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The Ethics of Fee Waivers: Negotiation of Statutory Attorney’s Fees in Civil Rights Cases

Thomas G. Hungar

Plaintiffs who prevail in lawsuits claiming deprivation of civil rights are generally entitled to receive, in addition to relief for their actual injuries, an award of “reasonable” attorney’s fees under the Civil Rights Attorney’s Fees Award Act of 1976 (Fees Act or Act) or a similar fee-shifting statute. The United States Supreme Court recently ruled in Evans v. Jeff D., however, that settlement offers by defendants in such cases may be conditioned on plaintiffs’ complete or partial waiver of attorney’s fees, without violating the language or intent of the Fees Act.

The Supreme Court’s pronouncement on this issue did not, however, resolve all controversy surrounding fee waivers. Before Jeff D., several bar association ethics committees had opined that these conditional settlement offers were unethical because they created a severe conflict of interest for plaintiffs’ attorneys. Civil rights organizations and other groups are currently attempting to obtain

2. There are now more than 150 federal statutes which provide for awards of attorney’s fees to prevailing parties in some circumstances. Ruckelshaus v. Sierra Club, 463 U.S. 680, 684 (1983).
4. The terms “conditional settlement offer,” “simultaneous negotiation,” and “fee limitations or waivers” refer to settlement negotiations in civil rights cases in which a defendant conditions settlement on a waiver of, or limitation on, the plaintiff’s statutory right to receive attorney’s fees. These terms also include so-called “lump-sum” settlement offers which explicitly provide that the settling defendant will not be liable for any additional attorney’s fees beyond the offered amount, thus forcing the plaintiff’s attorney to look to the plaintiff’s recovery as the sole source of his or her fee.
5. These ethics opinions are cited at note 24, infra. For an explanation of the conflict of interest created by these offers, see infra text accompanying notes 18-19.
additional rulings to this effect. After describing the background and history of the Fees Act, this Current Topic will consider the ethical problems raised by conditional settlement offers, and will argue that such offers are not unethical. Moreover, the article will demonstrate that current ethics codes obligate plaintiffs’ attorneys to negotiate fees and merits simultaneously once the issue of fees has been raised by defendants, and that defense counsels’ duties to their clients obligate them to inject this issue into settlement negotiations. The Current Topic will conclude with an analysis of the likely impact on civil rights enforcement of permitting simultaneous negotiation of fees and merits.

I. Background

Historically, state and federal courts in this country have followed the “American Rule” for the allocation of litigation costs, which requires each party to pay his or her own attorney’s fees regardless of the outcome of the litigation. With limited exceptions, therefore, the federal courts have declined to award attorney’s fees to prevailing parties without specific statutory authority. For a brief period in the early 1970’s, some federal courts began making fee awards to prevailing plaintiffs in civil rights and other “public interest” cases under the “private attorney general” theory. This practice was abruptly halted by the Supreme Court’s decision in Alyeska Pipeline Co. v. Wilderness Society, which held that federal courts have no power to abrogate the American Rule.


8. See Alyeska, 421 U.S. at 257-59 (discussing exceptions for willful disregard of court orders, bad faith, and “common fund” cases).

9. Id. at 270 n.46, and cases there cited. The “private attorney general” theory provided for awards of attorney’s fees to prevailing plaintiffs whose successes vindicated important public policies and assisted the continued proper functioning of government. Id. at 245-46.

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In direct response to *Alyeska*, Congress enacted the Fees Act,\(^{11}\) which provides that "[i]n any action or proceeding to enforce a provision of [the Civil Rights Acts], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."\(^{12}\) The legislative history of the Act evinces Congress' intent that the law be construed liberally so as to encourage meritorious lawsuits to redress the deprivation of civil rights. The courts have complied with this congressional mandate in several ways. For example, the Fees Act has been construed to allow prevailing plaintiffs to recover attorney's fees in almost all civil rights cases as a matter of course,\(^{13}\) even if the plaintiffs are only partially successful in their suits,\(^{14}\) and even if they settle before trial.\(^{15}\) Prevailing defendants, on the other hand, are rarely entitled to receive attorney's fees, on the theory that such awards against plaintiffs would chill civil rights enforcement by private parties.\(^{16}\)

As an additional incentive to litigate civil rights cases, courts award fees based on the prevailing market rate for similar legal services, rather than the actual cost of providing civil rights representation.\(^{17}\)

When the issue of conditional settlement first arose, therefore, some courts were reluctant to allow limits on plaintiffs' ability to recover the full amount of statutory fees provided by the Fees Act. Any such limitation, it was believed, would compromise Congress' intent to spur civil rights litigation. Moreover, courts were concerned by the conflict of interest inherent in simultaneous negotia-


\(^{13}\) Chicano Police Officer's Ass'n v. Stover, 624 F.2d 127, 129-30 (10th Cir. 1980); Dawson v. Pastrick, 600 F.2d 70, 78 (7th Cir. 1979).


\(^{17}\) Blum v. Stenson, 465 U.S. 886, 892-96 (1984). Fee awards are computed by multiplying the hours reasonably spent by a reasonable hourly rate to obtain the so-called "lodestar" amount. This amount may then be increased or decreased to reflect certain factors, such as the risk of not prevailing (and therefore of not recovering any attorney's fees), id. at 902 (Brennan, J., concurring), and the degree of success obtained. See Hensley v. Eckerhart, 461 U.S. 424, 433-37 (1983). A reasonable hourly rate is one which is reasonable given the type and complexity of the legal issues involved, the experience and ability of the attorney, the quality of the attorney's work, and prevailing hourly rates for similar services in the relevant community. Blum v. Stenson, 465 U.S. at 894-900 & n.11.
tion by plaintiffs' attorneys of their fees and their clients' relief. The conflict lies in the existence of a necessary tradeoff between the amounts allocated to the attorney's fee and to the plaintiff as damages or other relief; the attorney thus has a financial interest in maximizing his or her own fee at the expense of the client. In *Prandini v. National Tea Co.*, the seminal case in this area prior to *Jeff D.*, the Third Circuit held that plaintiffs' attorneys would not be permitted to negotiate fees and merits simultaneously. Other courts relied on *Prandini* in prohibiting defense counsel from injecting the issue of fees into settlement negotiations, on the grounds that simultaneous negotiation would be irremediably tainted by plaintiffs' attorneys' conflicts of interest, and that such settlements would in any case be contrary to the policy and purpose of the Fees Act, since they would discourage attorneys from bringing civil rights actions by lessening the chances that the attorneys would receive their fees.

