

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2009-176**

ISSUES:

In a lawsuit prosecuted by Attorney A against Defendant, Client has a statutory right to seek an award of attorney's fees. Attorney B, Defendant's counsel, makes a settlement offer, conditioned on Client's waiver of his statutory right to attorney's fees, that is insufficient to compensate Attorney A for her fees. (1) May Attorney A bar the settlement notwithstanding Client's desire to accept it? (2) Does Attorney B violate any ethical obligation by recommending or conveying the fee-waiver settlement offer in this case? (3) Does Attorney B violate any ethical obligation by recommending or conveying fee-waiver settlement offers in cases generally?

DIGEST:

1. A lawyer must inform the client of a fee-waiver settlement offer and consummate the settlement in accordance with the client's wishes even if it reduces the likelihood of recovering some or all of his or her fees.
2. A lawyer does not violate any ethical obligation by recommending or conveying a fee-waiver settlement offer in a given case.
3. A lawyer does not violate any ethical obligation by recommending or conveying fee-waiver settlement offers in cases generally.

AUTHORITIES

INTERPRETED:

Rules 1-500, 3-510, and former rule 2-109 of the Rules of Professional Conduct of the State Bar of California.^{1/}

Business and Professions Code sections 6068, subdivisions (a), (b), (c) and (h), and 6103.5.

STATEMENT OF FACTS

Client engages Attorney A to prosecute a lawsuit against Defendant under the Act. In addition to creating substantive claims, the Act is a "fee shifting statute," granting a successful plaintiff a right to seek an award of attorney's fees. Client and Attorney A enter into a written fee agreement that is legally valid and ethically compliant. The fee agreement provides that Attorney A shall be paid a one-third contingent fee or the statutory award, whichever is greater.

Attorney A has previously represented, and currently represents, others pursuing claims under the Act against Defendant. Attorney B, counsel for Defendant, has handled many of these matters and is responsible for defending Client's lawsuit. In the past, after settling claims under the Act, the plaintiffs have filed motions for attorney's fees. As a result, on Attorney B's recommendation, Defendant has decided to make fee-waiver settlement offers in lawsuits under the Act generally, and Attorney B has conveyed such offers.

Extensive motion practice and pretrial discovery ensue in Client's lawsuit. Attorney B recommends to Defendant to make a fee-waiver settlement offer of \$20,000, and Defendant accepts the recommendation. Attorney B conveys the settlement offer to Attorney A. If Client were to accept the settlement offer, Attorney A would receive far less than the value of the time she has invested in Client's lawsuit. The reasonable value of her services totals \$100,000.

In light of the evidence revealed in discovery, Attorney A believes Client's case to be winnable at trial and the fee-waiver settlement offer to be less than the potential value of Client's claim. Attorney A advises Client regarding her analysis of the merits, likelihood of success at trial, potential damages award, and the practicalities of litigation. Client, weary of litigation, decides the settlement offer is adequate and instructs Attorney A to accept it.

^{1/} Unless otherwise noted, all rule references are to the Rules of Professional Conduct of the State Bar of California.

DISCUSSION

1. Statutory Attorney's Fees

A variety of statutes that create a substantive claim also grant the successful plaintiff a right to seek an award of attorney's fees.^{2/} Such "fee shifting statutes," often involving civil rights, have been the subject of much discussion by us and others.^{3/}

Discussion has centered around the decision made by the United States Supreme Court in *Evans v. Jeff D.* (1986) 475 U.S. 717 [106 S.Ct. 1531] ("*Jeff D.*"), a case involving the Civil Rights Attorney's Fees Awards Act of 1976 ("Fees Act").

Prior to the decision made in *Jeff D.*, both the United States Courts of Appeals and state and local ethics committees were divided as to whether fee-waiver settlement offers were legally permissible and not ethically prohibited.^{4/} In general, opposition to such settlements focused on the risk of undermining the legislative purpose of enabling "private attorneys general" and interfering with the administration of justice.

