Ethics Refresher
2015

Tuscaloosa County
1 hour MCLE
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"SOMETIMES, IT REALLY IS EASIER TO ASK FOR PERMISSION THAN TO BEG FOR FORGIVENESS"

A. Rule 18, Alabama Rules of Disciplinary Procedure

"Rule 18 Conduct Not Subject to Disciplinary Action

If, before engaging in a particular course of conduct, a lawyer makes a full and fair disclosure, in writing, to the General Counsel, and receives therefrom a written opinion, concurred in by the Disciplinary Commission, that the proposed conduct is permissible, such conduct shall not be subject to disciplinary action."

B. Write – Alabama State Bar, P.O. Box 671
Montgomery, Alabama 36101-0671

C. Call – 334-269-1515
800-354-6154

D. Formal and Informal Opinions

AN ETHICS REFRESHER

True or False

1. The Ala. Rules of Professional Conduct (the "Rules") state that an attorney shall avoid even the appearance of impropriety.

True _____ False _____

2. An attorney must have a written fee agreement with every client.

True _____ False _____

3. In a contingency fee arrangement, an attorney may settle a lawsuit without the client's knowledge if agreed to by the client in the contingent fee agreement.

True _____ False _____

4. You must release a client's file to the client even if you have not been paid.

True _____ False _____

5. A lawyer can charge the client or the Bar for the time it takes to respond to a bar complaint filed by the client.

True ____ False _____

6. The advertising and solicitation rules apply to social networking sites such as Facebook.

True _____ False _____

7. A lawyer may provide emergency financial assistance to a client, if the repayment of the loan is not contingent on the outcome of the representation.

True ____ False _____

8. A lawyer may be hired by a third-party to represent a client and may be fired by the third party.

True ____ False ____

9. A lawyer can tape record his/her conversation with a client, witness, or opposing counsel without their knowledge or permission.

True _____ False _____

10. Lawyers and non-lawyers are treated the same when changing firms in regards to conflicts of interest and firm disqualification. .

True ____ False ____

RECENT FORMAL OPINIONS

FORMAL OPINION 2015-01

QUESTION:

The question before the Disciplinary Commission is whether a lawyer representing a client on a contingency fee basis may enter an agreement for, charge, or collect an attorney's fee based on the gross recovery or settlement of a matter, and in the same matter charge an additional contingent fee for the negotiation of a reduction of third party liens or claims, for example medical bills, statutory liens, and subrogated claims, where the liens or claims are related to, and to be satisfied from, the gross settlement proceeds from that matter.

ANSWER:

Absent extraordinary circumstances, a lawyer may not enter into an agreement for, charge, or collect an attorney's fee based on the gross recovery or settlement of a matter, and in the same matter charge an additional contingent fee for the negotiation of a reduction of third party liens or claims, where the liens or claims are related to, and to be satisfied from, the gross settlement proceeds from that matter.

DISCUSSION:

Rule 1.5(a), Ala. R. Prof. C., requires "[a] lawyer shall not enter into an agreement for, or charge, or collect a clearly excessive fee," and identifies nine factors to be considered when determining whether a fee is clearly excessive:

Rule 1.5.
Fees.

(a) A lawyer shall not enter into an agreement for, or charge, or collect a clearly

excessive fee. In determining whether a fee is excessive the factors to be considered are 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;
>
> (8) whether the fee is fixed or contingent; and
>
> (9) whether there is a written fee agreement signed by the client.
>
> ***

These factors, with the exception of paragraph (9) which provides for consideration of a written fee agreement signed by the client, are identical to those announced by the Supreme Court of Alabama in *Peebles v. Miley*, 439 So.2d 137 (Ala. 1983). While contingent fees are not permitted in criminal defense and domestic matters, see Rule 1.5(d), Ala. R. Prof. C., they are permissible in a wide variety of matters provided they do not call for, charge, or result in the collection of a "clearly excessive fee."

More than merely permissible, contingent fee agreements are normal and customary in plaintiff's practice, and particularly prevalent in personal injury representation. Among other requirements, Rule 1.5(c), Ala. R. Prof. C., dictates these agreements must be "in writing" and "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." Because all contingent fee agreements must be in writing, it is plainly impermissible for a lawyer to charge or collect a contingent fee for the negotiation of reductions in medical bills or hospital or subrogation liens or other third party claims to be satisfied out of settlement funds if there is no written agreement to do so. Rule 1.5(c), Ala. R. Prof. C.