The Supreme Court's decision in *Jeff D.* effectively overruled these cases by approving fee waivers and simultaneous negotiation of fees.
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and merits in civil rights cases. However, the Court's decision of the legal question does not in itself resolve the ethical dilemma presented by these types of settlement offers. It is therefore necessary to reevaluate the ethical issues and applicable ethics committee opinions in light of the Jeff D. holding.

II. The Ethics of Simultaneous Negotiation of Fees and Merits

At least five state and local bar associations have ruled that defense attorneys' requests for fee waivers or limitations are unethical in some or all situations, and commentators have supported their interpretation of the ethics codes. The critics of conditional settle-

22. Jeff D. involved a civil rights class action for injunctive relief, precisely the type of case in which the conflict of interest is most intense, see Dam, Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest, 4 J. LEGAL STUD. 47, 57 (1975), and the injury to plaintiffs' attorneys most severe. See infra text accompanying notes 106-07. Thus, Jeff D.'s holding forecloses further legal challenges to fee waivers in civil rights cases, except in certain limited cases. See infra note 86.

23. Although the majority opinion in Jeff D. discussed and dismissed the ethical concerns raised by conditional settlement offers, 106 S. Ct. at 1557-38, it is clear that the states have plenary power over matters of legal ethics and attorney discipline, except where directly preempted by federal law. See, e.g., In re Primus, 436 U.S. 412, 422 (1978); Sperry v. Florida, 373 U.S. 379, 383 & n.2 (1963); see also United States v. Klubock, 639 F. Supp. 117 (D. Mass. 1986) (U.S. Attorneys subject to state bar rules of ethics). Indeed, Justice Brennan's dissent in Jeff D. stated that "[t]he Court's decision in no way limits the power of state and local bar associations to regulate the ethical conduct of lawyers," and encouraged ethics committees to consider ruling unethical defense counsel requests for fee waivers. 106 S. Ct. at 1557; see also id. at 1557 n.20 (ethics concerns related to Fees Act are "purely a matter of local law"); Moore v. National Ass'n of Sec. Dealers, Inc., 762 F.2d at 1112 (Wald, J., concurring in judgment) ("indeed the ruling of the local bar ethics committee practically settles the question of whether" defendants may request fee waivers); id. at 1114 n.1 (Wright, J., dissenting).


Although the majority opinion in Jeff D. dismissed these rulings as "bottomed ultimately on § 1988," 106 S. Ct. at 1538 n.15, this is not accurate. See infra text accompanying notes 32-56. Thus, Jeff D. did not resolve the ethics issue.

25. See, e.g., Kraus, Ethical and Legal Concerns in Compelling the Waiver of Attorney's Fees by Civil Rights Litigants in Exchange for Favorable Settlement of Cases Under the Civil Rights Attorney's Fees Awards Act of 1976, 29 VILL. L. REV. 597, 626-33 (1984); see also Levin, Practical,
ments rely on four main arguments: first, that requests for fee waivers frustrate the policy of the Fees Act and violate defense attorneys' obligations to support legal services for the poor, and thus are prejudicial to the administration of justice; second, that such requests create and exploit a conflict of interest for plaintiffs' counsel, and are therefore per se unethical; third, that these settlement offers violate the heightened obligations of government counsel to achieve just results in litigation; and fourth, that demands for fee waivers violate the public's right to counsel and plaintiffs' attorneys' rights to practice by eliminating attorneys' opportunities to obtain a reasonable fee for representing indigent plaintiffs. Application of the standards of attorney conduct to these four arguments reveals, however, that requests for fee waivers or limitations on fee awards are not unethical. This result is the same under both the Model Code of Professional Responsibility (Code)26 and the Model Rules of Professional Conduct (Rules),27 which together govern the behavior of attorneys in virtually all American jurisdictions.28

26. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981) [hereinafter Code]. The Code consists of canons, disciplinary rules (DRs), and ethical considerations (ECs). The canons are "statements of axiomatic norms," and are essentially titles for each section of the Code. See Code, Preamble and Preliminary Statement. The DRs are mandatory rules of conduct, and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Id. The ECs are not mandatory; rather, they "are aspirational in character and represent the objectives toward which every member of the profession should strive." Id.

27. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter Rules]. The Rules consist of numbered Rules and accompanying Comments. Those Rules that use the terms "shall" or "shall not" are mandatory; violation of these commands may result in disciplinary action. See Rules, Scope. Other Rules, which use the term "may," are permissive and discretionary. Id. The Comments "do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." Id.