The ruling made in *Jeff D.* changed the debate. At the threshold, it held that fee-waiver settlement offers presented legal questions rather than *ethical* questions. (See, *id.* at p. 727 [any "duty" on the part of the trial court to reject a proposed fee-waiver settlement offer under the Fees Act "derives ultimately from the Fees Act rather than from the strictures of professional ethics"]; *id.* at p. 728 [the "defect, if any," in such a settlement offer "must be traced not to the rules of ethics but to the Fees Act"].) It proceeded to hold that fee-waiver settlement offers were legally permissible under the Fees Act on the ground that it is the client who possesses, and can waive, the right to seek an award of attorney's fees. (*Id.* at pp. 730-38.) It noted an argument that fee-waiver settlement offers would *not* be legally permissible under the Fees Act if such offers were made in cases generally pursuant to a "policy" or "practice." (*Id.* at p. 739.) It declined, however, to pass on the merits of the argument. (*Id.* at p. 740.)

^{2/} Such provisions are found in a wide variety of statutes. See Richard M. Pearl, *California Attorney Fee Awards* § 17 (2006), and Mary Francis Derfner & Arthur D. Wolf, *Court Awarded Attorney Fees* chpt. 29-37 (2006), for a general discussion of certain fee shifting statutes under California and federal law, respectively.

^{3/} See, e.g., Note, *Conflict and Solidarity: The Legacy of Evans v. Jeff D.* (2004) 17 Geo. J. Legal Ethics 499; Note, *Fee Waivers and Civil Rights Settlement Offers: State Ethics Prohibitions After Evans v. Jeff D.* (1987) 87 Colum. L. Rev. 1214. See also, California State Bar Formal Opn. No. 1989-114 (lawyer is obligated to inform client if fee-waiver settlement will achieve client's desired litigation result).

^{4/} Compare *Prandini v. Nat'l Tea Co.* (3rd Cir. 1977) 557 F.2d 1015 (defense counsel may not simultaneously negotiate a fee award and settlement on the merits); *Mendoza v. United States* (9th Cir. 1980) 623 F.2d 1338 (defense counsel discouraged from simultaneously negotiating fee award and settlement on the merits); Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, Formal Opn. No. 1980-94 (in a civil rights case, it is unethical for defense counsel to (1) make a fee-waiver settlement offer, (2) simultaneously negotiate a statutory attorney's fee award and settlement on the merits, or (3) use the merits as a lever to extract a fee waiver); Committee on Legal Ethics of the District of Columbia Bar Association, Opn. No. 147 (1985) (defense counsel may not expressly condition a settlement on the merits on a fee waiver, although a single lump sum settlement offer is permissible); with *Moore v. Nat'l Ass'n of Sec. Dealers, Inc.* (D.C. Cir. 1985) 246 F.2d 1093 (declining to impose a general rule against joint negotiation of a statutory attorney's fee award and settlement on the merits); *Chicano Police Officers' Ass'n v. Stover* (10th Cir. 1980) 624 F.2d 127 (plaintiff is free to waive statutory right to seek attorney's fees as part of an overall settlement); State Bar of Georgia, Advisory Opn. No. 39 (1984) ("Although [the simultaneous negotiation of a statutory attorney's fee award and settlement on the merits] may raise difficult ethical issues for a plaintiff's attorney, we are reluctant to hold that no resolution is ever available to ethical counsel."); State Bar of New Mexico, Advisory Opn. No. 1985-3 ("[I]n cases involving only damages, it is not ethically improper for a defendant to offer nor for a plaintiff to accept a lump sum settlement representing damages, costs, and attorney's fees.").

In the wake of *Jeff D.*, with a single noteworthy exception to be addressed in due course, state and local ethics committees in various jurisdictions withdrew old opinions inconsistent with *Jeff D.* and issued new opinions consistent with it.⁵

