want this, you know, you have some concern about losing the client as well or them going to somebody else who isn't going to ask for that. I think it's, you know, there are some matters on which you can predict the approximate amount of time and work it's going to involve. I mean, there are litigation matters that are so dependent on what the other side does or what, what, you know, happens during the case that it's really difficult to predict, but I do try to make clear to

clients that I'm not telling them the amount of retainer I'm asking for - is their maximum exposure here. You know, that it's going to cost more than that if we go through the litigation.

>>David, does your fee agreement say that you're going to replenish the retainer when it goes low?

>>It does.

>>Yeah, I mean, because I think that's the other critical thing here.

>>And you actually, I've started being more specific about - I used to have a general term that I'll ask you to replenish it, and now I say if it dips below a thousand dollars at the end of a month then you will replenish it.

>>Right, so that you're not billing in arrears once you've used up the initial retainer that when you get down to a thousand dollars, then you say I need another 2,000 or I need another 5,000 or whatever it is you decide you need up front.

>>Without discussing confidences, I'd be curious what's your experience and when you think you ended up charging too low a retainer versus too much retainer - what were the factors?

>>I think it might be an experience thing, like, underestimating - so I [unintelligible]. You kind of underestimating the complexity of the divorce. What if on the surface, it looks like a very simple - we should be able to come to some agreement turns into this nightmare.

>>Well, and that's part of that discussion David's saying you have up front that's why you have to replenish the retainer not just say once it's exhausted - I'm relying on you to honor my bills, you know pay me in arrears.

>>It's interestingly, I've actually had this twice and I had to have a very distinct discussion with my client about returning money because it ended up being much simpler than I thought. They had a little bit of money left over and they were, like, oh, keep it. And I'm just, like, well...

(LAUGHTER)

>>Thank you very much. I sent you an email. It was very nice - thank you, I appreciate the bonus.

>>A pleasant if rare.

>>Yes, that doesn't happen very often but it's very nice.

>>You know, it was just there was no reason for me.

>>No, that's a good problem to have.

>>And you look good when you give it back.

>>I do reassure - I do assure clients - with - this has to do with retainers and where there's money left at the end of it that if they - that's their money. That comes back to them.

>>We have a question over here.

>>Is it a violation of the disciplinary rules - I'm old, so I call them the disciplinary rules - to take into consideration especially on the domestic relations front the assets and income of the parties involved?

>>For what purpose? In determining the hourly rate?

>>Is it appropriate to, you know, if you've got somebody who's a bus driver you want to charge her \$150 but you've got somebody who's a physician and you want to charge them \$300.

There's nothing wrong with that.

>>The question was whether it's anything wrong or violation of the rules to charge different rates to different clients. And no. The answer is there isn't. I certainly do - one of the things I like about being in solo practice is that I can choose to do that. If I like a case and I want to represent somebody but they can't really afford my rate I can offer them a reduced hourly rate. And take the case. I haven't done it on the other end where I have a particular high...

>>I would be uncomfortable with that one. I'm perfectly comfortable with reducing it for someone who can't afford it. I'm dubious about ratcheting it up for what looks like the cash cow, you know?

>>It has to be reasonable.

>>But what's reasonable?

>>Reasonable is what's charged in the community for that kind of work. So if your normal hourly rates on a sliding scale is \$200 an hour to \$400 an hour you can't pick the cash cow and charge \$600.

>>Well, clearly.

>>But that's - that's really what that leads to.

>>But I think the other part of that is in terms of the retainer. If it's a high asset case and you have an understanding this is going to be complex. I would ask for a much bigger retainer from that person. You know, it's just that a lot of people - it's hard for them to come up with.

>>You wouldn't be fighting over Chippendale instead of Bob's warehouse.

>>Right.

>>Bob's warehouse gets fought over a lot - let me tell you that.

>>I just don't know how you determine what the going rate is for the community - other than just cold calling people and asking them what is your rate?

>>That's the answer.

>>OK. Alright.

>>Join a bar association. The question is how do you determine what the hourly rate is in the community? Ask friends. Ask others. Tell me what the range is you charge. Why do you do it?