However, a lawyer may not, even if in writing and signed by the client, enter into an agreement or agreements which call for an attorney's fee based on the gross recovery or settlement of a matter and in the same matter charge an additional contingent fee for the negotiation of a reduction of third party liens or claims which are related to, and to be satisfied from, the gross settlement proceeds from that matter. This is because the negotiation of a reduction of third party liens and claims is incident to normal personal injury representation. Frequently necessary to reach a settlement of a client's personal injury claim, this service is a routine element of case management.

While Rule 1.2, Ala. R. Prof. C., allows for limited scope representation, the limitations must be "reasonable under the circumstances." Lawyers may not ethically abdicate their duty to timely address liens attaching to settlement proceeds. Rule 1.4(b), Ala. R. Prof. C., requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation." One of the most significant decisions to be made by a personal injury plaintiff is whether or upon what terms to propose or accept a settlement. Without an explanation of his or her obligations with regard to medical bills or hospital or other liens related to the injury giving rise to the claim, and any legal interest a third party may have in the client's settlement proceeds, a client cannot make an informed settlement decision. This is especially the case if the lawyer has a statutory obligation to protect a third party's interest in those funds, for example in the case of hospital or Medicaid liens, or an ethical obligation by virtue of the issuance of a protection letter. See Formal Opinion 2003-02.

It also stands to reason that typically the most advantageous time for negotiation of third party liens or claims is prior to, rather than after, settlement of a tort claim. Whereas before settlement the lienholder or subrogated insurer will have to face the possibility of receiving no recovery at all, after settlement or judgment the lienholder will have no incentive to reduce its lien except as may be required by the common fund doctrine. A lawyer attempting to negotiate a reduction after settlement may not knowingly make a false statement of material fact or law to a third party claimant, including a false statement about the settlement status of the related claim or the third party's right to settlement funds therefrom. Rule 4.1(a), Ala. R. Prof. C. Therefore, absent extraordinary circumstances, a lawyer representing a client in a personal injury matter may not enter an agreement with the client to exclude consideration of third party liens or claims from the scope of representation. Rather, a lawyer's obligation to zealously represent the client's interests requires reasonable efforts to timely seek their reduction in conjunction with settlement.

Furthermore, the Rule 1.5(a) factors require that a fee for the negotiation of medical bills or hospital or subrogation liens, assessed *in addition to* an attorney's fee based on gross recovery, must be supported by some additional benefit to the client. However, as beneficiaries of the lawyer's services, third party claimants and lienholders routinely reduce their liens or claims on a pro rata basis equal to their share of the attorney's fee paid by the client consistent with the common fund doctrine. A further reduction in a third party's lien upon or claim to settlement funds, in excess of the amount potentially recoverable pursuant to the common fund doctrine, is frequently

necessary to for the parties to reach a settlement. A lawyer negotiating these reductions in the process of reaching a settlement is compensated for his services by an attorney's fee calculated as a percentage of the gross settlement.

Thus, a lawyer charging a client a fee for negotiating reductions in third party claims, including medical bills or hospital or other subrogation liens to be satisfied from settlement proceeds, in addition to an attorney's fee based upon the gross settlement, does so without providing any additional benefit to the client. This negotiation is incident to normal representation and requires no additional time or labor than that required of an attorney representing the client in the underlying claim. See Rule 1.5(a)(1), Ala. R. Prof. C. It is neither normal nor customary for lawyers to charge clients an additional amount for this "service." See Rule 1.5(a)(3), Ala. R. Prof. C. And a lien reduction granted by a medical provider or lienholder to facilitate the global settlement of the underlying claim, or consistent with the common fund doctrine, is the result of action already practically and ethically required of the lawyer and not the result of an additional service. See Rule 1.5(a)(4), Ala. R. Prof. C. It is therefore a violation a Rule 1.5(a), Ala. R. Prof. C., for a lawyer to enter an agreement for, charge, or collect such a "clearly excessive fee," which could be described as "double-dipping."

