

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 98-0001**

ISSUE: Where an attorney for the plaintiff in a civil rights action has been assigned his client's statutory right to seek attorney fees, what are the ethical considerations for that attorney: (i) when the attorney disagrees with his client's desire to accept a lump sum settlement offer^{1/} that is insufficient to pay the attorney's fee claim; and (ii) when, after being replaced by successor counsel, the first attorney is asked to agree that he will not seek fees either from the government defendant or from his former client? Are there ethical considerations governing the government defendant's attorney in recommending a lump sum settlement to the defendant?

DIGEST: The presentation of a lump sum settlement offer by the defendant, conditioned on a waiver of a statutory right to attorney fees, does not release the plaintiff's attorney from the obligation to communicate with his client regarding the terms, alternatives and consequences of the settlement, while being mindful of the obligation to put the client's interests first. In the event of a disagreement between client and attorney, the attorney may be entitled or required to seek court permission to withdraw. The plaintiff's attorney has no obligation to waive his right to fees, if any, from either his client or the defendant. The defense attorney does not violate any ethical rule by offering a settlement based on a waiver by the plaintiff and his attorney of the right to seek attorney's fees. In light of the fact that the statutory right to seek attorney fees in a civil rights action is given to the plaintiff by statute as a bargaining chip in civil rights litigation, the government attorney may consider in appropriate cases whether to recommend to his client a settlement that includes a waiver of the right to seek fees.

AUTHORITIES

INTERPRETED: Rule 1-500 of the Rules of Professional Conduct of the State Bar of California.

Rule 3-300 of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code section 6128.

STATEMENT OF FACTS

Client engages Attorney A to prosecute a civil rights lawsuit against a government entity under Title 42 United States Code section 1983 et seq. Client and Attorney A enter into a written retainer agreement that satisfies the requirements of Business and Professions Code section 6148 and rule 3-300 of the Rules of Professional Conduct of the State Bar of California.^{2/}

Numerous federal statutes authorize courts to award reasonable attorney fees to plaintiffs who prevail in civil rights litigation, whether they prevail through trial or settlement. In *Evans v. Jeff D.* (1986) 475 U.S. 717 [106 S. Ct. 1531], the Court held that the right to seek attorney fees under the Fees Act (42 U.S.C. § 1988) belongs to the client, not the attorney, and approved an agreement settling a class action in which the defendant obtained a waiver of the plaintiffs' fee claim as a condition of settlement. The effect of such an agreement may be to permit a plaintiff to obtain the relief

^{1/} A "lump-sum" settlement offer is an offer of a single sum of money meant to be divided by the plaintiff and his attorney, including attorney fees.

^{2/} Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

desired in the lawsuit, but may also leave the plaintiff's attorney without any compensation. As a result of the holding in *Evans v. Jeff D.*, Attorney A requests, and Client agrees, to include in the retainer agreement an assignment to Attorney A of the exclusive right under section 1988 to seek or waive attorney fees, including the exclusive right to accept a "lump-sum settlement" offer.^{3/}

Extensive pretrial discovery and a lengthy trial ensue. During jury deliberations, the government attorney (a member of the State Bar) offers Client a \$25,000 "lump sum including all section 1988 attorney fees" settlement, which Client wants to accept. At this time, Attorney A has incurred \$75,000 in time and expenses in the case. The government attorney states that the settlement offer expires when the jury signals it has reached a verdict.

Attorney A then withdraws with court permission and is immediately replaced by Attorney B (a member of the State Bar), who accepts the settlement offer on behalf of the Client. In open court, the government attorney and Attorney B announce to the court that unless Attorney A consents to the settlement and waives his right to seek fees from either Client or the government, the settlement cannot be consummated. The court asks Attorney A, "Do you consent to the settlement? Do you waive any right to claim fees from both Client and the government?"

DISCUSSION

The Committee has opined, in California State Bar Formal Opn. No. 1994-136, that an agreement between attorney and client transferring to attorney the right to seek fees under section 1988, and providing that client may not waive such fees, is not prohibited by the Rules of Professional Conduct as long as the agreement complies with rule 3-300.^{4/} In that opinion, the Committee also expressed concerns regarding the enforceability of such an agreement, citing a district court decision that subsequently was reversed.^{5/} Whether the assignment is enforceable is a question of law and beyond the scope of this opinion.