>>That's more uncomfortable to me than talking to clients about it, you know?

>>But also, you have to look at, you know, are you the person who's two years out of law school? You shouldn't be charging the – you know, you're going to be learning on the job and we do have a SJC decision where the court said in deciding if something was an excessive fee – that you should not be paying more for the inexperienced lawyer who has to learn – this is what Jim and David were saying – who has to learn everything that the experienced lawyer already knows. This had to do with an OUI case and excessive paying in an OUI case and it's like, you know, the general range in those – the highest anyone could come up with for this was way out of the norm was about 15,000 and this guy want to charge 50,000. And the SJC said No, no, no. Just because you had to learn this all from scratch, you know, doesn't entitle you to pay you for your education.

>>I understand that. But I just, you know, I just – it's always been kind of mysterious to me.

>>Yeah, I think – join a local bar and that's where you find the people who've been...

>>Go on to like MATTA has a website with a list serve and you can post it saying I'm interested in anybody that can tell me what the range of fees are that folks normally charge. Works very well.

>>Just, you know, don't necessarily if you're not busy or something it's not – if you lower your rate, you know, or you charge – you know, say you start charging \$60 an hour or something I doubt that gets you more clients. That's going to – clients who talk to other lawyers are going to think this person must not know what they're doing or they must be desperate.

>>I've been practicing for a while and I've always had the same rate. And I don't know if I should raise it because...

>>Probably.

>>Talk to your spousal unit or your accountant.

(LAUGHTER)

>>Well he's both.

>>Wow. OK. Have two conversations. Two votes.

>>Let me just say one thing that came up in response – what I was thinking of in response to this question over here and then I'll skip to this question. I - in my family law cases and some other kinds of litigation where you have a chance of getting an award of fees if I discuss that with the client I make sure that I state in my fee agreement that there is no guarantee. We're not making any assumptions about collecting our fees. I don't want a client at the end of the case to say well, you said they'd order him to pay my fees.

I think it's important to be – again good communication - very clear about that as well. There was somebody back here.

>>I was just going – I was thinking if you've established your rate – someone told me in terms of the time to double the amount of the retainer because it always takes twice as many hours as you expect. A lot of times I find I don't charge enough hours sometimes. And I end up with a retainer with insufficient hours. Some people balk at that – so the problem is then you use up that first retainer so quickly like someone else said.

>>Yes.

>>So he had said figure out what you need as a fair retainer and double it that way you'll have enough time and you can always refund if, you know, if it settles more quickly.

>>So this question has to do with the amount of the retainer and the fact that you may get a retainer and then the time charges can be double what your retainer was. Yes if you can get a retainer twice that amount so much the better for you but you also I think need to be clear with the client that you're not telling them that the amount they're paying as a retainer is the most that your fee is going to be. Unless you're agreeing to that. I think you're telling them this is an advance against fees but it isn't, you know, the most that you could have to pay. So that if you end up charging them twice what your retainer was you haven't made any kind of representation to them that that was all it was going to be.

>>David, my apologies. There are two questions – there are live people on the web. I just got two questions.

>>Oh, good.

>>One question is what are the sources if any out there for the market rate in the industry, especially since lawyers tend to be protective of their billing practices? And I think that's the answer that we just gave. I'm sorry we beat you to it. But Bar association and talk to friends. And I think frankly lawyers are willing to talk about that. The second question is if Massachusetts and New Hampshire attorneys working for a Massachusetts law firm for a potential client in New Hampshire do you have to have a written fee agreement since New Hampshire's rules are different? Well, I don't know what New Hampshire's rules are the writer who's a friend of mine – you'll know what the answer is David. But I think that if you're involved with a Massachusetts based matter it ought to be in writing.

>>There's no downside.

>>There's no downside. Thank you.

>>I think it's a good business practice.

>>Crazy not to.

>>Even if we didn't have that rule I'd be saying that you're better off with a written agreement.

>>And plus because I know how old the writer is your memory's not good as good it used to be.

(LAUGHTER)

>>All right so that's...

>>We used to work together.