In sum, while circumstances may exist in which it is permissible for an attorney to enter into an agreement for, charge, or collect a contingent fee for the reduction of medical bills or hospital or subrogation liens or other third party liens or claims to be satisfied out of settlement funds, the Disciplinary Commission is of the opinion they are impermissible in routine contingent fee representation where the attorney's fee is based on the gross settlement or recovery. This opinion does not address an agreement for or charge of fees or expenses for the outsourcing of lien resolution in complex matters, for example Medicaid liens or ERISA subrogation, or the apportionment of those costs between the lawyer and client where the both lawyer and client are beneficiaries of the third party service.

Communications with Persons Represented by Counsel

Rule 4.2(a) Communication with Person Represented by Counsel

(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

- This Rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.
- The Rule requires actual knowledge, but actual knowledge can be inferred from the circumstances.
- This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation.

- This Rule does not preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.
- Parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. However, a lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a).
- A lawyer's adventitious receipt of information from someone who has spoken with a represented person independently, not at the lawyer's behest, suggestion, encouragement or prior knowledge, does not implicate Rule 4.2. *Miano v. AC & R Adver. Inc.,* 148 F.R.D. 68 (S.D.N.Y 1993)
- The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.
- A lawyer is not necessarily free to accept a party's claim that they have fired their lawyer and are now unrepresented. The lawyer should seek confirmation of the termination.
- In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.
- Consent of the organization's lawyer is not required for communication with a former constituent. However, the lawyer should avoid inquiries that would violate the attorney-client privilege and refrain from allowing voluntary disclosure of privileged information by the former constituent.
- If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

Governmental Client Exception to the Anti-Contact Rule

- Generally, permits direct lawyer contact with a governmental officer or employee represented in their official capacity. However, some states recognize an exception to the exception, in cases where the governmental client is represented with respect to negotiation or litigation of a specific claim and the contact does not involve an issue of general policy. Restatement Third, The Law Governing Lawyers §101.
- The Government Client Exception is consistent with public policy that favors open communication, open government, open files, and open meetings.
- The Governmental Client Exception assumes that the officer or employee is sued in their official capacity. If a governmental officer or employee has retained separate counsel to represent them in their individual capacity, then the Governmental Client Exception is not applicable.
- Jurisdictions are split over the extent and scope of the Governmental Client Exception.

- In Alabama, the Disciplinary Commission held in RO-2003-03 that Rule 4.2 does not prohibit a lawyer from communicating directly with government officials who are represented by counsel about the subject matter of the representation.
- The government may impose a policy that requires officials and employees to refuse to speak to opposing counsel without consent or the presence of the government agency's lawyer.
- Caution: The Government Client Exception does not allow, however, the lawyer representing the government to communicate directly with private individuals represented by counsel without counsel's consent.

RULE 1.15
SAFEKEEPING PROPERTY

(a) A lawyer shall hold the property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. No funds of a lawyer shall be deposited in such a trust account, except (1) unearned attorney fees that are being held until earned, and (2) funds sufficient to pay bank service charges on that account or to obtain a waiver thereof. **Any funds while in the lawyer's trust account which the lawyer is entitled to receive as a fee, reimbursement, or costs shall not be used by the lawyer for any personal or business expenses until such funds are removed from the trust account.**

Interest or dividends, if any, on funds, less fees charged to the account, other than overdraft and returned item charges, shall belong to the client or third person, except as provided in Rule 1.15(~~g~~ k), and the lawyer shall have no right or claim to the interest. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for six (6) years after termination of the representation.

A lawyer shall designate all such trust accounts, whether general or specific, as well as deposit slips and all checks drawn thereon, as either an "Attorney Trust Account," an "Attorney Escrow Account," or an "Attorney Fiduciary Account." A lawyer shall designate all business accounts, as well as other deposit slips and all checks drawn thereon, as a "Business Account," a

"Professional Account," an "Office Account," a "General Account," a "Payroll Account," or a "Regular Account." However, nothing in this rule shall prohibit a lawyer from using any additional description or designation for a specific business or trust account, including, for example, fiduciary accounts maintained by the lawyer as executor, guardian, trustee, receiver, or agent or in any other fiduciary capacity.

