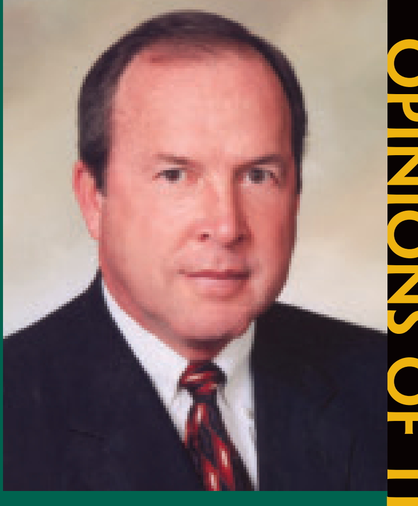

J. ANTHONY MCLAIN

Confidential/Sealed Settlements

QUESTION:

"I read something not too long ago which I cannot now put my hands on. It had to do with attorneys accepting a 'non-refundable retainer fee' in, for example, a divorce case. I believe I recently read somewhere that a non-refundable retainer fee was not allowed under the *Alabama Rules of Professional Responsibility*. I would appreciate your referring me directly to any opinion or memo issued by your office to that effect. I tried to find this provision in the rules, but I was not able to put my hands on it immediately. If these are strictly outlawed by the bar association, I would appreciate your getting me a copy of whatever it is that outlaws such a practice.

"Secondly, I would like to ask you about an event which recently happened to us in the course of settling a fraud case. Our firm was representing a young lady against a prominent Alabama statewide bank. The case was being settled for a certain sum. The defendant required that my client enter into a confidentiality agreement which essentially provided that she would not disclose the amount or any of the terms of the settlement itself; however, she was not prohibited from discussing the facts of the case with anyone. However, the defendant's lawyers went a step further and required our law firm separately from the client to agree not to disclose anything having to do with the case, including but not limited to the facts, terms of the settlement, amount of settlement, etc. We were also required to agree not to disclose any of the information in this case to any publication, newspaper, journal, etc.

"I have grave concerns about the ability of a defendant and a defense law firm imposing on a plaintiff's law firm certain restrictions as a condition of settlements.

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"I can easily see how this type of weapon can be used by the defense bar to create a potential conflict of interest between the plaintiff's existing counsel and the plaintiff herself due to the fact that it is not necessarily in our best interest to settle the case according to the terms imposed upon the law firm alone by defense counsel, whereas it may be in the client's best interest. It seems amazing that, in this case, the plaintiff is not prohibited from discussing the facts of this case, yet the plaintiff's lawyers are prohibited from such discussion or communications.

"In an effort to get this case resolved and to prevent any possible conflict with the client, our firm went ahead and agreed to the terms which were being imposed on us by the defendants. However, before this situation arises again, I would appreciate your advising us on the following points:

"1. Is a confidentiality agreement imposed on the plaintiff's attorneys, which is more restrictive than the confidentiality provisions imposed on the plaintiff himself, a violation of the *Rules of Professional Responsibility* in that they present a potential conflict of interest between the plaintiff and his attorneys?

"2. Can a defendant impose a confidentiality requirement on plaintiff's counsel in that the plaintiff's counsel is not a party to the suit and is not receiving any consideration from the defendant for any confidentiality agreement?

"3. Are any bonds of limitations placed on such confidentiality agreements by the *Rules of Professional Responsibility*? If so, what are they?

"I would appreciate your giving us the benefit of your wisdom and insight into these many and complex issues raised by the confidentiality agreements to which plaintiffs and their lawyers are being 'bound and gagged' and the effect of professional responsibility rules on them."

ANSWER QUESTION ONE:

The Disciplinary Commission has, on a number of occasions, considered the question of non-refundable retainers and has consistently held that there must be some connection between the attorney's fee and the legal services rendered.

ANSWER QUESTION TWO:

The *Alabama Rules of Professional Conduct* require that a lawyer must abide by a client's decision to accept an offer of settlement in a matter and to defer to the client regarding third parties who might be adversely affected. Consequently, a lawyer may participate in a confidential settlement even though there may be a possibility of adverse consequences on third parties or the public. The Disciplinary Commission recognizes, however, that there may be circumstances where confidential settlements conceal information that might prevent health and safety consequences for the public. Such circumstances clearly demonstrate the need for a revised approach to confidential settlements either by statute, court rule or a rule of professional conduct.