Since *Jeff D.*, we have considered related issues twice. In California State Bar Formal Opn. No. 1989-114, we concluded that a lawyer is ethically obligated to inform a client that the client possesses, and can waive, the right to seek an award of statutory attorney's fees as a condition of settlement—presumably under all fee-shifting statutes, not only the Fees Act—even though it may result in the lawyer not receiving remuneration for services performed. That conclusion remains sound, although under some fee-shifting statutes at least, the lawyer is entitled to the statutory attorney's fees actually awarded. (See, *Flannery v. Prentice* (2001) 26 Cal.4th 572, 577 [110 Cal.Rptr.2d 809] [absent an agreement to the contrary, attorney's fees awarded under the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) belong to the lawyer].) In California State Bar Formal Opn. No. 1994-136, we concluded that, so long as certain conditions were met, an agreement between a lawyer and a client assigning to the lawyer the client's right to seek an award of attorney's fees under the Fees Act was not ethically prohibited. *Pony v. County of Los Angeles* (9th Cir. 2006) 433 F.3d 1138, 1143-1144, which holds that such an assignment is legally void, has rendered that conclusion of little consequence.

Here we narrowly address certain ethical issues arising from fee-waiver settlement offers faced by attorneys representing plaintiffs and by attorneys representing defendants.

2. An Attorney May Not Bar Settlement

The first question presented by the factual scenario is whether Attorney A may bar the \$20,000 fee-waiver settlement offered to Client by Defendant through Attorney B, notwithstanding Client's desire to accept the offer. The answer is no.

Subject to rules, statutory provisions, and judicial decisions governing fees and fee agreements, a lawyer has a contractual right to the compensation specified in the fee agreement with a client. We consider here a situation in which Attorney A has such a contractual right to the greater of a one-third contingent fee or the statutory attorney's fee, and has rendered services fairly valued at an amount much greater than the \$20,000 fee-waiver settlement offer that Client wishes to accept.

In the factual scenario, it is to Attorney A's own personal advantage to press Client's case to conclusion in hopes of securing a victory and assurance of payment under the fee-shifting provisions of the Act. Attorney A, however, may not veto a settlement that Client wishes to accept in order to benefit herself. Instead, Attorney A is obligated to inform Client of Defendant's settlement offer and to consummate the settlement in accordance with Client's wishes even if it reduces the likelihood of recovering the full value of her services.^{6/}

^{5/} See, e.g., Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opn. No. 1987-4, in which the Committee noted that *Jeff D.* had forced it “to recognize that the principal underpinning” of earlier opinions, including its Formal Opn. No. 1980-94, was “removed by the Supreme Court's decision . . . and that the reasoning of those Opinions [was], to a significant degree, inconsistent with the reasoning of the Supreme Court.” Consequently, the Committee concluded that “it is not unethical per se for defense counsel to propose settlements conditioned on the waiver by plaintiffs of an award of attorney's fees authorized by [fee-shifting statutes].” See also, Utah State Bar Ethics Advisory Opinion Committee, Opn. No. 98-05 (“It is not unethical for a defense attorney to present an offer of settlement conditioned on waiver of attorney's fees.”).

^{6/} See, Paul W. Vapnek et al., *California Practice Guide: Professional Responsibility* (The Rutter Group 2007) § 5:349 (citing rule 3-510 (“Communication of Settlement Offer”) and § 6103.5 (“Communicate Written Offer of Settlement to Client”)). See also, American Bar Association, Model Rules of Professional Conduct, Rule 1.2(a) (“A lawyer shall abide by a client's decision whether to settle a matter . . .”); *id.*, Comment [1] (the decision “whether to settle a civil matter must . . . be made by the client”).

3. An Attorney May Recommend And Convey A Fee-Waiver Settlement Offer In Any Given Case

The second question presented by the factual scenario is whether Attorney B violates any ethical obligation by recommending to Defendant, or by conveying on its behalf, the \$20,000 fee-waiver settlement offer in this lawsuit under the Act. Again, the answer is no.

We are of the opinion that a fee-waiver settlement offer is not ethically prohibited. Indeed, such offers may properly serve not only the interests of the offering defendant, but also the accepting plaintiff. The plaintiff has asserted violation of statutory rights, the defendant has contested such violation, and the two of them have reached an accord that is mutually satisfactory and brings closure to the dispute.