(b) Upon receiving funds or other property in which a client or third person has an interest from a source other than the client or the third person, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding that property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and a severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) A lawyer shall not make disbursements of a client's funds from separate accounts containing the funds of more than one client unless the client's funds are collected funds; provided, however, that if a lawyer has a reasonable and prudent belief that a deposit of an instrument payable at or through a bank representing the client's funds will be collected promptly, then the lawyer may, at the lawyer's own risk, disburse the client's uncollected funds. If collection does not occur, then the lawyer shall, as soon as practical, but in no event more than five (5) working days after notice of noncollection, replace the funds in the separate account.

(e) A lawyer who practices in this jurisdiction shall maintain current financial records as provided in these Rules and required by Rule 1.15 of these

Rules, and shall retain the following records for a period of six (6) years after termination of the representation:

(1) **receipt and disbursement journals containing a record of deposits to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited, as well as the date, payee, and purpose of each disbursement;**

(2) **ledger records for all client trust accounts showing, for each separate trust client or third person, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons or entities to whom such funds were disbursed;**

(3) **copies of retainer and compensation agreements with clients as required by Rule 1.5 of these Rules;**

(4) **copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf;**

(5) **copies of bills for legal fees and expenses rendered to clients;**

(6) **copies of records showing disbursements on behalf of clients;**

(7) **the physical or electrical equivalents of all trust account checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks provided by a financial institution;**

(8) **records of all electronic transfers from client trust accounts, including the name of the person authorizing transfer, the date of transfer, the name of the recipient, and confirmation from the financial institution of the trust account number from which money**

was withdrawn and the date and the time the transfer was completed;

(9) **copies of monthly trial balances and quarterly reconciliations of the client trust accounts maintained by the lawyer; and**

(10) **copies of those portions of client files that are reasonably related to client trust account transactions.**

(f) With respect to client trust accounts required by Rule 1.15 of these Rules:

(1) **only a lawyer admitted to practice law in this jurisdiction or a person under the direct supervision of the lawyer shall be an authorized signatory or authorize transfers from a client trust account;**

(2) **receipts shall be deposited intact and records of deposit should be sufficiently detailed to identify each item; and**

(3) **withdrawals shall be made only by check payable to a named payee and not to cash, or by authorized electronic transfer.**

(g) Records required by Rule 1.15 may be maintained by electronic, photographic, or other media provided that they otherwise comply with these Rules and that printed copies can be produced. These records shall be readily accessible to the lawyer.

(h) Upon dissolution of a law firm or of any legal professional corporation, the partners shall make reasonable arrangements for the maintenance of client trust account records specified in these Rules.

Retention, Storage, Ownership, Production and Destruction of Client Files

R0 2010-02

QUESTION:

What are a lawyer's obligations and duties pertaining to the storage, retention, and destruction of client files?

ANSWER:

- Lawyer's should adopt a file retention policy and disclose such to clients at the outset of representation
- Generally, the file is the property of the client
- Segregate file from property of attorney and other clients
- Promptly produce to client upon request, except, if the attorney has a valid attorney's lien. (Ala. Code § 34-3-61 (1975))
- Providing contemporaneous copies during representation does not terminate lawyer's obligation to provide client full copy of file at the end of representation unless provided for in employment agreement
- Initial copy must be provided at no charge
- Must retain client's file for a minimum of six years
- May store client files electronically
- May use a cloud server for storage
- Must reproduce file in the format requested by the client
- Disciplinary Commission has adopted the entire file approach in determining what must be given to the client. Exceptions do exists, such as, client has a mental health disorder or where information in the file could endanger the safety and welfare of the client or others.
- 3 Categories of property
- Category 1 is intrinsically valuable property such as original wills and deeds. Such property may not be destroyed.
- Category 2 is valuable property of the client. Such property may be destroyed with the actual consent of the client or upon implied consent or within 60 days of a date established by the lawyer's file retention policy or as provided by notice to the client by the lawyer of the item's impending destruction. (Ex. Notifying client of such by written notice to client's last known address)

- Category 3 is property with no value. It may be destroyed after six years without notice to the client.
- Lawyer must maintain an index of all destroyed files and should identify the following: identity of client, nature or subject matter of the representation, date the file was opened and closed, court case number, general description of property destroyed, and the date of destruction.