

Opinion No. 445 (September 28, 1987)

**ATTORNEYS FEES: SETTLEMENTS RESTRICTING THE FUTURE PRACTICE OF LAW – SUPPORT FOR THE LAW AND RESPECT FOR THE LEGAL SYSTEM.**

Both the United States and California have “fee shifting” statutes which provide that the Court may award attorney’s fees to plaintiff’s counsel where the plaintiff’s action has conferred a significant public benefit. (E.g., 42 U.S.C. §1988; C.C.P. §1021.5.) Frequently, plaintiff’s counsel is an attorney with a “public interest” firm or organization dependent in large part on public funding and the receipt of court awarded fees. Also, frequently the plaintiff is indigent and the action commenced on his or her behalf seeks injunctive relief rather than damages. It is not an unusual occurrence for defense counsel in these actions to offer a settlement on the condition that plaintiff’s counsel waive his or her right to court awarded fees. Such offers place plaintiff’s counsel in a difficult dilemma: accepting the offer is clearly in the interest of the client and, at least with respect to the issue sub judice, the public; however, waiver of court awarded fees will likely result in no compensation being received in respect of the pending matter and, if a practice of such waiver demands becomes prevalent, the economic viability of future public interest litigation is jeopardized. We have been asked whether it is ethically permissible for defense counsel to condition a settlement proposal on plaintiff’s counsel’s agreement to waive court awarded fees.

**AUTHORITIES CONSTRUED:**

Evans v. Jeff D., U.S., 106 S.Ct. 1531 (1986)  
Riverside v. Rivera, U.S., 106 S.Ct. 2686 (1986)  
Serrano v. Unruh, 32 Cal.3d 621, 639 n.29 (1982)  
42 U.S.C. Section 1988  
California Business and Professions Code §6068(a)  
California Business and Professions Code §6068(b)  
California Business and Professions Code §6068(h)  
California Code of Civil Procedure Section 1021.5  
California Rules of Professional Conduct, Rule 2-109  
Committee on Legal Ethics of the District of Columbia  
Bar Association Opinion No. 147 (1/2/85)  
American Bar Association DR 1-102(A)(5)  
American Bar Association DR 2-106  
American Bar Association DR 2-108(3)  
American Bar Association DR 2-108(B)  
American Bar Association DR 2-110  
American Bar Association DR 1-182(A)(5)  
American Bar Association DR 5-101(A)  
American Bar Association EC 7-7  
American Bar Association EC 7-8  
American Bar Association EC 7014  
American Bar Association EC 2-25  
American Bar Association Model Rules of Prof.  
Conduct 8.4(d)  
Georgia State Bar Opinion No. 39 (7-20-84)  
Board of Maine Grievance Commission of the Board  
of Overseers Opinion No. 17 (1-15-81)  
Michigan Bar Association Opinion C-235 (5-85)  
State Bar of New Mexico Advisory Committee  
Opinion 1985-3

New York City Bar Association on Professional Ethics  
Opinion No. 80-94 (1981)  
New York City Bar Association on Professional Ethics  
Opinion No. 82-80  
Vermont Bar Association Opinion 85-3 (1985)

### DISCUSSION

We have been asked whether it is ethically permissible for defense counsel to condition a settlement proposal on plaintiff's counsel's agreement to waive court awarded fees. It is the opinion of this committee that, in the context of civil rights and civil liberties cases it is not ethically permissible for defense counsel to condition a settlement proposal on plaintiff's counsel's agreement to waive all right to court awarded fees. We recognize that there is no California Rule of Professional Conduct specifically dealing with the issue presented. However Rule 1-100 states: "The prohibition of certain conduct in these rules is not to be interpreted as an approval of conduct not specifically mentioned."

Our analysis begins with a review of the relevant decisions. In *Evans v. Jeff D.*, U.S., 106 S.Ct. 1531 (1986), the Supreme Court held that the District Court did not have a duty to reject a proposed settlement because the settlement included a waiver of statutorily authorized attorney's fees. The Court acknowledged the dilemma created by settlements conditioned upon fee waivers but determined that, given the absence of a statutory prohibition on the practice and given, in the Court's view, the overriding public policy in favor of settlement, the practice was not prohibited. A three justice dissent found that the public policy in favor of providing adequate legal representation for those wronged by the type of conduct to which fee shifting statutes were addressed was the overriding policy and that the practice should be prohibited.\* The dissent also stressed that the majority did not address the applicability of local ethical restrictions on the practice and invited state and local bar associations to regulate the practice.

Numerous state and local bar associations have also addressed the issues. In Opinion No. 17 (1-15-81), the Grievance Commission of the Board of Overseers of the Board of Maine held that in a class action where plaintiff's counsel is statutorily entitled to be compensated by defendant, the "inherent conflict of interest ... requires a plaintiff's attorney to abstain from any fee discussion with a defendant until after the underlying case has been at least tentatively resolved." However, the opinion further states that "[i]n no event may plaintiff's counsel prevent his client from settling a case, even though such a settlement may ignore the plaintiff's right to [statutory fees]." The opinion states that none of the provisions of the ABA Code of Professional Responsibility are directly applicable and relies on analogous class action cases which criticize simultaneous negotiation of the merits of settlement and of attorneys fees for support for its conclusion.