28. Fourteen states (Arizona, Arkansas, Connecticut, Delaware, Florida, Maryland, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, and Washington) have adopted the Rules, often with minor modification. ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 1:3 (1986) [hereinafter LAWYERS' MANUAL]. North Carolina has adopted a combination of the Rules and the Code. Id. The remaining states, except for Maine and Mississippi, currently operate under the Code, again with some modifications. See Developments in the Law — Conflicts of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1249 (1981) [hereinafter Developments — Conflicts]. Most federal courts have also adopted one or the other of the ABA codes. See id.; see also Nix v. Whiteside, — U.S. —, 106 S. Ct. 988 (1986) (applying Code and Rules to determination of ethical obligations of criminal defense lawyer whose client intends to commit perjury). Although most state bar associations have the power to enforce the rules of ethics through the issuance of ethics opinions and disciplinary sanctions, Developments — Conflicts, supra, at 1250, courts also possess the inherent power to regulate and discipline
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A. Conduct Prejudicial to the Administration of Justice

Both the Code and the Rules (hereinafter sometimes collectively referred to as "ethics codes") provide that "a lawyer shall not...[e]ngage in conduct that is prejudicial to the administration of justice." Before the Supreme Court's decision in Jeff D., it was argued that conditional settlement offers violated this provision by frustrating the policy of the Fees Act, since preventing plaintiffs' attorneys from earning the fees due them under the Act would reduce the available pool of attorneys willing to handle civil rights cases. However, Jeff D.'s contrary holding silences the opposition to fee waivers on these grounds, since the Court explicitly found that these waivers do not violate either the letter or spirit of the Act. A related argument against conditional settlement offers is that they violate defense attorneys' ethical obligations to further the administration of justice by "support[ing] all proper efforts to meet [the] need for legal services," and generally by promoting equal access to the courts for all litigants. However, this argument misconstrues the purpose and extent of the ethics codes' support for pro bono service. Each lawyer is encouraged to participate personally in providing legal services to those unable to afford them. It is impossible to support an interpretation of these ethics code provisions which would require a defense attorney to prejudice the interests of her own client, in the course of her representation of that client, merely in order to provide some possible benefit to a plaintiff's at-
torney who happens to be fulfilling his legal services duty.\textsuperscript{34} The need for legal services for the poor does not override lawyers' traditional ethical obligations to their clients.

Moreover, it is difficult to demonstrate that a settlement offer conditioned on a fee limitation or fee waiver actually has any direct impact on "the administration of justice" or the supply of legal services to indigents with meritorious cases. Both the Supreme Court and legal scholars have argued that allowing such offers may actually permit more efficient and just resolution of cases by encouraging settlements.\textsuperscript{35} There is no empirical evidence to support the proposition that fee waivers discourage the bringing of civil rights actions; those jurisdictions that forbade such offers prior to \textit{Jeff D.} did not experience a more rapid increase in filings of civil rights actions than did jurisdictions which permitted such offers.\textsuperscript{36} In sum,

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\textsuperscript{34} See Rules, supra note 27, Rule 1.7; Code, supra note 26, DR 7-101(A)(1), (3), EC 5-1, EC 5-21, EC 7-1; see also Daley & Karmel, \textit{Attorneys' Responsibilities: Adversaries at the Bar of the SEC}, 24 Emory L. J. 747, 772 (1975) ("The notion that a private attorney owes a duty to the public which overrides his duty to his client is alien to the traditions and ethical standards of the legal profession"). At most, the defendant's attorney may be entitled (but not obligated) to explain the situation to his or her client, and determine if the client is willing to forego making a conditional settlement offer in the interests of justice. See Rules, supra note 27, Rule 2.1 \& comment; Code, supra note 26, EC 7-8, EC 7-9; see also infra text accompanying notes 83-84.
\textsuperscript{35} See, e.g., Evans v. Jeff D., 106 S. Ct. at 1540-42; Comment, supra note 25, at 811. Permitting simultaneous negotiation of fees and merits makes defendants more willing to settle, since only in this way can they know their total exposure. Marek v. Chesny, U.S. --, 105 S. Ct. 3012, 3016 (1985). Defendants will be much less willing to settle on the merits if they thereby open themselves to liability for an undetermined amount of attorney's fees, very often the single most costly element of the settlement award. See infra note 81 and accompanying text.

In contrast, jurisdictions forbidding simultaneous negotiation generally saw less growth in filings of civil rights cases. Thus, in the Third Circuit (which banned simultaneous negotiation in 1977, in Prandini), although filings of civil rights cases increased 58.7\% over the entire 1977-86 period, civil rights cases as a percentage of all civil cases filed actually fell from 10.1\% to 9.0\%. See Annual Report of the Director of the Administrative Office of the United States Courts, Table C3 (1978); 1986 Annual
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requests for fee limits or waivers cannot be said to prejudice the administration of justice.

B. Creation of the Conflict of Interest

A second objection to conditional settlement offers is that they create and exploit a conflict of interest for plaintiffs’ counsel. That such offers create a conflict of interest for plaintiffs’ attorneys cannot be denied. When a defendant’s offer of conditional settlement includes, in addition to a request for a fee waiver, a proposed resolution of the merits of the plaintiff’s claim that is at least as beneficial as the plaintiff could reasonably expect to obtain at trial, settling is obviously in the plaintiff’s best interests. Just as obviously, however, settling on these terms is not in the best interests of the plaintiff’s attorney, who is being asked to forego all or part of the fee he or she would normally receive. Since most plaintiffs in civil rights cases are indigent or nearly so, the statutory fee award is often the attorney’s only source of payment.37

Jeff D. provides no guidance on this question. The majority opinion dismissed the conflict of interest objection with the observation that a plaintiff’s attorney has no ethical dilemma when presented with a favorable settlement offer that includes a fee waiver: the lawyer’s sole “ethical duty [is] to serve his clients loyally and competently,” even to the detriment of his own interests.38 This observation, while correct, does not answer the concern advanced by two bar associa-