>>...C and A. The next one is S - system. Have a good system for recording your time. And record it - a system for recording your time as you go. Not getting to the end of the month and trying to think about how much time you spent on each of your cases. I've - I've started using a little timer. And I think some of the billing software programs actually have a timer. I find I am much more disciplined about this if I have a timer running. And if I get some interruption - a personal call or I respond to an email or something --I stop the timer. And then I switch it back on again and then I have a really reliable record of how much I spent on one matter. It disciplines - it makes me a little more disciplined in making sure I'm completely focused on the matter while the timers running. And it's going to be much easier to generate my bills.

>>Time slips will do that.

>>Yes. Yes. I used to use timemattus which did that. I'm now using QuickBooks which I think there's some add-on that will do that but I just found a simple timer app which is doing it find for me. Write down what you did. Make a good record of it. Use verbs describe the tasks that you preformed because your bill is not only a basis for getting paid but it's a report to the client on what you've been doing on their case. And it - the more detail you have the easier it is to justify the fee that you are charging and the time that you're billing the. So make that - just have a system and stick to it for recording time, reporting it to the clients. And it's become so much easier to do that now than it used to be.

>>OK. So now you have a divorce practice - you have to be careful about...

>>Yes.

>>...And everybody does - go ahead.

>>Yes. OK. So we're getting to here is issues of attorney client privilege. Do you - you know, how much do you reveal in your bills in a matter in which somebody maybe reviewing your invoices? I think you just need to be mindful of that. I think you can still state - you spent, you know, 20 minutes on the phone with the opposing lawyer or with your client or with - now if there's some expert witness in your speaking with them and you haven't decided whether to retain them and maybe you don't mention a person's name. You can just mention expert witness your client will know who it was because you will have explained that to the client separately.

But just - yeah, being - in any case in which you either could be seeking - you could be seeking your fees or a court - or opposing lawyer could be reviewing your bills, think about how much you want to disclose about that. Certainly subject matters discussed with client, you know, preparation for trial or preparing a witness or something, none of that is going to be harmful if somebody else sees it.

>>Courts are pretty protective of confidential information that is redacted from bills. Even if you've got a submission under a statutory fee possibility or in a divorce case, you move to submit we end up doing redacted bills on occasion and judges have been receptive to that. But you sure - unless you really want to nail somebody, you sure you don't want to say my client admitted that they killed the person, you know, probably not a great idea.

>>Conversation with client in which crime.

(LAUGHTER)

>>Right, in which client, yeah - admission.

>>Good night and have a good day.

>>So this system that you have needs to include actually sending the bills out and sending them out early. I actually represented a woman who was being sued by her lawyer for legal - for fees and one of his bills was for something like \$20,000 for a month's work, and he sent it to her about six months after the month in question. And I'd say that looks like a person who really doesn't care very much about getting paid. It's not helpful to report to the client six months later what you did in November of 2015, and if you really want to get paid, you want to get these bills out quickly. If there's any - if the client has a problem with your bill or is shocked by it or is disagreeing with some strategy, the earlier you have that conversation the better and of course, the sooner the client gets the bills the more likely you're going to have those kinds of conversations.

>>Plus, if you send them out monthly, you've got estoppel working. If the client doesn't object, you can argue that they waived.

>>Yes, that's right, yeah. So they didn't have a, you know, if they don't complain about your time charges until three years later, you have a pretty good argument there that you were reasonable. Some do's and don'ts on this - on recording time and tracking your time. I think it's important to make sure the clients feel they were treated fairly in their billing. I sometimes write down the time charges. I often will - if I spend a short amount of time on something in the middle of doing something else, I'll write it on their bill, but there'll be no charge. I think you have to have a long-term view here, and a happy client is possibly a source of future business. You're always better off having people feel good about you and feel that you were ethical and honest and fair with them than have them have resentments after they receive your bills and you apply that retainer against a huge bill. Bill your clients for lawyer work. Don't bill them for work that would be done by an administrative assistant or a paralegal if you had one. I - that's one of the things I find myself doing. I do - as a solo - a lot of tasks that in another firm, a non-lawyer would be doing. I might report that in my bill, but I'm not going to charge the clients for that work or I'm not going to charge them my hourly rate. I try to pay attention to the quality of my time. You could be having a conversation with a client while you're driving home from work, and you're not at your desk, you're not taking notes. Maybe that isn't necessary, maybe what you're conveying is something you're able to give them good advice and is good quality time, but just think about that and think about it from the client's perspective as well. I had a woman who was helping me with my website who only ever seemed to call me when she was driving. And she never followed up on things, and I think

