

“THE NEW FLAT-FEE RULE: NOW WHAT?”

(JUST WHEN YOU THOUGHT YOU HAD BILLING
ALL FIGURED OUT, COMES ALONG A NEW MANDATORY
RULE ON JANUARY 1, 2019)

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TOPICS TO BE DISCUSSED

1. New Flat Fee Rule (Eff. 1/1/19 & 7/1/19)
 - What is a flat or fixed fee?
 - What is the new flat-fee rule?
 - When did it become effective?
 - What happens to my existing flat-fee engagement agreements?
 - What are the basic elements of the new rule?
 - How does the new rule differ from what the rule was before?
 - What are some practical things to watch out for?

TOPICS TO BE DISCUSSED (CONTINUED)

2. New Rules for ALL Fees (Eff. 7/1/19)
3. BONUS: New HRCP 11.1 (Eff. 9/17/19)

WHAT IS A FLAT OR FIXED FEE?

WHAT IS THE NEW FLAT-FEE RULE?

- ▶ When did it become effective (1/1/19 & 7/1/19)?
- ▶ What happens to my existing flat-fee agreements if they don't now conform to the new rule?
- ▶ What are the basic elements of the new rule?
 - rule only applies if flat fee, in total, exceeds \$1,500 for entire representation
 - fee agreements cannot be described as non-refundable or earned upon receipt (what about general/classic/availability retainers?)

WHAT IS THE NEW FLAT-FEE RULE?

(CONTINUED)

- all flat-fee agreements must:
 - be in writing
 - be signed by the client
 - provide notice of:
 - ❖ nature and scope of services
 - ❖ total amount of fee and terms of payment
 - ❖ how flat fee may be incrementally earned (milestones or hourly rate)
 - ❖ fee will be held in trust until earned
 - ❖ client is entitled, upon request, to accounting

WHAT IS THE NEW FLAT-FEE RULE?

(CONTINUED)

- ❖ if engagement is terminated before completion of representation, client is entitled to a refund of unearned portion of flat fee, if any, in accordance with terms of fee agreement
- upon attainment of milestone or when a certain portion of the fee has been earned on an hourly basis, lawyer shall:
 - ❖ withdraw earned amount
 - ❖ make reasonable effort to notify client of disbursement
 - ❖ if requested by client, provide an accounting

