ETHICS OPINION

RO-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.
<u>Fees.</u>

> (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:
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> > (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> > (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> > (3) the fee customarily charged in the locality for similar legal services;
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> > (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.

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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 of 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.