

Advisory Opinion 1985-3

The following question has been posed to the Advisory opinions Committee:

In a case involving alleged violations of Federal Civil Rights statutes, such as Title VII and 42 U.S.C. Section 1983, where the prevailing party would be entitled to reasonable attorneys fees as expenses of the litigation, is it unethical or in any way improper for the defendant, to make a settlement offer and for the plaintiff to accept a settlement offer, in a lump sum dollar amount representing the total of back pay, compensatory and punitive damages as well as attorneys fees which would be received by plaintiff and counsel for plaintiff?

The rules under which this Committee operates prevent the Committee from answering inquiries regarding conduct of attorneys other than the attorney requesting an advisory opinion. However, the factual setting the inquiring attorney has set forth prevents rigid adherence to that rule. Because the question arises from settlement negotiations, it would be impossible for the Committee to ignore the conduct of other attorneys. Therefore, the Committee will respond to those aspects of the inquiry dealing with "defense counsel" with the understanding that no individual defense counsels conduct is being examined.

Counsel has presented an extremely complex question. *See generally*, Comment, Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations, 131 U. Penn. L. Rev. 793 (1983). Similar questions have been addressed by the Bar Association of the City of New York and the Bar Association of the State of Georgia. Those two entities reached opposite results.

The New York City Bar Association Committee on Professional and Judicial Ethics issued its Formal opinion 80-94 in 1981. *Reprinted in* 36 Rec. A.B. City N.Y. 507. The precise question presented to the NYC Bar was whether defense counsel could ethically insist on a waiver of attorneys fees in civil rights actions. The NYC Bar recognized the policy underlying statutory fee awards stating:

Authorization of fee awards under [Civil Rights] Statutes is critical to the administration of justice; indeed, it appears critical to the perception of justice and its accessibility to all members of society. The statutory fee award is a recognition that protections afforded minorities subjected to invidious discrimination or to persons abused 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.

...

These statutes thus provide one form of response to the need to balance the scales of justice and provide a means for encouraging those who could not otherwise afford to do so a realistic opportunity to enforce their rights. Routine demands in the context of settlement that plaintiff's counsel waive such statutory fees thus could seriously undermine the effectiveness of these provisions as a device for making counsel available to persons having claims under the statutes.

The only support the NYC Bar was able to find in the disciplinary rules was in DR1-102(A)(5) which states that:

"A. A lawyer shall not:

5. Engage in conduct that is prejudicial to the administration of justice."

The Committee also referred to Ethical Consideration 2-25 which urges every lawyer to support efforts to make legal services available to all who need them. A "substantial minority" of the Committee was described in Opinion No. 80-94. It was the minority's position that prohibiting specific conduct during settlement invaded the jurisdiction of the courts and the legislature. That substantial minority contended that "enforcement of statutory goals is not within the province of ethics committees." The minority was also concerned that the opinion could interfere with the settlement process and invade an area not properly an ethical matter. Opinion No. 80-94 was subsequently reaffirmed in opinion No. 82-80 (a copy of which could not be located).

The State Bar of Georgia adopted the position of the minority of the NYC Bar in Advisory opinion No. 39, dated July 20, 1984. The Georgia Bar rejected the NYC Bar Opinion stating:

We are instead, more persuaded by the position taken by the dissent in Opinion No. 82-80 which cited with approval the following language from the United States Supreme Court in *White v. New Hampshire*, 455 U.S. 445, Fn. 15 (1982), a case where -the issue of the ethical propriety of simultaneous negotiation of attorneys fees in Federal Civil Rights actions was raised, but not actually decided: "In considering whether to enter a negotiated settlement, a defendant may have good reasons to demand to know his total liability from both damages and fees. Although such situations may raise difficult ethical issues for a plaintiff's attorney, we are reluctant to hold that no resolution is ever available to ethical counsel."

The Georgia Bar was apparently persuaded by a defendant's need for determining its total exposure in a single settlement. The Committee felt that preventing negotiations and settlement of attorneys fees would impede overall settlement claims; a result Congress certainly did not intend.

No federal court, nor apparently any state court, has prohibited simultaneous settlement negotiations of damages and fees. However, several courts have indicated displeasure with such negotiations. *See, e.g., James v. Home Construction Company*, 689 F.2d 1357 (11th Cir. 1982) (indicating in dictum that Congress did not intend for a plaintiff to bargain away his statutorily entitled claim to attorneys fees); *Shadis v. Beal*, 685 F.2d 824 (3rd Cir.), *cert. denied*, 103 S. Ct. 300 (1982) (court refused to enforce contractual provisions between plaintiff's lawyers, a legal services program, and Pennsylvania which purported to bar awards of attorneys fees in litigation against the state); *Parandini v. National Tea Company*, 557 F.2d 1015 (3rd Cir. 1977) (court directed district courts to bifurcate settlement on the merits and award of attorneys fees); *Obin v. District No. 9 of the International Association of Machinists*, 651 F.2d 574 (8th Cir. 1981) (simultaneous settlement places counsel in inevitable conflict with the interests of his clients and should be avoided); *Mendoza v. United States*, 623 F.2d 1338 (9th Cir. 1980) (simultaneous negotiation strongly discouraged).

However, this Committee finds it unnecessary to accept the extreme positions of either the NYC Bar or the Georgia Bar. The present inquiry is distinct from the inquiries presented to those two entities. The NYC Bar and the Georgia Bar were both presented with inquiries from attorneys representing non-profit public interest entities. The present inquiry is from an attorney in private practice and involves the recovery of damages. This is fundamentally distinct from a public interest lawyer, for example, seeking an injunction to benefit a class of individuals. There, a defendant could quickly place plaintiff's counsel in an untenable conflict of interest by agreeing to the injunction but making the agreement conditional on a waiver of attorney's fees, because the client never agreed to pay. The client has no incentive to hold out for an agreement to pay attorney's fees. of course, this scenario could have a chilling effect on the availability of counsel for indigent plaintiffs.

The present inquiry, however, deals with settlements involving damage recovery. If the inquiry was also directed to injunctive relief or otherwise indicated a chilling effect on plaintiff's counsel, we would have a much more difficult situation and we might very well adopt the position of the NYC Bar. But since damages are being recovered in settlement, counsel can anticipate the problem of a demanded waiver and the resulting conflict of interest by drafting a retainer agreement providing for the payment of attorneys fees from the recovery in the event the client agrees to waive the statutory attorneys fees.

In conclusion, the New Mexico Committee is of the opinion that, in 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 attorneys, fees. If a prior agreement between plaintiff and his counsel has not allocated a division of the total settlement, counsel should be guided by D.R. 2-106 in negotiating the division of the settlement with his client prior to acceptance thereof.