It is not ethically prohibited, of course, for a lawyer to recommend to his or her client to offer to enter into a settlement and subsequently to convey such an offer. Among the lawyer's ethical obligations is to "support the Constitution and laws of the United States and of this state." (Bus. & Prof. Code § 6068, subd. (a).) The laws of this state are informed by a "strong policy encouraging settlements." (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 592 [41 Cal.Rptr.2d 878]; accord, e.g., *Stewart v. Preston Pipeline, Inc.* (2005) 134 Cal.App.4th 1565, 1582 [36 Cal.Rptr.3d 901] [quoting *Levy*].)

It is likewise not ethically prohibited for an attorney to recommend and convey a fee-waiver settlement offer of claims under a statute granting a successful plaintiff a right to seek an award of attorney's fees. "Many federal and state statutes authorize courts to award attorney's fees to the party who prevails in the particular litigation"; "some statutes mandate prevailing party awards, others are discretionary"; some statutes make the "prevailing party fee awards . . . awardable" to the plaintiff, others to the plaintiff's lawyer. (Vapnek et al., *Cal. Practice Guide: Professional Responsibility, supra*, § 5:337-5:339.5.) Under a fee-waiver settlement offer, the defendant makes an offer conditioned on the plaintiff's waiver of his or her right to seek an award of attorney's fees—a right that, as noted above, belongs to the plaintiff and not the plaintiff's attorney. The plaintiff is granted the right to seek an award of attorney's fees to facilitate the assertion and vindication of the underlying claim, not to support his or her lawyer. (See, e.g., *Jeff D., supra*, 475 U.S. at p. 732, fn. 20 [speaking of the right to seek an award of attorney's fees granted by the Fees Act as a "bargaining chip"].) It appears that no such right to seek an award of attorney's fees is unwaivable by a plaintiff. If it were otherwise, assertion and vindication of the underlying claim by the plaintiff would be "impede[d]" "by reducing the attractiveness of settlement" to the defendant, and would thereby run counter to the strong policy encouraging settlements. (*Id.* at pp. 731-732 [Fees Act]; accord, *Pony, supra*, 433 F.3d at p. 1144 [same].)

Against this background, we conclude that there is no ethical obligation that would bar a fee-waiver settlement offer.

In arriving at this conclusion, we have considered the single noteworthy contrary authority issued since *Jeff D.*—Los Angeles County Bar Association, Formal Opn. No. 445 (1987) ("Formal Opn. No. 445"). After such consideration, we find Formal Opn. No. 445 unpersuasive and decline to follow it.

Formal Opn. No. 445 opens with an admission that there is no ethical obligation "specifically dealing" with fee-waiver settlement offers, and closes with a recognition of the "strong . . . policy" encouraging settlements. Nonetheless, between these acknowledgements, the opinion finds fee-waiver settlement offers ethically objectionable, citing (1) the lawyer's ethical obligation to support the law and the legal system (§ 6068, subds. (a), (b)) as a basis for an obligation to ensure access to justice, (2) the lawyer's ethical obligation not to reject the cause of the defenseless or the oppressed (§ 6068, subd. (h)), and (3) the lawyer's ethical prohibition against entering into, or participating in, any agreement restricting a lawyer's right to practice (former rule 2-109; current rule 1-500). There is indeed an ethical obligation to support the law and the legal system and facilitate access to justice. (Cf. Stats. 2001, ch. 880 (Assem. Bill No. 913), § 1, subds. (a), (b) [legislative findings and declarations that the "provision of pro bono legal services is the professional responsibility of California attorneys as an integral part of the privilege of practicing law in this state," and that "[e]ach year, thousands of Californians, particularly those of limited means, must rely on pro bono legal services in order to exercise their fundamental right of access to justice in California"].) That obligation, however, has never been construed in any reported decision of which we are aware to impose any specific prohibition on lawyers, including a bar against fee-waiver settlement offers. (See, annotations to § 6068, West's Ann. Cal. Bus. & Prof. Code § 6068 (Westlaw 2008).) For its part, the ethical obligation not to reject the cause of the defenseless or the oppressed imposes a duty to provide representation when needed (Vapnek et al., *Cal. Practice Guide: Professional Responsibility, supra*, § 8:54), not to refrain from making fee-waiver settlement offers. Lastly, the ethical prohibition against agreements restricting a lawyer's right to

practice is not implicated in any way. Although fee-waiver settlement offers may affect how much money a lawyer may make in practice, they do not purport to limit the lawyer's right to engage in the practice itself.