37. See H.R. REP. No. 1558, supra note 11, at 1; S. REP. No. 1011, supra note 11, at 2, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5908; see also Legal Services Corporation Act §§ 1002(3), 1003(a), 1006(a), 42 U.S.C. §§ 2996a(3), 2996b(a), 2996e(a) (Supp. III 1985) (federally funded legal aid societies may not represent clients capable of paying legal fees); cf. ACLU Memorandum, supra note 6, at 8 (ACLU does not accept fees from clients).
tion ethics committees, which was that defense counsel's attempt to create and exploit such a conflict is the source of the ethical violation. 39

Although this latter argument against simultaneous negotiation was not specifically addressed or rejected by the Court in Jeff D., it is founded upon an incorrect interpretation of the rules of ethics. Nothing in the ethics codes provides a basis for ruling unethical an otherwise permissible action by a defense lawyer simply because it creates a conflict of interest for opposing counsel. Except for certain narrow and specific limitations, 40 an attorney's obligation to advance his or her client's interests takes precedence over competing concerns, whether they be the attorney's own or those of third parties. 41

Furthermore, conditional settlement offers are hardly unique in their capacity for creating a conflict for opposing counsel. Virtually all settlement offers create such a conflict to some degree. For example, where an attorney is compensated on a contingent fee basis, he or she generally has an interest in settling earlier (even if for a smaller sum) than does the client, since this enables the attorney to avoid the substantial investment of time required to prepare and try the case. 42 On the other hand, where an attorney is working for an

40. See Kraus, supra note 25, at 632.
41. Rules, supra note 27, Rule 1.3 comment (lawyer should be zealous, committed, and dedicated advocate on behalf of client's interests), Rule 1.7 comment (loyalty is an essential element in the lawyer's relationship with the client), Rule 3.1 comment (lawyer has duty "to use legal procedure for the fullest benefit of the client's cause"); Code, supra note 26, DR 7-101 (lawyer must seek lawful objectives of client through any reasonable and legal means, and must not prejudice client's interests), EC 5-1 (lawyer's professional judgment must be exercised solely for benefit of client, within bounds of the law, regardless of lawyer's personal interests or interests of third parties), EC 5-2 (lawyer should not assume position that might make his or her own interests conflict with client's interests), EC 5-21 (lawyer must disregard desires of third parties that conflict with client's interests), EC 7-1 (attorney's duty to the legal system is to represent his or her client zealously, within bounds of law), EC 7-9 (lawyer must always exercise discretion consistently with client's best interests). The application of provisions such as EC 5-1 can be seen, for example, in ethics opinions requiring legal aid lawyers to place the interests of their clients above both the lawyers' own interests and those of the legal aid society. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974); ABA Comm. on Professional Ethics, Formal Op. 324 (1970).
42. See Johnson, Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions, 15 Law & Soc'y Rev. 567, 586-91 (1980-81). The conflict is particularly intense, and is most likely to affect the clients' interests, in the context of class actions. See, e.g., Dam, supra note 22, at 57; Rosenfield, An Empirical Test of Class-Action Settlement, 5 J. Legal Stud. 113, 115-16 (1976) (empirical study of 104 class actions indicating that settling plaintiffs' attorneys accept smaller recovery for class in exchange for larger fee for themselves); see also Saylor v. Lindsley, 456 F.2d 896, 900-10 (2d Cir. 1972) (Friendly, J.) (recognizing and discussing inherent conflict). Permitting requests for fee limitations in class actions could have the effect of increasing the amount of the class' recovery. This is because fee waivers eliminate the attorney's usual incentive to settle for less than the
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hourly fee, he or she benefits most from prolonging the litigation as long as possible, to the detriment of the client. In both of these situations, a settlement offer might cause the interests of attorney and client to diverge, yet neither amounts to an ethical violation. Indeed, the mere fact that settlement offers create this conflict of interest has never been thought a reason for forbidding them. Rather, courts have simply assumed additional control over the settlement process, particularly in the problematic context of class actions, in order to prevent abuses by counsel.

Rule 8.4(a), which has no direct counterpart in the Code, bars an attorney from knowingly inducing another to violate the rules of professional conduct, but a fee waiver offer is no more an inducement to act unethically than is any other settlement offer. If conditional settlement offers are to fall under Rule 8.4(a), then so must all settlement offers. Indeed, when a defendant makes a request for a fee limitation or waiver, his or her intention is not to induce plaintiff’s counsel to violate any ethical obligations. Rather, the opposite is true: the defendant wants plaintiff’s counsel to evaluate objectively the offer’s fairness to the plaintiff, not to reject the offer class could otherwise obtain, thus making fully compensatory settlements (and trials) more likely. The attorney has a duty to recommend against settlement where the offer is inadequate; settlement offers conditioned on fee waivers simply remove the incentive to ignore this duty.

43. Johnson, supra note 42, at 575-82.
44. See, e.g., Fed. R. Civ. P. 23(e) (court must approve settlements in class actions); Schlesinger v. Teitelbaum, 475 F.2d 137, 141 (3d Cir.), cert. denied, 414 U.S. 1111 (1973) (court has jurisdiction to review fairness of contingent fees); Spilker v. Hankin, 188 F.2d 35, 39 (D.C. Cir. 1951) (same).
45. RULES, supra note 27, Rule 8.4(a). Although the Code does not contain an explicit rule barring inducements to unethical conduct, various Code provisions could be read to imply such a prohibition. See, e.g., CODE, supra note 26, Canon 1 (lawyer should assist in maintaining integrity of profession), Canon 9 (lawyer should avoid even the appearance of impropriety), DR 1-102(A)(2) (lawyer shall not circumvent DRs through actions of another).
46. If the defendant makes a split settlement offer which attempts to allocate benefits between fees and merits, however, the defendant’s attorney may indeed be trying to induce plaintiff’s counsel to act unethically. Rule 8.4(a) would be violated if the defendant had intentionally set the fee portion of the offer higher than appropriate, and the merits portion correspondingly lower, in an attempt to induce the plaintiff’s attorney to recommend acceptance even though the client would receive less in damages and/or injunctive relief than his or her claim was objectively worth. But the fact that such offers are unethical should not translate into a ban on the opposite type of situation, in which defendant’s offer benefits the plaintiff by reducing or eliminating the fee award. Sufficient safeguards exist to prevent plaintiffs’ attorneys from taking advantage of what are in effect bribe or “sweetheart” offers. See, e.g., authorities cited supra note 44. It would be appropriate, however, to ban all split offers which consist solely of money damages. In such situations, the defendant has no legitimate interest in attempting to allocate the award between the plaintiff and the plaintiff’s attorney; it therefore would be reasonable to presume that the defendant’s offer was fashioned in this manner for improper reasons — as either a bribe or a punishment for the plaintiff’s lawyer.
out of hand because it injures the lawyer's own interests. This is simply not the type of situation to which the Rule was intended to apply. Thus, the fact that conditional settlement offers create a conflict of interest does not render them unethical.

