

Electronically Filed
Supreme Court
SCRU-11-0001047
25-SEP-2018
09:08 AM

SCRU-11-0001047

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

In the Matter of the

HAWAI‘I RULES OF PROFESSIONAL CONDUCT

ORDER AMENDING THE HAWAI‘I RULES OF PROFESSIONAL CONDUCT
(By: Recktenwald, C.J., Nakayama, McKenna, Pollack, and Wilson, JJ.)

IT IS HEREBY ORDERED that Rules 1.5 and Comments and 1.16(d) and Comments of the Hawai‘i Rules of Professional Conduct are amended, effective as of January 1, 2019, as follows (deleted material is bracketed and stricken; new material is underscored):

Rule 1.5. FEES.

(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, 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 the rates of the fee or expenses shall also be communicated to the client. 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.

(c) Special Duties Regarding Flat Fees. A lawyer may charge a flat fee for specified legal services, which constitutes complete payment for such services. If a lawyer charges a flat fee, the lawyer shall create a written fee agreement, signed by the client (or the person paying the lawyer to render services for another), that provides notice of the following:

- (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.

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.

([e]d) Contingency Fees; Requirements. 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 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.

([d]e) When Contingency Fees are Prohibited. A lawyer shall not enter into an arrangement for, charge, or collect:

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

([e]f) Division of Fees Amongst Lawyers. A division of fees between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer and, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
- (2) the client is advised of and does not object to the participation of all the lawyers involved; and
- (3) the total fee is reasonable.

(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.

([f]h) Inapplicability of This Rule. This Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

COMMENTS:

Special Duties Regarding Flat Fees

[10] A lawyer accepting a flat fee must reduce the agreement to a writing that includes the information specified in Rule 1.5(c)(1) through (6) of these Rules. Compliance benefits both the client and the lawyer, as the information is vital for reconciling future disputes should the representation terminate before the ultimate goal of the representation is achieved. The right to an accounting upon request, referred to in Rule 1.5(c)(5), above, 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.

Rule 1.16. DECLINING OR TERMINATING REPRESENTATION.

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

COMMENTS:

Assisting the Client Upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

[10] The papers to which a client is entitled upon termination of representation may include all documents in the lawyer's file except (a) documents which were only for review and use by the lawyer and persons in the lawyer's office and which the lawyer reasonably believes will not be of material use or benefit to the client or successor lawyer; (b) documents which would violate a duty of confidentiality owed to a third party;

(c) documents which cannot be copied or disclosed pursuant to a court order or other law; and (d) documents which may cause the client or a third party physical or psychological harm.

[11] The right to an accounting upon request ensures the client will receive information concerning the work performed by the lawyer that is sufficiently detailed to aid in the resolution of any fee dispute or request for a refund by the client that may arise.

DATED: Honolulu, Hawai'i, September 25, 2018.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

/s/ Michael D. Wilson