The Committee has now been asked to consider several questions:

- Does Attorney A, when the settlement offer is made or when Client indicates a desire to accept the offer, have an obligation to withdraw from the case?
- If the settlement fails because Attorney A refuses to consent, and the jury then returns a defense verdict, has Attorney A breached a duty to Client or violated any rule?

^{3/} We limit our opinion to ethical issues that arise under the Federal Fees Act in light of the United States Supreme Court's decision in *Evans v. Jeff D.* We note that in *Flannery v. Prentice* (2001) 26 Cal.4th 572 [110 Cal.Rptr.2d 809], the California Supreme Court expressly declined to follow the Court's reasoning in *Evans v. Jeff D.* (*Id.* at 579-80, 110 Cal.Rptr.2d at 814.) The court instead held that absent a fee contract to the contrary, the proceeds of an attorney fee award under the California Fair Employment and Housing Act (see Cal. Gov. Code § 12965) belongs to the attorney and not the client. (*Id.* at 590, 110 Cal.Rptr.2d at 823.)

^{4/} Formal Opinion 1994-136 concludes that an assignment by the client to his or her attorney of the statutory right to attorney fees appears fair and consistent with the purposes of the attorney fee in civil rights cases. But the opinion emphasizes that compliance with rule 3-300 requires that the member seeking the assignment satisfy the disclosure requirements, including informing the client that a settlement offer might be made that depends upon a waiver of some or all of the attorney fees, that in such event the member's interests and the client's interests may differ, and that the member might attempt to override the client's desire to settle on such terms. See also *In the Matter of Yagman* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 788, declining to erect a disciplinary barrier to the assignment, in the retainer agreement, of the right to seek or waive statutory attorney fees. *Yagman* also concludes that such an assignment, because it purports to transfer a present interest, comes within the purview of rule 3-300.

^{5/} *Darby v. City of Torrance* (C.D. Cal. 1992) 810 F.Supp. 271, rev'd (9th Cir. 1995) 46 F.3d 1140.

- Does the government attorney violate rule 1-500 (prohibiting agreements restricting a member's practice), or any other rule of professional conduct, by participating in a settlement that is conditioned on a waiver by Attorney A of any right to seek fees (a) from the defendant? (b) from Client?
- Does the government attorney have an obligation to his or her client in all civil rights actions subject to section 1988 to recommend that all settlement offers be conditioned upon a waiver of fees or upon a lump sum settlement?

I. Withdrawal by Attorney A.

In *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904 [26 Cal.Rptr.2d 554], the court deals with the situation in which a plaintiff's attorney negotiates the amount of damages payable to the plaintiff by the defendant while simultaneously negotiating an award of fees to himself, also payable by the defendant. The dual nature of the negotiations creates a conflict of interest which, when presented to a trial court, imposes on it the obligation to determine whether or not a fair balancing of the interests of the plaintiff and the plaintiff's attorney is reflected in the negotiations. The decision states that the same basic conflict occurs in federal civil rights cases when a settlement offer is conditioned on a waiver of any claims for attorney fees: "the duty of counsel to promote the client's interest in obtaining the highest settlement amount as opposed to the interest of the attorney in obtaining satisfactory compensation for work done." (*Id.* at 923.)

The Committee, in California State Bar Formal Opn. No. 1994-136, recognized that a conflict of interest could arise when a settlement offer is dependent upon a waiver of some or all of the attorney fees. Further, Formal Opinion 1994-136 states that where the client has contracted with his or her attorney that the right to recover or waive statutory attorney fees belongs to the attorney, the attorney "may be forced to withdraw" in the event of a disagreement between them concerning a settlement offer that depends on a waiver of fees:

[T]he attorney must promptly and fully inform the client of all settlement offers. (See Cal. State Bar Formal Opn. No. 1989-114.) In the event of a settlement offer contingent upon waiver of attorney fees, the attorney must not only advise the client of all terms of the offer, but should also remind the client that the attorney "owns" the right to attorney's fees, and advise the client that he or she has the right to consult with independent counsel regarding the settlement offer. . . . In the event of a disagreement between client and attorney as to whether or not a settlement offer should be accepted, the attorney may be forced to withdraw from representation. (See rule 3-700(B)(2) [mandatory withdrawal when member knows or should know that continued employment will result in violation of the rules] and rule 3-700(C)(1)(f) [permissive withdrawal where client breaches agreement as to fees].)