C. Special Duties of Government Lawyers

Even if conditional settlement offers may be made ethically by lawyers representing private defendants, it is argued that the special position of government lawyers imposes on them a duty to refrain from making such offers in cases where the government is a defendant. This argument draws support from EC 7-14, which discourages government attorneys from using their positions or "the economic power of the government" to obtain "unfair" settlements. Since requests for fee waivers place plaintiffs' attorneys in an extremely difficult position, the argument runs, government counsel should refrain from making such requests.

The Code does not support such a rule. The special limitations on the conduct of government attorneys are intended to protect opposing parties, not opposing counsel. Settlements involving fee waivers or limitations are simply not unfair to plaintiffs; if anything, such settlement offers benefit civil rights plaintiffs. A limit on attorney's fees enables plaintiffs, in some circumstances, to obtain more complete relief than they would otherwise obtain. Where a government attorney proposes a conditional settlement offer that increases the size of the plaintiff's award, the plaintiff can hardly complain of any violation of the government attorney's duty.

D. Violation of the Lawyer's Right to Practice

A final objection to conditional settlement offers is that they violate the policy considerations behind the Code's and Rules' "assurance of the public's right to counsel through the lawyer's right to practice." In part, this objection relies on the theory that condi-

47. See D.C. Bar Opinion, supra note 24; N.Y.C. Bar Opinion, supra note 24.
48. CODE, supra note 26, EC 7-14. This EC (which has no counterpart in the Rules) is, of course, not mandatory, and therefore cannot itself support disciplinary action against violators.
49. Id.
50. See Evans v. Jeff D., 106 S. Ct. at 1540-41; see also infra note 106.
51. D.C. Bar Opinion, supra note 24, at 8 (quoting Committee on Legal Ethics of the D.C. Bar, Op. 130); see also N.Y.C. Bar Opinion, supra note 24. This objection to fee waivers is based on an analogy to DR 2-108(B), which provides that "[i]n connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law." CODE, supra note 26, DR 2-108(B); see also RULES, supra note 27, Rule 5.6(b) (to the same effect). Professor Kraus argues that this
tional settlement offers subvert the congressional policy underlying the Fees Act by discouraging attorneys from bringing civil rights actions. Proponents of this theory argue that Congress, by enacting the Fees Act to encourage enforcement of civil rights, created a public right to assistance of counsel in meritorious civil rights cases. After the Supreme Court’s decision in Jeff D., however, the Act can no longer be read in such a broad manner. Manifestly there is no “public right” to counsel attracted by fee awards, other than whatever right may have been created by the Fees Act itself, and the Supreme Court has definitively stated that rights under that statute belong to, and may be waived by, the individual plaintiff. No “public right” is violated; rather, a private right is exchanged by the possessor of that right for other perceived benefits.

To the extent that this argument relies on the theory that conditional offers would violate the lawyer’s right to practice, it also suffers a fatal weakness. There is an obvious difference between the type of offers at issue here and those forbidden by the ethics codes as violative of the attorney’s right to practice. The ethics code provisions were designed specifically to prevent settlement offers conditioned on agreement by plaintiffs’ attorneys not to represent other parties in future suits against the settling defendants. This type of agreement is a direct contractual bar to the attorney’s right to take any cases involving a certain defendant, a far cry from the mere elimination of the attorney’s opportunity to receive a statutory fee from the defendant in a given case. In fact, acceptance of a fee waiver settlement does not restrict the plaintiff’s attorney’s legal right to receive a fee — he or she still has a claim against the plaintiff for the reasonable value of his or her services. Even if the plaintiff's acceptance of a fee waiver settlement does not restrict the plaintiff’s attorney’s legal right to receive a fee — he or she still has a claim against the plaintiff for the reasonable value of his or her services.

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52. See D.C. Bar Opinion, supra note 24; N.Y.C. Bar Opinion, supra note 24.
53. Evans v. Jeff D., 106 S. Ct. at 1539. Before the Supreme Court decided Jeff D., some courts had ruled that the statutory fee actually belonged to the attorney rather than the client, despite clear statutory language to the contrary. See, e.g., James v. Home Constr. Co., 689 F.2d 1357, 1358 (11th Cir. 1982). These cases are now, of course, overruled.
54. RULES, supra note 27, Rule 5.6(b) comment; CODE, supra note 26, DR 2-108(B); ABA Comm. on Professional Ethics, Informal Op. 1039 (1968).
55. RULES, supra note 27, Rule 1.8(j) (attorney may enforce lien against client’s judgment); CODE, supra note 26, DR 5-103(A)(1) (same); see also LAWYERS’ MANUAL, supra note 28, § 41:2101-02 (listing state attorneys’ lien statutes). Many legal aid and public interest law firms do not accept fees from clients, however, and thus will receive nothing if the statutory fee is waived. See infra note 73. But these organizations’ decisions not to seek fees from clients were made voluntarily, without any coercive influence whatsoever.
is indigent, and therefore unable to pay his or her lawyer, the lawyer has lost nothing to which he or she was legally entitled: the right to the statutory fee belongs to the plaintiff, and may be waived or limited as the plaintiff sees fit.56

The ethics rules governing the legal profession do not render settlement offers conditioned on fee limitations or waivers unethical in themselves. This conclusion means that attorneys will often be placed in the difficult position of negotiating fee waivers or limitations, and thus raises additional questions concerning the ethical limitations on attorney conduct in such situations. Chief among these are (1) the extent to which a plaintiff’s lawyer may avoid being forced to accept a reduced or waived fee, and (2) the remaining ethical constraints on defense counsel engaged in simultaneous settlement negotiations in civil rights cases.