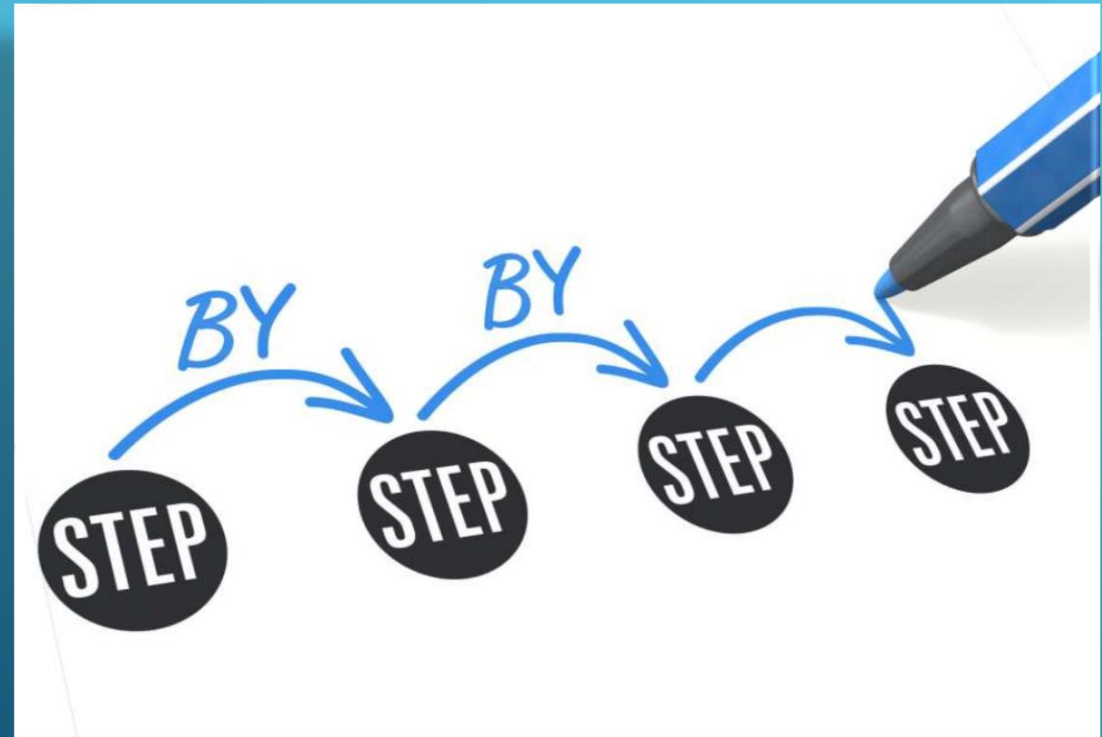
RULE 1.5 (C) & (D)
SOME AGREEMENTS
MUST BE SIGNED
| BY THE CLIENT

1.5(C) – FLAT FEES OVER \$1,500

- Flat fee exceeds **\$1,500**
- “In total” for the “entire representation”
- **Must** have the client/payor sign
- **Must** include **6 things** in **Rule C(1)-c(6)**

1.5(C)(1) TO (C)(6)

- Step-by-step guide
- Requirements for **flat-fee** agreements



1.5(C) (1)&(2) – NATURE, SCOPE, \$\$\$

- (1) the nature and scope of the services to be provided;
- (2) the total amount of the fee and the terms of payment;

before completion of the representation, either by reference to milestones in the contemplated representation or expressed as a specific hourly rate

(4) that the fee will be held in a trust account until earned

(5) the client is entitled, upon request, to an accounting of the tasks performed by the lawyer during the course of the representation; and

(6) if the engagement is terminated before completion of the representation, the client will be entitled to a refund of the unearned portion of the flat fee, if any, in accordance with the terms of the written fee agreement

1.5(C) (3) – CAN EARN AS YOU WORK

(1) the nature and scope of the services to be provided;

(2) the total amount of the fee and the terms of payment;

(3) the basis or rate at which the flat fee may be incrementally earned before completion of the representation, either by reference to milestones in the contemplated representation or expressed as a specific hourly rate;

(4) that the fee will be held in a trust account until earned;

(5) the client is entitled, upon request, to an accounting of the tasks performed by the lawyer during the course of the representation; and

(6) if the engagement is terminated before completion of the representation, the client will be entitled to a refund of the unearned portion of the flat fee, if any, in accordance with the terms of the written fee agreement.

1.5(C) (4) & (5) – DURING THE REP.

(1) the nature and scope of the services to be provided;

(2) the total amount of the fee and the terms of payment;

(3) the basis or rate at which the flat fee may be incrementally earned

before completion of the representation, either by reference to milestones in the contemplated representation or expressed as a specific hourly rate;

(4) that the fee will be held in a trust account until earned;

(5) the client is entitled, upon request, to an accounting of the tasks

performed by the lawyer during the course of the representation; and

(6) if the engagement is terminated before completion of the

representation, the client will be entitled to a refund of the unearned portion of the flat fee, if any, in accordance with the terms of the written fee agreement.

1.5(C) (6) – EARLY TERMINATION

(1) the nature and scope of the services to be provided;

(2) the total amount of the fee and the terms of payment;

(3) the basis or rate at which the flat fee may be incrementally earned

before completion of the representation, either by reference to milestones in the contemplated representation or expressed as a specific hourly rate;

(4) that the fee will be held in a trust account until earned;

(5) the client is entitled, upon request, to an accounting of the tasks

performed by the lawyer during the course of the representation; and

(6) if the engagement is terminated before completion of the representation, the client will be entitled to a refund of the unearned portion of the flat fee, if any, in accordance with the terms of the written fee agreement.

1.5(C) - FINAL ¶ – DISPERSE FUNDS AS EARNED

(6) If the engagement is terminated before completion of the representation, the client will be entitled to a refund of the unearned portion of the flat fee, if any, in accordance with the terms of the written fee agreement.

In accordance with the written fee agreement, upon attainment of a discrete milestone of the representation or when a certain portion of the flat fee has been earned on an hourly basis, the lawyer shall withdraw the earned amount, make reasonable effort to notify the client of the disbursement, and, if requested by the client, provide an accounting.



RULE 1.5 (G)

Termination

Refund &

| Accounting

1.5(G) – TERMINATION & ACCOUNTING

(g) Termination and Accounting. Whenever a client-lawyer relationship is terminated before a fee is fully earned, the lawyer shall provide the client an accounting, upon request, and shall refund to the client the unearned portion of the fee. If a client disputes the amount of the fee that has been earned, the lawyer shall take reasonable and prompt action to resolve the dispute.