- I'm sure it's because she wasn't writing them down and I wasn't getting her full attention and I - myself - felt a little resentful about that. So consider that. Maybe you have a conversation - return a call in the car and you record it on your bill, and you don't charge the client for it. So they see that you're not charging them for it. I wouldn't be surprised if somebody in this room or one of the people watching this online has responded to a text message or email during my presentation. Maybe it was from a client.

>>No.

(LAUGHTER)

>>All right, is that the same quality - hopefully you were listening to us here.

(LAUGHTER)

>>So is that client getting, you know, your hourly rate's worth of business when you respond to that email? I think just be careful about those things.

>>These two guys were listening.

Yes, if they're doing it online, it's easy for them to be responding to emails. Don't incur large client expenses without having prepared the client in advance. I write in my fee agreements that if I'm going to incur an expense of over \$100, I'll get their prior approval whenever possible. And, you know, that - when clients realize how much it costs for a deposition transcript, they might think twice about whether they really need the deposition of everyone, you know, every possible witness. And this I think comes - this addresses the case that Connie mentioned earlier - the OUI case. Don't learn a new practice area on the client's dime. I have found - and my business litigation practice is fairly varied and I've had some matters on which I've, you know, I didn't have prior experience - land use, or municipal litigation. I'm not - if I spend several hours reading up on that, I don't think it's fair of me to bill the client for that time when if they went to a lawyer who specialized in that area, they would already know the answers and know the stuff that I just learned. So - and I try to reassure clients about that as well because I want them to know, again, that I'm going to treat them fairly and I'm going to represent them well, but I'm not going to be charging them as - for my learning curve. All right.

>>Sorry, question?

>>And this is something I struggle with. The minimum time - continually for court appearances.

>>Yes, oh, great point and actually I had that in my notes, and I hadn't mentioned it so. So you're asking about the time for court appearance - when you're in court appearances?

>>Or minimum time billings.

>>OK.

>>Yeah, so - because you don't know when your case is going to be called - you could be there for an hour or you could be there for, like, - the whole day.

>>So the question has to do with when you're in court, and this comes up a lot for Probate and Family Court lawyers I think probably more than Superior Court and maybe District Court lawyers as well because every case is on for 9 a.m. and some of them aren't reached until the afternoon and you're spending all these hours in court hanging around - some of it waiting for your case to be called. How do you bill the client for that? Do you limit the hours you bill the client for that? This - I think some of this comes down to client communication and what the client's expectations are. One of the things to inform clients about litigation is that there is that aspect to it. There's a lot of inefficiency there, and on the one hand you might say they're taking you away from other work and they're taking up all of your time and so they should pay for that. However, it's hard for a client to get a \$1,500 or \$2,000 bill for one day in court when you're before the judge for 10 minutes. I generally don't - I don't bill for the whole day if I'm there for the whole day. So if I'm on a 9 o'clock and I get called at 4 p.m., the client may get billed for four or five hours. I will mark the bill down. I'll have the client see that on the bill that I didn't charge them for all that time. If you are billing the client for all of your time, it's - I think you need to make sure you spend that time - as much as possible - working on the client's case. I see this in Probate Court all the time where lawyers are off seeing their friends and chatting about something and they leave their clients alone on the bench, and the clients see all this. They see how you're spending your time in court, and then imagine how they're going to feel when they get a bill for six or seven hours of your time when you spent it, you know, off on a separate bench reading "Lawyers Weekly" or the newspaper or chatting with your friends or the court staff. So, you know, be mindful of how you're billing them for this and what their expectations - make sure that you set their expectations. You could also work on other matters and tell the client I may work on other matters while I'm there, but of course, I won't bill you for that time - that, you know, most of us have work that we can carry with us. Yes?