(*Id.* at p. 3.)

In the circumstances of this case, the Committee concludes that upon Client's statement that he wishes to accept the settlement, Attorney A has the normal obligation to advise Client of the alternatives and their foreseeable consequences, while being mindful of the obligation to put Client's interests first. See *Considine Co. v. Shadle, Hunt & Hagar* (1986) 187 Cal.App.3d 760 [232 Cal.Rptr. 250]. The obligation to put Client's interests first in advising Client does not require that Attorney A agree to surrender his right to compensation; if Client insists on accepting the settlement, Attorney A would have the right to withdraw with court permission (see rule 3-700(A)(1)) on the ground of breach of an agreement or obligation to Attorney A as to fees. If Attorney A is unwilling to agree to the settlement terms, he could also foresee that he would be opposing the client's position on settlement, justifying, if not requiring, his request to withdraw.

While we recognize that Attorney A could reasonably conclude that his withdrawal is required upon Client's statement that he wants to accept the settlement, thus setting the stage for Attorney A to oppose Client's position before the court, we emphasize that the point at which withdrawal may actually be required depends upon the circumstances of each case. It cannot be presumed that the mere presentation of a settlement offer dependent on a waiver of statutory attorney fees will require withdrawal, even though Attorney A has contracted with Client for the right to statutory fees. The fact that

an attorney representing a plaintiff in an action under Title 42 United States Code section 1983 must disclose to the client the possibility of offering a waiver of fees, as a means of reaching settlement, would seem to preclude an automatic requirement of withdrawal upon such an offer being made.

II. Attorney A's refusal to consent to the settlement.

The law is settled in California that the decision whether to accept a settlement remains with the client and that an agreement by the client not to settle a case without the consent of his attorney is void as against public policy. *Hall v. Orloff* (1920) 49 Cal.App. 745, 748-749 [194 P. 296]. See also *In re Marriage of Hasso* (1991) 229 Cal.App.3d 1174, 1185 [280 Cal.Rptr. 919] (rejecting as against public policy an argument for a rule forbidding parties from settling without their attorneys' consent); *Blanton v. Womancare Inc.* (1985) 38 Cal.3d 396, 404-405 [212 Cal.Rptr. 151] (attorney's agreement to binding arbitration, without client consent, held unenforceable). Under these authorities, the Committee concludes that the portion of the agreement purporting to convey to Attorney A the exclusive right to accept a lump sum settlement is invalid.

In Evans v. Jeff D., Justice Stevens' majority opinion pointed out that counsel for the plaintiffs faced no real ethical dilemma when presented with a settlement offer conditioned on a fee waiver because the rules of professional conduct placed the attorney's duty to the client above his obligation to seek a statutory fee award. That was in the context of *Evans v. Jeff D.*, where the plaintiff, under the retainer agreement in that case, retained the right under section 1988 to seek or waive attorney fees.

But an attorney whose retainer agreement assigns to the attorney the exclusive right to seek fees from the defendant has no ethical obligation to surrender the right in order to effectuate a settlement. Were the rule otherwise, the attorney in every case could be found to have an obligation, if demanded by his client and the opposing party, to reduce or eliminate his fee to permit a settlement on terms agreed to by the client and the opposing party. To state the proposition is to refute it. Thus, while the attorney does not have the right to veto a settlement the client wishes to accept (under *Hall v. Orloff*), and the client always has the right to determine whether or not to accept a settlement offer, the attorney is not required against his wishes to waive his right, if any, to fees. Accordingly, the Committee concludes that Attorney A's refusal to agree not to claim fees from the client or the opposing party, and not to sue them for the fees, does not violate any rule of professional conduct, whether or not it causes the settlement to fail.

In considering whether Attorney A would violate any duty to the plaintiff if he did not agree to waive any right to fees from either the government or the plaintiff, Business and Professions Code section 6128, subdivision (b) provides: "Every attorney is guilty of a misdemeanor who . . . [w]illfully delays his client's suit with a view to his own gain." Section 6128, on its face, applies to conduct while acting as attorney for a client. Here, Attorney A has withdrawn as counsel for the client. The client is now a former client. Further, Attorney A's refusal to become a party to the settlement and waive his contractual right under the retainer agreement to a statutory fee does not, in the opinion of the Committee, constitute willfully delaying his client's suit.