III. Ethical Obligations of Plaintiffs’ Attorneys in Negotiating Fees with Defendants

The rules of ethics governing attorney behavior make clear that the attorney’s primary duty is to advance the interests of his or her client.57 An attorney’s financial, social, or moral interests cannot be permitted to interfere with this duty of loyalty.58 Thus, when faced with a settlement offer that includes a fee waiver or limitation, the attorney has no choice but to evaluate it in terms of its fairness to his or her client, regardless of the possibility that the attorney (or his or her employer or affiliated organization) may lose part or all of the statutory fee. Without the independent, informed, and uninfluenced consent of his or her client, the lawyer cannot ethically avoid the necessity of engaging in good faith simultaneous negotiation of merits and fees.

The duty of loyalty applies to legal aid and public interest lawyers as well as to private practitioners and government counsel.59 It has been noted that attorneys employed by “public interest” organiza-

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56. See supra note 53.
57. See supra note 41 and accompanying text; cf. supra note 40.
58. RULES, supra note 27, Rule 1.7(b) & comment; CODE, supra note 26, EC 5-1, EC 5-2, EC 7-1.
59. See Developments — Conflicts, supra note 28, at 1406, 1447; Oregon State Bar Ass’n Comm. on Legal Ethics, Op. 402 (June 1978) (“Legal Aid lawyers have the same ethical obligations and are bound by the same rules as all other lawyers”); see also Legal Services Corporation Act §§ 1006(b)(3), 1007(a)(10), 42 U.S.C. §§ 2996c(b)(3), 2996f(a)(10) (Supp. III 1985) (Legal Services Corp. attorneys bound by ABA ethics codes).
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tions are subject to conflicting loyalties when, as often happens, the interests of their clients are at odds with the organization's political, social, or legal agenda. Thus, for example, a large cash settlement offer could be clearly in the best interests of the plaintiff, yet the attorney might desire to proceed to trial in hopes of obtaining a landmark judicial ruling recognizing a new legal right, a result which would benefit other clients of the firm in future litigation, or would better serve the attorney's conception of the "public interest." Regardless of the appeal of the goals of the attorney or the attorney's organization, the ethics codes dictate that these goals be ignored if doing so is necessary to serve the client faithfully.

It has been suggested by civil rights advocates that one way to avoid conditional settlement is for the plaintiff's lawyer simply to refuse to negotiate the question of fees with defendants. Such an approach would, it is suggested, provide the plaintiff's attorney with a complete and efficient solution to the problem. Under the rules of ethics, however, it is beyond question that an attorney may not take such a position on his or her own initiative. A refusal to discuss the matter of fees violates the duty to act always in the client's best interests, since plaintiffs may benefit from an agreement to waive or


61. See RULES, supra note 27, Rule 1.7 & comment, Rule 1.8(f); CODE, supra note 26, Canon 5, DR 5-107, EC's 5-21 to 5-24; see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974) (legal aid lawyer's exercise of professional judgment on behalf of client may not be subject to interference or veto by others in organization); ABA Comm. on Professional Ethics, Formal Op. 324 (1970) (legal aid lawyer must avoid being influenced by legal aid society's goals at the expense of "impairing his primary obligation of loyalty to his client"); State Bar of New Mexico Advisory Opinions Comm., Op. 1984-11 (Dec. 19, 1984).

62. This option has not only been recommended by commentators, see, e.g., Note, Settlement Negotiations: Ethical and Legal Dilemmas in Simultaneously Negotiating the Merits and Statutorily Authorized Attorney's Fees, 1984 UTAH L. REV. 651. 668 (1984), but is apparently the policy of at least one public interest law firm. See Brief of NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae at 12, White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445 (1982) [hereinafter NAACP Brief] ("Amicus itself has . . . adopted the absolute position that it will not discuss fees in the course of settlement negotiations . . .").

63. See generally supra note 41. A similar ethical problem arises where plaintiff's attorney, though not directly refusing to negotiate the issue of fees, repeatedly puts off discussion on the ground that he or she needs consent from a superior in his or her organization. See ACLU Memorandum, supra note 6, at 9 (discussing such a system for making fee waiver agreements difficult). This practice is ethically questionable on its face. Cf. CODE, supra note 26, Canon 9 (lawyers should avoid even the appearance of
limit fees in some circumstances. For the same reason, an attorney may not decline to communicate such an offer to his client unless it is perfectly clear that it would be unacceptable. And in determining whether the conditional offer would be unacceptable, the attorney must be especially careful to protect the client’s interests and to avoid any consideration of self-interest, and must resolve any doubt in favor of informing the client.

The attorney’s ethical obligations do not cease upon communication of the offer to the client. He or she should reveal the conflict of interest and then discuss the various options with the client, pointing out the legal and other consequences of each. In discussing a settlement offer conditioned on a fee limitation or waiver, the attorney may explain the need for attorney’s fee awards to support continued civil rights litigation, and may even appeal to the plaintiff’s sense of justice or morality in this regard. It is possible that even an indigent plaintiff would be willing to reject an otherwise

impropriety). In any case, such a practice would clearly be improper if it had the effect of interfering with the negotiating lawyer’s ability to serve effectively the client’s best interests. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974).