In Opinion No. 80-94 (1981), the New York City Bar Association on Professional Ethics addressed the question whether it was ethical for defense counsel in actions to which fee shifting statutes were applicable to make settlement offers which are contingent upon fee waivers. A majority of the Committee concluded that such conduct was unethical and grounded its interpretation on the interplay of three concepts. The majority felt:

1. That the purpose of the statutes -- to make counsel

available to those who cannot afford them -- reflected the overriding policy. This basis of the opinion has now been nullified by *Jeff D.* at least insofar as federal litigation is concerned. It is unclear whether California would follow *Jeff D.* The California Supreme Court has stated that "it is not our view that federal authority is of more than analogous precedential value in construing §1021.5 ... We envision an independent state rule." *Serrano v. Unruh*, 32 Cal.3d 621, 639 n.29 (1982).

2. That the long-term effect of the practice would reduce availability of public interest counsel to indigents, which reduction would prejudice a vital aspect of the administration of justice and thereby give rise to a violation of ABA DR 1-102(A)(5) which provides that a lawyer shall not "[e]ngage in conduct that is prejudicial to the administration of justice."

3. That the practice is analogous to the prohibition of ABA DR 2-108(B) prohibiting a lawyer from requiring, as a condition of settlement, that opposing counsel agree not to thereafter represent similarly situated plaintiffs and, by analogy, is ethically prohibited.

In Opinion No. 39 (7-20-84), the Georgia State Bar declined to follow the reasoning of New York City Opinions 80-94 and 82-80 and determined that it is not unethical for defense counsel to offer a lump sum settlement which could result in a full or partial fee waiver. The opinion stresses the desirability of settlements and the defendant's need to know their total exposure - both for liability and for fees.

In Opinion No. 147 (1/2/85), the Committee on Legal Ethics of the District of Columbia Bar Association concluded that a defense attorney in an action in which statutory attorney's fees are provided may not ethically condition a settlement offer on a waiver or limitation of fees but may ethically offer a single lump-sum settlement. The Committee stressed that the purpose of the fee statute is to provide counsel for those who could not otherwise afford counsel in order to advance the administration of justice and concluded that a settlement offer conditioned upon a fee waiver would violate DR ABA 102(A)(5) (conduct prejudicial to the administration of justice). The Committee also noted that defense counsel in the subject situations are usually government counsel, who have a duty to deal fairly (ABA EC 7014). Further, the Committee found support in ABA EC 2-25 (lawyers should support efforts to make counsel available to those who cannot afford it) and, by analogy, ABA DR 2-108(3) (avoiding settlement agreements which restrict the right to practice law).

In Opinion C-235 (5-85), the Michigan Bar Association reviewed the applicable court and ethics opinions and concluded that they provided uncertain guidance on the issue whether in a case to which a fee shifting statute was applicable a plaintiff's lawyer may simultaneously negotiate a settlement on the merits and a resolution of attorney's fees. Declining to base its opinion on public policy or statutory interpretation because it felt that it was incompetent to do so, the Committee grounded its conclusion that such conduct was permissible on the fundamental ethical principle that the lawyer's duty is to the client, not to the "public interest." With that guiding principle in mind the Committee suggested that a lawyer could engage in simultaneous negotiation if he or she complied

with ABA DR 5-101(A) (disclosure of potential conflict and receipt of client consent), and ABA EC 7-7 and ABA EC 7-8 (informing client of settlement offers and all relevant considerations relating thereto). The Committee also suggested that counsel should seek assistance and/or protection from the court and, where "actual conflict" is unavoidable, withdraw pursuant to ABA DR 2-110. Finally, the Committee opined that adequate disclosure to the client of the potential conflict of interest "must start with the retainer agreement" wherein counsel should specify how the issue of awardable fees will be handled as between lawyer and client and as between client and the opposing party.

In Opinion 1985-3, the State Bar of New Mexico Advisory Committee concluded that because its facts involved an attorney in private practice (as opposed to "public interest" practice) and the relief sought was limited to damages, it was not unethical for defendant's counsel to offer or plaintiff's counsel to accept (with his or her client's approval) a lump sum settlement provided counsel did not violate ABA DR 2-106 (excessive fees).

In Opinion 85-3 (1985), the Vermont Bar Association opined that it would be ethical for a plaintiff's attorney who has entered into a settlement agreement which provided, inter alia, for a waiver of statutory fees to breach the agreement and seek court awarded fees. The reasoning of the opinion is that because it "would seem reasonable to conclude that it would be inappropriate to allow the function of [fee shifting statutes] to be negated through settlement negotiations," and because a court would have to approve the breach and the fee, the conduct is ethical.