>>It's not so much what you do, what do the Rules of Ethics require you to do?

>>So I don't think there's a...

>>Repeat the question.

>>...the question was do the Rules of Ethics have any particular requirements for if you have - I assume you're asking about if you have a day in court and there's...

>>Well, are there any - are you ethically OK in charging them for this?

>>I think that you are. I don't know of any...

>>Yes, you are. You're spending on the client's time.

>>Yeah, yeah, I just think, again, thinking about having a happy client at the end of the process and the client who thinks he or she was treated fairly. You know, if you can use that time for some other client's matter or not bill the client for all that time, you're going to - you're going to have a better client relationship.

>>I think driving time is the same issue, you know, I mean yeah, you can, you know, you can charge \$300 an hour to drive from Boston to Plymouth, but it's probably not good business.

>>There are two separate questions in here - is one, is there a prohibition against doing it? And the answer is no. And the second one is should you? And David and Connie have answered that better than I did.

>>Yes?

>>When you send your bill out - let's say the first of every month or the fifth of every month and - does it make sense to give some lead time to the client before you take the funds from your client's...?

>>No, I'm here with the rule in front of me, and before David went on to H I was about to jump in on this. Which is that you can - the other reason for not letting that \$20,000 bill sit for six months is that you cannot pay yourself from your retainer from the funds you are holding until you have billed. It either has to be before or simultaneous with when you pay yourself. If you do it simultaneously and the client then starts screaming, he was at court all day and were working on the other client's case, why are you billing me? You have to put the disputed portion back into the trust account. So there's something to be said for sending it out - sending the bill out five days before you pay yourself.

>>And that's why my concern is that it would seem to me you don't want to raise the issue, like, that your bill is unfair. So you don't want to say if you have a concern - you don't want to say you have a dispute or something, you know, please give me a call, but I think it's eminently reasonable to say if you have any questions, please give me a call, wait 10 days, and then make the transfer.

>>Five days - it's also not a bad idea to put this in the fee agreement that I'll send the bill out and, you know, if I haven't heard from you in five days, I'll assume we're all on the same page.

>>And it's actually a simple matter in this instance to back and fill. If the client raises an issue, you pull it back out of operating, put it into IOLTA until the issue is resolved - of the disputed portion - it's very easy to do.

>>For the one or five-10 days you can, like, avoid the...

>>Yeah, you can do it simultaneously if you want, and you send out the bill for \$3,000, pay yourself \$3,000 and the client starts squawking about this day in court and they're fighting - and they, you know, they say you charged me 1,000 and I don't think it should be more than 500 - you put 500 back. Five hundred is the - that's a bad example because the numbers are the same - but, you know, you say you charge 1,000 - they say I don't think it should be more than 300 - you put \$700 back until you get it sorted out. Just don't have this be your last nickel because you will have to put the money back into trust.

>>And I do that - I don't wait five days. I send them the bill and I apply the retainer. And I - like you, in my - most clients actually email their bills now, but I always have a line in there that says if you have any comments or questions about any line items on the bill or anything else, just give me a call. So I invite that without specifically saying, you know, if you're not happy with me applying your retainer against the bill...

(LAUGHTER)

