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APA 7th ed.

Brengle, D. (2023). Flat fees in missouri. *Journal of the Missouri Bar*, 79(2), 56-57.

Chicago 17th ed.

David Brengle, "Flat Fees in Missouri," *Journal of the Missouri Bar* 79, no. 2 (March-April 2023): 56-57

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# Flat fees in Missouri

David Brengle

## “Never spend your money before you have earned it.” -Thomas Jefferson

The American Bar Association says lawyers use flat fees where the work involved is straightforward, predictable, and routine. As a result, flat fees are often encountered in uncontested divorces, simple wills, traffic tickets, misdemeanors, adoptions, and name changes.<sup>1</sup> While there may be truth in the ABA’s assertion on flat fees, practical concerns of practicing law may make the flat fee, or larger structured fees, more common than the ABA’s suggestion. At times, flat fees are sometimes encountered in felony criminal law, immigration law, bankruptcy, contested divorces, and order of protection proceedings.

Despite the apparent finality provided by the descriptive name, when a lawyer undertakes a representation in return for a flat fee, that lawyer also undertakes an obligation to account for both earned and unearned portions of flat fees.<sup>2</sup> If the lawyer’s representation ends before the client’s case ends, the lawyer is responsible to account for how much of the flat fee is earned and return all unearned fees to the client.<sup>3</sup> Lawyers sometimes attempt to remove this obligation under the rules through a client agreement by characterizing a flat fee as “nonrefundable.” Some fee agreements indicate that the lawyer earns the fee upon receipt or upon filing an “Entry of Appearance.” Such agreements violate the rules and are not enforceable. A client’s consent to a lawyer violating the Rules of Professional Conduct does not make the conduct less violative.

### Considerations when using flat fees

If an agreement between a lawyer and client outlines that the lawyer earns an entire flat fee upon filing an “Entry of Appearance,” such an agreement likely violates Rule 4-1.5, which states that all fees must be reasonable. To determine if a fee is reasonable, the rule requires consideration of at least eight factors:

- (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(s) performing the services; and
- (8) whether the fee is fixed or contingent.

Fee reasonableness is viewed in retrospect, not at the time of fee negotiation. Considering the factors set out in Rule 4-1.5, most flat fees will be unreasonably high if a lawyer views the entire fee as earned upon receipt or upon the filing of an “Entry of Appearance.” Accordingly, if lawyers use flat fees, they must consider when different portions of their fees are earned.

A lawyer may charge a flat fee and explain in their engagement letter or representation agreement that they will bill against the flat fee at a reasonable hourly rate until the fee is exhausted. Significantly, flat fees exceeding \$2,000, paid in advance, must remain in the lawyer’s trust account until earned, by some benchmark.

Many lawyers opt to use flat fees to avoid the hassles of hourly billing. Another way to use flat fees in accordance with the Rules of Professional

Conduct, but without hourly billing, is to attach the earning of fees to milestones in a case. For example, in a criminal case, some portion of the fee is earned after arraignment, after a review of discovery, after legal research related to discovery review, after the filing of pretrial motions, and finally after trial or plea agreement. Of course, if a lawyer were to undertake the use of this “milestones” or “benchmark” approach, they should plainly outline the milestones and fees associated with each milestone in their engagement letter or representation agreement.

### The problems of early termination and early resolution


Occasionally, a client will hire a lawyer and shortly afterwards decide they no longer wish for that lawyer to represent them. This situation presents the problem of how much (if any) of the lawyer’s flat fee is earned and how much of the flat fee is unearned such that the rules require a refund to the client. Missouri allows flat fees that are \$2,000 or less to be deposited directly into an

**“If the lawyer’s representation ends before the client’s case ends, the lawyer is responsible to ... return all unearned fees.”**

operating account. However, Comment 20 to Rule 4-1.15, which took effect Jan. 1, 2019, provides:

Even though an advanced flat fee that will be promptly paid and which does not exceed \$2000 may be placed directly into the office operating account, if the attorney-client relationship is terminated prior to the advanced flat fee being earned then any unearned portion of the advanced fee shall be refunded.

Missouri lawyers must be able to account for and articulate what portion of a flat fee is earned versus not earned in the event a client chooses to end the attorney-client relationship. Records of work completed (whether quantified by tasks, benchmarks, or hours) help lawyers justify the reasonableness of their fees. However, under Formal Opinion 128, as amended, if a lawyer completes the representation, the lawyer need not refund any portion of their fee, provided the fee was reasonable. Accordingly, the rule allows for a lawyer to earn the entire flat fee when they can resolve the matter earlier than anticipated, provided such a fee is reasonable.

Many lawyers successfully adopt alternative fee arrangements that comply with the rules of professional conduct. Law practice management consultants, malpractice risk managers, and The Missouri Bar offer assistance to lawyers looking for ideas for efficient and permissible fee agreements. 



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#### Endnotes

- 1 *Fees and Expenses*, ABA (Dec. 3, 2020), [www.americanbar.org/groups/legal\\_services/milvets/aba\\_home\\_front/information\\_center/working\\_with\\_lawyer/fees\\_and\\_expenses/](http://www.americanbar.org/groups/legal_services/milvets/aba_home_front/information_center/working_with_lawyer/fees_and_expenses/).
- 2 Rule 4-1.15.
- 3 Rule 4-1.15 and 4-1.16(d).

# Annual Law Update

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Legal updates spanning multiple areas of law, designed to help Missouri lawyers stay informed.



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