III. Does the government attorney's settlement proposal violate Rule of Professional Conduct 1-500, or any other rule?

Although, as stated above, the decision whether to accept a settlement remains with the client, an attorney's obligation of competence requires that the attorney give an independent judgment in advising a client as to a settlement. The demand for a fee waiver disturbs the relationship between Client and Attorney A and creates a potential conflict for Attorney A. The relationship is disturbed because Client may care nothing about the fee waiver; Attorney A, on the other hand, may care very much. The government's offer may affect Attorney A's independent judgment in various ways. As one commentator has pointed out:

The lawyer may recommend that a settlement be accepted not because it is the best that could be obtained, but to bring the case to a swift conclusion, thus avoiding further work that will go uncompensated. Or, the lawyer may recommend that a settlement be rejected not because a better one could be obtained, but because success in the courtroom will yield an award of fees. Unless

a settlement proposes complete relief or is grossly insufficient, it is difficult to weigh the adequacy of the offer against the strength of the claim. A fee-waiver demand makes this task harder still--it inserts the lawyer's own interests into the negotiating process and can subtly influence professional judgment, even unwittingly, in one direction or the other.

Peter H. Woodin, *Fee Waivers and Civil Rights Settlement Offers: State Ethics Prohibitions After Evans v. Jeff D.* (1987) 87 Colum. L. Rev. 1214, 1231-32 (1987).

Knowing that the settlement offer conditioned on a fee waiver disturbs the relationship between Client and Attorney A and creates a potential conflict for Attorney A, does the government attorney violate rule 1-500 or any other rule by advancing the settlement proposal? In the opinion of the Committee, the answer is "no."

Rule 1-500 prohibits a member of the California Bar from participating in or offering an agreement that "restricts the right of a member [of the bar] to practice law." Absent the retainer agreement described in the statement of facts, no reason appears why defense counsel may not, consistent with the Rules of Professional Conduct, propose and obtain a settlement that includes a waiver by the plaintiff of the right to seek attorney fees as prevailing party. The offer only invites the plaintiff to make use of what the Supreme Court has characterized as a "bargaining chip." There is nothing to suggest that the availability of fee waivers or of simultaneous negotiation of damages and attorneys' fees has limited any attorney's right to practice law. Simultaneous negotiation of attorneys' fees and substantive relief could prove as favorable to attorneys as to clients.^{6/}

The assignment to Attorney A of the right to seek fees under section 1988, or to waive fees, whether or not enforceable, does not change this conclusion. The assignment purports to vest in Attorney A, rather than the plaintiff, the exclusive right to seek or to waive fees. In this circumstance, the government attorney's settlement offer conditioned on a waiver of fees is beyond the power of the plaintiff to accept without Attorney A agreeing to become a party to the settlement. Attorney A will either consent or not. In either event, there is not, in the opinion of the Committee, a restriction on the right of a member to practice law within the meaning of rule 1-500. The "Discussion" at rule 1-500 states that paragraph (A) "makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited." An attorney's consent to a lump-sum settlement offer, and the defense counsel's offer of a settlement that might reduce the ability of the plaintiff's attorney to receive compensation in the matter, are not the equivalent of an agreement to "refrain from representing other clients in similar litigation."

IV. The government attorney's obligation in other civil rights actions.

The issue here is whether the government attorney has an ethical obligation to his or her client to recommend that all offers of settlement in civil rights cases be conditioned upon a waiver of attorney fees. No rule of ethics requires such conduct in all cases. While the government attorney's obligations of competence and diligence require that he or she attempt to achieve the most satisfactory resolution of each case from the client's standpoint, it does not follow that in all cases that resolution will include a waiver of attorney fees. In some cases, demanding a waiver of fees could prevent any settlement. In *Evans v. Jeff D.*, the fee waiver was a part of a settlement in which the plaintiff class achieved virtually all the relief sought in the complaint, a result that exceeded the likely result at trial. The Court in *Evans v. Jeff D.* characterized the plaintiffs' right to waive fees under the Fees Act as a "bargaining chip," one of the weapons in the arsenal for achieving relief.