>>Yeah, all right so - the H. We've done C-A-S-H - Help. What happens when the client doesn't pay you? You've communicated well, you've got a fee agreement, you got a retainer unfortunately, this is one of those cases where the fee was twice the retainer and you didn't get it replenished. Now you've done a great job recording, sending out your bills and you're not getting paid. Why - H - why help? Well, because that's what you'll need if your client doesn't pay. You need, you know, again, this is one of those things learned the hard way as a solo to have good practices about actually getting paid. And one of the things - just as it can be uncomfortable talking with clients about money at the beginning, it can be uncomfortable talking with them about money when they owe you, but you have to get over that. And in my experience, the clients - when I call them - and you should call them. It's - email is so easy you can just get something off your desk quickly, but you have no guarantee that they're going to pay attention to it. They might read it and think I'll deal with that later, and then not deal with it - there's nothing better than a phone call. And I think it's good for the lawyer who has the relationship with the client to be the one that makes the phone call, but often there's an explanation, you know, they're waiting for somebody to come in, they'll pay you next week - gives you something to follow up on. They're, you know, clients I think most of them understand that they're obligated to pay you and they'll pay you, and you - I'm not sure if they're afraid of being sued by you or not, I haven't ever threatened a client with suit. But it is important to stay on top of that and to call them and then if they make some sort of promise to you and break it call them again and stay in touch with them. That kind of contact is the best way you can be most successful at getting paid. So what do you do if they still don't pay you? Well the next, I suppose, would be a letter. A letter explaining - perhaps attaching their agreement and the invoices and telling them that they owe you. And then what? Well, do you sue them? Their - those of you who are - have your own firms - know that when you complete a legal malpractice application for MIT legal malpractice insurance there is a question on there - have you sued a client in the last 12 months? And there's a reason that question is on there. And the reason is that you are at a much higher risk of being sued for malpractice when you sue a client. As a litigator I get that. I understand - if someone comes to me and they're being sued and they want me to represent them I'm going to explore whether there is a counterclaim to be made against the other party and that's the obvious counterclaim to be made is you didn't do a good job on my case, or you overbilled me, or you made a mistake and we didn't get as much money as we should've gotten. So it's always better to try to talk the client into paying you and often better to give up on collecting the fee and perhaps kick yourself for not having gotten a bigger retainer or addressed this when the client was only a \$1,000 behind instead of when they were \$20,000 behind. But suing a client should be an absolute last resort. I even - I do some criminal defense - an OUI case, flat fee, and the client paid half of it upfront and was supposed to pay the rest of it before trial and didn't. Got a not guilty I don't see any possibility of a counterclaim for malpractice there. I mean we won. It's an absolute victory; he's off the hook. I still haven't and part of it is, you know, is that how you want to be spending your time? It is a lot of stress and distraction associated with that as well. So think long and hard before filing suit. Some would advise that you perhaps get a consultation with a lawyer who represents people in malpractice cases and talk about the case so that you can anticipate whether you might be at risk of being sued. I was - I won't - there was a case of fishermen about - a very interesting case about a lawyer who ended up suing a client and regretting it. And I don't know if it's...

>>Fisherman versus Brooks.

>>It's a very interesting, but scary case to read and ought to make any – that guy did a pretty bad job for his clients. But it ought to make anybody concerned about being sued even if the suit is not very notorious, it's going to cost you. It's going to cost you in your malpractice insurance premiums, so not worth it.

>>It was the first case in Massachusetts that allowed introduction of evidence of a violation of a disciplinary rule as evidence of malpractice. So it's also famous for that as well.

>>And, yeah, it's a good read. So...

>>And he didn't get the fee and he got, what? A couple hundred thousand dollars? It was, you know...

>>Yeah he got wacked. And the insurance company testified against him. Great stuff.

>>So cash that's what it's all about? Just make sure you have excellent communication – get an advance, have a great system for recording and reporting on your work, and have that be in need of help as little as possible because you do the first three really well. Just be – two other – two or three other just very general precautions – don't undersell yourself. Don't be desperate about taking on a client. There are other clients out there and if you sense there's a red flag there, there probably is and sometimes you just need to go with your gut with certain matters. And don't agree to take a matter on principle. If the client's principle, it's usually not yours. And, you know, you can choose what you want to work for free on and don't have the client persuade you that their case is the one you should take for free and you don't be too quick to throw out answers to legal questions. That initial phone call and start giving advice over the phone before you've established an attorney-client relationship or any kind of fee arrangement. It is so tempting to do. I love doing that – listening to a client's problem and helping them understand the different possibilities and explaining to them. But you can charge for that and there's one word I use in those phone calls – it's consultation. Come in for a consultation. Or let's schedule a phone consultation. I think implicit in that – right from the beginning – is that they're going to have to pay for this. And if it wasn't clear to them you need to state this is what I'll charge you for that, you can send me the money, and then we can talk.

>> You know, as David said he did a conflict check before having that consultation (LAUGHTER).

>> Yes (LAUGHTER).

>>All right, thank you. That's all I have.

>>Applause.