DISCUSSION QUESTION ONE:

With regard to non-refundable legal fees, the beginning principle is that the client has the absolute right to terminate the services of his or her lawyer, with or without cause, and to retain another lawyer of their choice. This right would be substantially limited if the client was required to pay the full amount of the agreed-on fee without the services being performed. In *Gaines, Gaines and Gaines v. Hare, Wynn*, 554 So.2d 445 (Ala. Civ. App. 1989), the Alabama Court of Civil Appeals stated:

> "The rule in Alabama is that an attorney discharged without cause or otherwise prevented from full performance, is entitled to be reasonably compensated only for services rendered before such discharge. *Mall v. Gunter,* 157 Ala. 375, 47 So.2d 144 (1908)."

The court also points out that when a client discharges a lawyer, the discharge ordinarily does not constitute a breach of contract even with a contract of employment which provides for the payment of a contingent fee and that part performance of a contract, prior to being discharged, entitles one to recover on *quantum meruit* for those services rendered.

Additionally, Rule 1.16(d) of the *Rules of Professional Conduct* provides:

"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 that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law."

Based on the above, it is the view of the Disciplinary Commission that no retainer should be non-refundable to the extent that it exceeds a reasonable fee. That is to say that there should be some nexus between the fee charged and the services performed by the lawyer. For factors for determining the reasonableness of the fee, see *Peebles v. Miley*, 439 So.2d 137 (Ala. 1983) and Rule 1.5(a) of the *Alabama Rules of Professional Conduct*.

The Disciplinary Commission applied the above rule to contingent fee contracts in RO-91-05 holding that a client, after entering into a contingent contract, may discharge the lawyer and the lawyer then being entitled to compensation only on a *quantum meruit* basis. It must be said, however, that a contingent fee client cannot wait until a favorable settlement offer has been received to discharge the lawyer.

In that situation, the lawyer can recover on the contract if the discharge was without cause. See *Kaushiva v. Mutter*, 454 A.2d 1373 (D.C. App. 1983), cert. denied 464 U.S. 820, 104 S.Ct. 83 (1983).

DISCUSSION QUESTION TWO:

While the *Alabama Rules of Professional Conduct* do not specifically address the ethical propriety of a lawyer participating in the formation of a confidential settlement they, nevertheless, may be interpreted in a manner making such conduct permissible.

Rule 1.2 of the *Rules of Professional Conduct* specifically states in sub-paragraph (a) that "a lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter" and, in the Comment to that rule, that a lawyer should defer to the client regarding "concern for third parties who might be adversely affected." Thus, a fair reading of this rule requires the lawyer to abide by a client's decision to enter into a confidential settlement agreement even if that agreement has potential to harm third parties or the public.

This theme is carried forward in the Comment to Rule 4.4, "Responsibility to a client requires a lawyer to subordinate the interest of others to those of his client," but with the caveat that "that responsibility does not imply that a lawyer may disregard the rights of third persons." While Rule 4.4 does recognize the rights of third persons, it does not make the lawyer morally autonomous to the extent that he or she could disregard the desires of his client to enter into a confidential settlement even though that settlement

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might shield the public from adverse health and safety information. Although Rule 2.1 provides that a lawyer in rendering advice may refer to other considerations such as moral and social considerations, there is nothing in the rules that requires the client to follow this advice. Thus, the lawyer is left with the obligation to abide by a client's decision to accept an offer of settlement as clearly provided in Rule 1.2. (See Anne-Therese Bechamps, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know*? 66 Notre Dame L. Rev. 117 (1990)).

With regard to the specific questions listed in your request, it is the Commission's view that it is not a violation of the *Rules of Professional Conduct* for a confidential settlement agreement to impose more restrictions on a plaintiff's lawyers than the plaintiff. Since the lawyer must abide by the client's decision in this matter, in accordance with Rule 1.2(a), there would be no conflict between the lawyer and his client in such a settlement. Moreover, if there is a conflict in such a situation, it is no more than the conflict inherent in any lawyer/client relationship where a fee is negotiated/charged. With regard to the second specific question, it is the view of the Disciplinary Commission that a defendant or defendant's counsel may require confidentiality as a condition of settlement, even though counsel is technically not a party to the suit. With regard to question three, the current *Rules of Professional Conduct* place no limitations on the formation of confidential settlements by lawyers.

In reaching the above conclusion, the Disciplinary Commission is not unmindful of the ongoing efforts in state legislatures, Congress and the courts to fashion a solution that would fairly balance the privacy and property rights of the litigants and the safety and public health concerns of the public. (See e.g., *Andrew Blum*, *Protective Order Battle Continues*, Nat'l L.J., January 11, 1993 at 1 and *Bob Gibbins, Secrecy versus Safety, Restoring the Balance*, A.B.A.J., December 1991 at 74). [RO 1992-17]

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