4. An Attorney May Recommend And Convey Fee-Waiver Settlement Offers In Cases Generally

The third question presented by the factual scenario is whether Attorney B violates any ethical obligation by recommending to Defendant, or by conveying on its behalf, fee-waiver settlement offers in lawsuits under the Act generally. Here too, the answer is no.

We are of the opinion that fee-waiver settlement offers are not ethically prohibited in cases generally. Just as there is no ethical obligation barring such a settlement offer in any given case, neither is there any such obligation barring settlement offers of this sort in cases generally.

Formal Opn. No. 445 expresses a fear that the making of fee-waiver settlement offers in cases generally might shrink the pool of lawyers willing to represent the class of plaintiffs who have been granted statutory rights to seek awards of attorney's fees.⁷ Two decades ago, at the time *Jeff D.* was decided, the United States Supreme Court expressed the view that it was only a "remote" possibility that fee-waiver settlement offers might shrink the pool of lawyers willing to take cases under the Fees Act. (*Jeff D.*, *supra*, 475 U.S. at p. 742, fn. 35.) That may no longer be true. (Compare Nazer, *Conflict and Solidarity: The Legacy of Evans v. Jeff D.* (2004) 17 Geo. J. Legal Ethics 499, 525-537 [arguing that *Jeff D.* has not resulted in shrinking the pool of lawyers willing to take cases under the Fees Act] with Albiston & Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General* (2007) 54 U.C.L.A. L. Rev. 1087, 1097-1098 [arguing that *Jeff D.* "significantly undermined plaintiffs' leverage in settlement negotiations," but that *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources* (2001) 532 U.S. 598 [121 S.Ct. 1835], which rejected the catalyst theory for recovery of attorney's fees under the Fees Act, "discourages attorneys from representing . . . plaintiffs" under the Fees Act, especially in "paradigmatic public interest cases, such as class actions seeking injunctive relief against government actors"].) But it is unknown whether fee-waiver settlement offers have shrunk, or may shrink, the pool of lawyers willing to take cases under fee-shifting statutes generally. It is also unknown what costs and benefits have flowed, or may flow, from such pool-shrinking in terms such as the foreclosure of meritorious cases, on the one side, and the deterrence of frivolous cases, on the other.

We recognize that an argument could be made that a lawyer might violate his or her ethical obligation to "support the . . . law[]" (Bus. & Prof. Code § 6068, subd. (a)) and to "counsel" and "maintain" "only" "those actions, proceedings, [and] defenses" that "appear to him or her" to be "legal" (Bus. & Prof. Code § 6068, subd. (c)) if the making of fee-waiver settlement offers in cases generally were held to be unlawful. But so far as we are aware, the making of such settlement offers has not been held unlawful under *any* fee-shifting statute. It is true that, in *Bernhardt v. County of Los Angeles*, *supra*, 279 F.3d 862, the court stated that the making of fee-waiver settlement offers in cases generally under the Fees Act of 1976 "present[ed] serious questions." (*Id.* at 926.) But subsequently in *Pony v. County of Los Angeles*, *supra*, 433 F.3d 1138, the same court characterized that statement as "dicta." (*Id.* at 1145, fn. 4.) We believe that, in the absence of any holding of unlawfulness under any fee-shifting statute, fee-waiver settlement offers—which are not proscribed by any rule, statutory provision, or judicial decision—are not ethically prohibited in cases generally.

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 See, *Jeff D.*, *supra*, 475 U.S. at pp. 739-741 & footnote 34; *Pony*, *supra*, 433 F.3d at p.1145, footnote 4; *Bernhardt v. County of Los Angeles* (9th Cir. 2002) 279 F.3d 862, 866; see also, *Jeff D.*, *supra* 475 U.S. at p. 758 (dissenting opinion of J. Brennan) ("[O]nce 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 attorney's 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.").