RULE 1.5 AND 1.16
MUST PROVIDE
ACCOUNTINGS

WHEN TO PROVIDE ACCOUNTING (UPON REQUEST)

1. During the representation; and
2. Ending representation; and
3. Disbursing funds from CTA/IOLTA

HOW MANY TIMES DO NEW RULES SAY TO PROVIDE AN ACCOUNTING (UPON REQUEST)?

1.5 (c)(5)	1.5 c(final ¶)	1.5 (g)	1.16 (d)	1.5 cmt. 10 & 1.16 cmt. 11
During the Representation	Upon Disbursement	Upon Termination	Upon Termination	Detailed Enough to Resolve Disputes
“the client is entitled, upon request, to an accounting of the tasks performed by the lawyer during the course of the representation”	“...the lawyer shall withdraw the earned amount, make reasonable effort to notify the client of the disbursement, and, if requested by the client, provide an accounting.”	“Whenever a client-lawyer relationship is terminated before a fee is fully earned, the lawyer shall provide the client an accounting, upon request...”	“Upon termination of representation, a lawyer shall ... upon request, providing an accounting of such funds.”	“The right to an accounting ... ensures the client will receive information concerning the work performed by the lawyer sufficiently detailed to aid in the resolution of any fee dispute or request for a refund by the client”

HOW DOES THE NEW RULE DIFFER FROM WHAT THE RULE WAS BEFORE?

- Not only are fee payments received before any legal services are rendered “presumed” to be unearned, fee agreement cannot now even say they are non-refundable or earned upon receipt.
- A flat-fee agreement must be: (1) in writing; (2) signed by the client; and (3) provide notice of the specified items.
- In a flat-fee agreement arrangement, you must make “reasonable effort” to notify your client any time you disburse fees to yourself.

WHAT ARE SOME OF THE PRACTICAL THINGS TO WATCH OUT FOR?

- What happens if you're terminated by the client during a period between milestones/benchmarks and while you continued to perform work for the client? Are you entitled to recover for that interim work or must you have actually reached the next milestone/benchmark before being entitled to draw down any additional payment?
- What happens with a flat-fee agreement arrangement in a criminal case where you earn your fees incrementally (at successive milestones/benchmarks) but you're successful in having the case dismissed at a much earlier point in time than originally anticipated by the milestones / benchmarks? Are you entitled to take the entire flat fee at that point?

WHAT ARE SOME OF THE PRACTICAL THINGS TO WATCH OUT FOR?

(CONTINUED)

- Can you provide for that possibility or eventuality in the flat-fee engagement agreement by providing that the entire flat fee could be earned much earlier if the case is concluded earlier?
- Can you “front-load” your milestone/benchmark fee entitlements?
- What if, after receiving notice of your disbursement of fees to yourself at any given milestone/benchmark, your client disputes your entitlement to those fees? Are you nonetheless entitled to take the fees since you have reached the necessary milestone/benchmark?

SAMPLE CLAUSES YOU MAY WISH TO CONSIDER INCLUDING IN YOUR FLAT - FEE AGREEMENTS

- “If my services are terminated prior to the achievement of a milestone/benchmark, you agree that I am entitled to and may withdraw a portion of the remaining fee based on the proportionate value of the services I have provided since the previous milestone/benchmark.”
- “You agree that I will earn the entire fee at the completion of the representation regardless of and even if certain specified milestones/benchmarks have never been reached, unless the representation is concluded by the termination of my services by either you or me.”

SAMPLE CLAUSES YOU MAY WISH TO CONSIDER INCLUDING IN YOUR FLAT - FEE AGREEMENTS

(CONTINUED)

- “I will use my good-faith judgment to determine when a particular milestone/benchmark has been reached to draw down the fee, and notify you. My determination will be presumed valid unless you notify me in writing within ____ days of the date of the notice that you dispute that determination.”
- “This fee does not include appeals on your behalf.”
- “This fee only covers the present charges [causes of action] brought against you. If additional charges [causes of action] are later brought against you arising out of the same matter, we will need to amend this agreement and agree upon an additional fee for our services in covering those additional charges [causes of action].”