While these decisions seem somewhat disparate, there are certain consistent positions. All focus specifically on fee shifting statutes in the area of civil rights and civil liberties. Additionally, virtually all that consider the question bar as unethical a settlement demand which includes a complete waiver of attorney's fees. We believe that these two consistent positions adhered to by the bars of our sister states and local jurisdictions reflect the ethical norms of California as well. It is our opinion, therefore, that it is also unethical in California in civil rights and civil liberties cases for a defense counsel to condition a settlement demand upon a complete waiver of plaintiff's right to any court awarded fees.

California Business and Professions Code §§6068(a) and (b) require California attorneys to support the law and respect the legal system. Additionally, Business and Professions Code §6068(h) provides that it is the duty of an attorney "never to reject, for any consideration personal to himself or herself, the cause of the defenseless or oppressed." We believe that these provisions are analogous to former ABA DR 1-102(A)(5), now ABA Model Rules of Prof. Conduct 8.4(d), and taken together require an attorney to refrain from conduct prejudicial to the administration of justice.

Additionally, we believe that offers of settlement by defense counsel in civil rights and civil liberties cases which are conditioned upon a complete waiver of the plaintiff's right to attorney's fees seriously undermine those ethical principles. As stated by the District of Columbia Bar, Committee on Legal Ethics, Opinion No. 147:

"Authorization of fee awards under such statutes is critical to the administration of justice; indeed, it ap-

pears critical to the perception of justice and its accessibility to all members of society. In the civil rights and civil liberties areas, the statutory fee award is a concrete recognition that the protections of minorities against invidious discrimination or abuse by arbitrary governmental action are often meaningless unless counsel can be secured to assist in the enforcement of those rights, and that, typically, victims of such conduct are unable to afford counsel. Offers of settlement that are conditioned on plaintiff's counsel waiving such statutory fees could seriously undermine the effectiveness of these provisions as a device for making counsel available to persons having claims under these statutes."

Id. at A36.

California has, in Business and Professions Code Section 6068(h), explicitly recognized the duty of each attorney to participate in maintaining some minimal level of access for the disadvantaged and oppressed. It would be incongruous if that promise of access, supported by the policies of the civil rights' attorneys' fee statutes, was permitted to be rendered ineffectual through such practices as defendants routinely requiring the waiver of all rights to attorneys fees. Should defense counsel be permitted to condition settlement offers in this manner, the effect would certainly be to drastically curtail that access by making it economically impossible for plaintiff's attorneys to continue their practice. As stated by Justice Brennan in his dissent in Evans, supra:

"And, of course, once fee waivers are permitted defendants will seek them as a matter of course, since this is a logical way to minimize liability. Indeed, defense counsel would be remiss not to demand that the plaintiff waive statutory attorneys fees. A lawyer who proposes to have his client pay more than is necessary to end litigation has failed to fulfill his fundamental duty zealously to represent the best interests of his client. Because waiver of fees does not affect the plaintiff, a settlement offer is not made less attractive to the plaintiff if it includes a demand that statutory fees be waived. Thus, in the future, we must expect settlement offers routinely to contain demands for waivers of statutory fees."

Id. at 106 S.Ct. at 1553.

The impact of this practice will therefore be to effectively eliminate future access to the courts in civil rights and civil liberties cases by eliminating the practice of those lawyers willing to take such cases based on the possibility of future court awarded fees.

A similar basis for this decision is the policy embodied in California Rules of Professional Conduct, Rule 2-109 which states:

"(A) A member of the State Bar shall not be a party to or participate in an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member of the State Bar to practice law...."

Should defendants be permitted to condition settlement upon a waiver of fees, the effect will be to eliminate the practice of those lawyers who are currently willing to take such cases. The effect could be as dramatic and as

complete as if the defendant had extracted an agreement explicitly restricting their future practice of law.

For this reason, it is the opinion of this Committee that it is not ethically proper for a defense attorney to condition a settlement offer in a civil liberties or civil rights case on a complete waiver of the plaintiff's attorney's right to compensation under applicable fee shifting statutes.

This Committee is not unmindful of the strong judicial policy in favor of settlement. Acknowledging that policy and the complexities it introduces, we limit this opinion solely to a consideration of conditioning settlement offers in civil rights and civil liberties cases on a waiver by the plaintiff of all right to attorney's fees. We make no comment on the ethical propriety of settlements conditioned upon acceptance of partial waiver of fees or offers of lump sum settlements or the simultaneous negotiation of settlement on the merits and settlement of fees. We also make no comment on attorney's fees demands in other types of class action or in other civil litigation where attorney's fees may be available.

\* Two months later in Riverside v. Rivera, U.S., 106 S.Ct. 2686 (1986), a four justice panel, joined by a fifth in the conclusion only, stressed that the public policy which underlies fee shifting statutes favors the provision of adequate legal representation to persons wronged by the type of conduct which the fee shifting statutes addressed. However, the Court was not dealing with a settlement and the Court's public policy discussion does not contrast the legal representation policy with the policy in favor of settlements.