^{6/} Los Angeles County Bar Association Formal Opinion 445 (Sept. 28, 1987) concludes that it is unethical for a defense attorney to condition a settlement offer in a civil rights case on a complete waiver of the plaintiff's right to seek attorney fees, on the theory that the impact of such a practice will "effectively eliminate future access to the courts in civil rights and civil liberties cases." In *Evans v. Jeff D.*, the Court criticized this reasoning as speculation. Other pre-*Evans v. Jeff D.* ethics committee opinions have expressed varying positions on the issue. A 1981 opinion of Association of the Bar of the City of New York, Comm. on Professional and Judicial Ethics, Op. 80-94 (1981), concluding that fee-waiver demands are unethical, was withdrawn in 1987, following *Evans*. N.Y.C. Bar Formal Op. 1987-4 (1987).

Though the Court in *Evans v. Jeff D.* stated that it did not construe the Fees Act as embodying a general rule prohibiting settlements conditioned on the waiver of fees, 475 U.S. at 737, the Court suggested that a fee waiver proposal *could* be found to violate the Fees Act if (1) a defendant adopted a statute or uniform state-wide policy or practice requiring a waiver of fees as a condition of settlements, or (2) a waiver offer were part of a “vindictive effort” to deter attorneys from representing plaintiffs in civil rights suits against the defendant. 475 U.S. at 739-740.^{7/} If, as suggested by the Court, a uniform policy of requiring a fee waiver as a condition of all settlements could be found to undermine the purposes of the Fees Act, it would follow that defense counsel could not have an ethical obligation to his or her client to recommend that all offers of settlement in civil rights cases be conditioned on a waiver of attorney fees.

The Committee believes that the government attorney may consider requesting a fee waiver for possible inclusion in a settlement in appropriate cases. Since a section 1983 plaintiff ordinarily has no interest in an attorney’s fee award, and may more readily agree to a fee waiver than agree to other settlement terms, a fee waiver may be more easily obtained than other concessions. Therefore, the decision of the government attorney to request a fee waiver or not depends upon the facts and circumstances of each case.

CONCLUSION

Under the facts presented and in response to the specific questions posed, the Committee concludes:

- When the settlement offer is made or when Client indicates a desire to accept the offer, Attorney A does not have an obligation to seek to withdraw from the case. The point at which withdrawal may actually be required depends on circumstances beyond the mere presentation of a settlement offer that contemplates a waiver of statutory attorney fees. Upon presentation of that offer, Attorney A’s obligation is to advise Client of the alternatives and their foreseeable consequences.
- If the proffered settlement fails due to Attorney A’s refusal to consent, and the jury then returns a defense verdict, Attorney A’s refusal to agree not to sue the client or the opposing party does not violate any rule of professional conduct. Attorney A has no ethical obligation to waive any claim he may have against the client or the other party.
- The government attorney does not violate rule 1-500, or any other rule, by participating in a settlement that is conditioned on a waiver by Attorney A of any right to seek fees from the defendant or from Client. The government attorney’s offer of a settlement that might reduce the ability of the Attorney A to receive compensation in the matter is not the equivalent of an agreement to refrain from representing other clients in similar litigation.
- The government attorney does not have an ethical obligation to his or her client in all civil rights actions subject to section 1988 to recommend that all settlement offers be conditioned upon a waiver of fees or upon a lump sum settlement. The decision of the government attorney to request a fee waiver or not depends upon the facts and circumstances of each case.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

^{7/} Picking up where *Evans v. Jeff D.* left off, the Ninth Circuit recently held that a section 1983 plaintiff had standing to pursue a claim for damages against County of Los Angeles based on allegations that the county and County Counsel had a custom, practice and policy to offer or accept settlements in federal civil rights cases only for a “lump sum, including all attorneys’ fees” and that that policy had deprived plaintiff of the opportunity to obtain a civil rights lawyer to represent her in a previous section 1983 action. *Bernhardt v. County of Los Angeles* (9th Circuit 2002) 279 F.3d 862. A similar case is *Johnson v. District of Columbia* (D.D.C. 2002) 190 F. Supp.2d 34, arising under the Individuals with Disabilities Education Act, Title 20 United States Code section 1400 et seq. (IDEA) and section 1983. In *Johnson* the district court held that a cause of action was stated for a violation of IDEA and section 1983 based on the defendants’ making a settlement offer that was conditioned on plaintiff’s waiving any right to prevailing party status and agreeing not to seek legal fees or costs. The court distinguished *Evans* based on an explicit right-to-counsel provision in IDEA and on specific allegations of an ongoing vindictive and retaliatory effort to deny parents of children needing special services access to legal representation.