64. See Joos v. Auto-Owners Ins. Co., 94 Mich. App. 419, 288 N.W.2d 443, 445 (1980) (attorneys have a legal duty to disclose and discuss with clients all good faith offers to settle); Rules, supra note 27, Rule 1.4(a) comment (lawyer must inform client of any possibly acceptable settlement offers); Code, supra note 26, EC 7-8, EC 9-2 (lawyer should ensure that client has all relevant information needed to make decisions about the litigation, and should fully inform the client of all material developments in the case); Committee on Professional Ethics of the Birmingham Bar Ass’n, Op. 81-06 (Aug. 14, 1981); see also In re Ratzel, 108 Wis.2d 447, 321 N.W.2d 543, 544 (1982) (attorney disciplined for failing to keep client adequately informed of progress of settlement negotiations).

65. See Rules, supra note 27, Rule 1.4(a) comment ("A lawyer may not withhold information to serve the lawyer's own interest or convenience"); see generally supra note 41. In fact, an attorney may be obligated to disclose all settlement offers that include requests for limits on statutory fees, for the simple reason that they create a conflict of interest which must be disclosed to the client. Rules, supra note 27, Rule 1.7(b)(2); cf. Code, supra note 26, DR 5-101(A) (lawyer must disclose actual and potential conflicts of interest before accepting employment).

66. See Rules, supra note 27, Rule 1.4 comment; Code, supra note 26, EC 7-8; Ethics Comm. of the Bd. of Professional Responsibility of the Supreme Court of Tennessee, Op. 84-F-77 (Oct. 17, 1984) (lawyer must inform client of all possible settlement options, but may not attempt to influence client's choice).

67. See Rules, supra note 27, Rule 2.1 comment (lawyer may "refer to relevant moral and ethical considerations in giving advice"); Code, supra note 26, EC 7-8 (attorney may point out unjust or harsh consequences that might result from a particular action that is legally permissible). An attorney who chose to exercise this option would, however, be treading perilously close to the line demarcating impermissible conflicts of interest. By far the safer course would be to discuss this issue only at the initial stage of litigation, and thereafter not to initiate discussions of it with the client, for fear of improperly influencing the client's decision. Moreover, where the plaintiff is an incompetent individual or a large, unorganized class, the attorney's duty of loyalty is heightened, and he or she should make recommendations based solely on the best interests of the client or
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favorable settlement offer merely because he or she wished to secure adequate compensation for the attorneys or additional punishment for the defendants. However, the attorney must not coerce or attempt to influence the client in an attempt to obtain a rejection of a favorable settlement offer that includes inadequate fees. In fact, if the attorney objectively believes a conditional settlement offer to be in the best interests of the plaintiff, the attorney is ethically bound to recommend acceptance of the offer. The attorney must at all times be motivated by concern for the client’s interests, and must abide by the client’s settlement decisions.

Because a conditional settlement offer makes it difficult for the attorney to continue to advise the plaintiff objectively, the preferred course of action is to discuss fee arrangements, the conflict of interest created by simultaneous negotiation, and similar factors at the outset of the attorney-client relationship, before the problem arises. Although not a panacea for the problems posed by conditional settlement offers, discussion of the issue at this stage of the representation is the best opportunity for making objective, well-considered decisions concerning the scope and purpose of the representation and the appropriate response to conditional settlement offers, should they be made later in the litigation. The results of these preliminary negotiations establishing the attorney-client relationship may be memorialized in a written retainer agreement, which should at a minimum summarize the general understanding between the client and the lawyer regarding the scope and purposes of the representation. It could also provide that the plaintiff would be liable for a reasonable fee, perhaps contingent on the award re-

client class. See RULES, supra note 27, Rule 1.14, Rule 1.4 comment; CODE, supra note 26, EC 7-12.

68. See RULES, supra note 27, Rule 1.4, Rule 2.1; CODE, supra note 26, EC 7-5, EC 7-8, EC 7-9.

69. See Committee on Professional and Judicial Ethics of the State Bar of Michigan, Informal Op. CI-592 (March 14, 1981) (in making recommendations to his client, “[a] lawyer cannot permit his personal profit to motivate his course of action in the slightest degree”); see also supra note 41.

70. RULES, supra note 27, Rule 1.2(a) (lawyer must abide by client’s decision whether to settle); CODE, supra note 26, EC 7-7, EC 7-8.

71. This procedure is suggested by several commentators. See, e.g., Bennett, Settlement of Cases in Which Statutory Attorneys' Fees are Authorized: An Ethical Dilemma, ACLU LAW., Aug. 1983, at 5, 13; Levin, supra note 25, at 520; ACLU Memorandum, supra note 6, at 8. Even in these preliminary negotiations, the attorney must not attempt to influence or control the client’s decisions. The problem may not be avoided “by instructing the client beforehand that [simultaneous negotiation] is unethical,” as one commentator has proposed. See Note, supra note 62, at 668 n.92.

72. See RULES, supra note 27, Rule 1.5(b), (c) (written fee agreements are generally preferred, and are required for contingent fee arrangements).
ceived, in the event that the plaintiff chose to waive statutory attorney's fees.