Example

- Family Lawyer charges a flat fee of \$7,000 for divorce
- She has no “milestones” or hourly rate
- Client fires her after she does some work
- Lawyer keeps all of the money

Example

- Franky the Lawyer charges \$15,000 to represent defendant for 3 robbery cases
- Franky has a written fee agreement that his client signs before paying
- Franky's fee agreement says "once the case starts there might be no refund"
- Franky's agreement also says "client waives billing statements & accountings"
- Franky deposits the fees directly into his business account

Example

- Ima Immigration lawyer immediately charges \$2.⁹⁹ for her “initial consult”
- And \$3.⁹⁹ to “set up” the file
- And \$4.⁹⁹ to be “available, loyal, and exclusive”

Example

- Crim. lawyer charges \$2,000 for a simple DUI case (earned at \$200/hr)
- Case goes off the rails – hourly rate blows past total fee



RULE 1.5 (B)

ADVANCE FEES

MUST ALL BE

| REFUNDABLE

1.5 (B) MANNER IN WHICH FEES ARE EARNED

in writing. Fee payments received by a lawyer before legal services have been rendered are presumed to be **unearned** and shall be held in a trust account pursuant to Rule 1.15 of these Rules. Fee agreements may not describe any fee as non-refundable or earned upon receipt.

RULE 1.5 (B)

ALL FEE AGREEMENTS

MUST BE

| WRITTEN

1.5 (B) ALL FEES MUST BE IN WRITING

(b) Manner In Which Fees are Earned. 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, or if it is reasonably foreseeable that the total cost of representation to the

CMT. 2 – WRITTEN FOR ALL NEW CLIENTS


“in a new client-lawyer relationship, an agreement as to the fee and expenses must be promptly established in writing”

CMT. 2 – WRITTEN FEES FOR ALL NEW CLIENTS


“A written statement concerning the terms of the engagement **reduces the possibility of **misunderstanding**.”**

CMT. 2 – WHAT TO PUT IN FEE AGREEMENT

- Can be a “simple memo”
- Can use a “customary fee agreement”
- **Must** have general nature of **services**
- **Must** have the **fee**
- **Must** state who pays **costs**, you or client

The background is an underwater scene. A large, dark, textured rock formation is visible on the left side, sloping downwards. The water is a deep blue-green color, filled with numerous small, light-colored bubbles or particles, giving it a grainy, textured appearance. The lighting is somewhat dim, creating a moody atmosphere.

CIV PRO. R. 11.1 DISCRETE GIGS

A short, solid pink vertical line is located on the left side of the image, positioned below the word "GIGS".

NEW

CIV PRO RULE 11.1

LIMITED
APPEARANCE
&
“GHOSTWRITING”



CIV. PR. R. 11.1(A)&(B) – LIMITED APPEARANCE

- Think gig economy
- **Must file notice** of limited appearance
- **Must inform client** of limits, scope
- **Must move for early** withdrawal
- May file consent, withdrawal to court
- Standard forms provided

CIV. PR. R. 11.1(C) – “GHOSTWRITING”

- Document drafting for *pro se* parties
- You do **not** need a **formal agreement**
- You do **not** need to **use** your name

CIV. PR. R. 11.1(C) – “GHOSTWRITING”

- **Must conspicuously state:**
 - **“this document was prepared with the assistance of an attorney”**
- **N/A for non-profit programs (Legal Aid, VLS)**

FIND NEW RULES & PROPOSED ONES -- DESKTOP

The screenshot shows the Hawai'i State Judiciary website. The top navigation bar includes links for Home, For Public, For Litigants, For Attorneys, For Jurors, For Media, Language Access, ADA, and Access to Justice. The main header features the Hawai'i State Judiciary logo and social media icons for Twitter, Facebook, and YouTube. A secondary navigation bar contains links for General Information, News & Reports, Self-Help, Services, Courts, Legal References, Community Outreach, and Special Projects & Events. The 'Legal References' link is circled in green, and its dropdown menu is open, showing options: Search Court Records, Proposed Rule Changes, Supreme Court Various Orders, Opinions and Orders, Court Rules, and Internet Resources. Both 'Proposed Rule Changes' and 'Court Rules' are circled in green. The main content area displays the 'Ho'ohiki Disclaimer' page, which includes a disclaimer about online access to court information and a note that criminal case information is no longer available in Ho'ohiki. The left sidebar contains links for eCourt Kokua, Ho'ohiki, Jobs, and Efiling. The right sidebar provides information on system availability and recommendations.

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Ho'ohiki
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Search for jobs at the judiciary

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Ho'ohiki Disclaimer

Disclaimer

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Criminal case information is no longer available in Ho'ohiki. Criminal case and Traffic case information can be found in eCourt Kokua.

Ho'ohiki provides access to information about a case, but not to the court documents in the case. If you wish to view or copy court documents, you must go to or contact the legal documents office of the courthouse where the case has been filed.

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- Mac OS X or higher

Supported browsers:

- Chrome 23 or higher

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FIND NEW & PROPOSED RULES -- MOBILE