Use of a retainer agreement does not, however, allow the attorney to avoid any of the previously discussed limitations on attorney conduct. Thus, the agreement could not provide that the attorney would not engage in simultaneous negotiation of fees and merits, or that he or she could reject out of hand any settlement offer containing less than a specified fee award. Merely requesting that such provisions be included would probably violate the attorney's ethical obligations to his or her client, particularly where the obvious purpose is to increase the lawyer's chance of receiving a fee at the ex-

73. Providing that the client will be liable for reasonable attorney's fees in the event he or she waives statutory fees will, however, be of little practical effect in many cases. See Calhoun, Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U.S.C. § 1988, 55 U. COLO. L. REV. 341, 353-56 (1984). Most clients of civil rights attorneys are indigent — this was the primary motivating factor in the enactment of the Fees Act — and thus will be unable to pay any fees unless they receive substantial damage awards. Evans v. Jeff D., 106 S. Ct. at 1552 & n.9. Moreover, for legal, ethical, and policy reasons, many public interest and legal aid organizations do not accept fees from their clients. See, e.g., 45 C.F.R. § 1609 (1985) (federally funded legal aid societies may not accept reimbursement from clients, other than for out-of-pocket expenses); ACLU Memorandum, supra note 6, at 7-8 (as a matter of policy, ACLU does not seek fees from clients). Public interest law firms (as distinguished from legal aid organizations) that maintain tax-exempt status under § 501(c)(3) of the Internal Revenue Code may not accept fees from their clients without losing their tax exempt status, Rev. Proc. 75-15, 1975-1 C.B. 662; Rev. Rul. 75-75, 1975-1 C.B. 154, nor may they "use the likelihood or probability of a fee award as a consideration" in selecting cases. Rev. Proc. 75-13 § 3.03, 1975-1 C.B. 662.

Another potential problem has not previously been discussed, but could be of significance. By virtue of the first amendment, public interest lawyers enjoy exemption from certain ethics code constraints on solicitation of clients. See, e.g., In re Primus, 436 U.S. 412 (1978). This exemption is dependent at least in part on the fact that public interest law firms do not condition their legal representation on an entitlement to attorney's fees. 436 U.S. at 426-31. Requiring clients to enter into retainer agreements providing for payments of fees would weaken the justification for this exemption. Cf. RULES, supra note 27, Rule 7.3; CODE, supra note 26, DR 2-104(A)(2), (3).

74. Such agreements are invalid because they impermissibly infringe the client's absolute right to decide whether to accept a settlement offer. See Hayes v. Eagle-Picher Indus., Inc., 513 F.2d 892, 894 (10th Cir. 1975) (agreement giving attorney power to make settlement decisions without client's consent is contrary to the basic tenets of the attorney-client relationship); Giles v. Russel, 222 Kan. 629, 567 P.2d 845, 850 (1977) (retainer agreement that prevents client from settling without attorney's consent is void as against public policy); RULES, supra note 27, Rule 1.2 comment ("the client may not be asked . . . to surrender . . . the right to settle litigation that the lawyer might wish to continue"); F. MacKINNON, CONTINGENT FEES FOR LEGAL SERVICES 74-75 (1964); see also supra note 70.

The Connecticut Committee on Professional Ethics issued an opinion specifically approving the practice of entering into retainer agreements which give the attorney the right to reject a settlement that provides for an inadequate fee. Connecticut Bar Opinion, supra note 24. This opinion was apparently based in part on the mistaken belief that the right to attorney's fees belongs to the attorney rather than the client. Id. But see supra text accompanying note 53. In any case, this is a startlingly incorrect interpretation of the applicable ethics code provisions (none of which were cited in the opinion).
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pense of the client’s right to settle.75 Similarly, the retainer agreement cannot provide for an “assignment” from the client to the attorney of the right to recover statutory fees.76 This would do nothing to lessen the inherent conflict of interest created by a conditional settlement offer, and would again impermissibly infringe the client’s ultimate ability to settle cases by giving the attorney veto power over any settlement that provided for an inadequate fee. In addition, an assignment of statutory fees would directly contravene another ethics rule: lawyers are strictly forbidden from acquiring any proprietary interest in their clients’ causes of action.77

Objective application of the ethics codes to the various methods that plaintiffs’ counsel might use to escape the conflict of interest posed by simultaneous negotiation of attorney’s fees and substantive merits leads inescapably to the conclusion that in many cases the conflict cannot ethically be avoided.78 Therefore, plaintiffs’ attorneys must be prepared to ignore completely their own interests in order to further those of their clients; if unable to do this, they

75. Several commentators have suggested that plaintiffs’ attorneys should attempt to obtain such agreements from their clients. See, e.g., Bennett, supra note 71, at 13; Levin, supra note 25, at 520 & n.53; Note, supra note 62, at 668; ACLU Memorandum, supra note 6, at 6-8. Although the ethics codes do not specifically forbid such agreements, case law does render them unenforceable, see supra note 74, and to include them in the retainer agreement would therefore serve no purpose but to mislead the client as to his or her rights, clearly an impermissible result in the context of the attorney-client relationship. See Rules, supra note 27, Rule 1.4 comment (lawyer must not withhold material information from client to serve own interests); see generally supra note 41.

76. This procedure has also been suggested as a means for avoiding the problem of fee waiver proposals. See ACLU Memorandum, supra note 6, at 6.

77. Rules, supra note 27, Rule 1.8(j); Code, supra note 26, DR 5-103(A). The only two exceptions to the prohibition against acquiring an interest in the litigation relate to contingent fee arrangements and liens for fees owed, clearly inapplicable to an assignment of the client's claim for attorney's fees. See Rules, supra note 27, Rule 1.8(j)(1), (2); Code, supra note 26, DR 5-103(A)(1), (2).

The rule against acquiring an interest in the litigation also bars efforts by the attorney to induce the client not to settle. See, e.g., Committee on Professional Ethics of the Ass'n of the Bar of the City of New York, Op. 82-11 (1982) (attorney representing indigent plaintiffs may not guarantee them a certain recovery regardless of result at trial in order to induce rejection of inadequate settlement offers); Committee on Ethics of the Maryland State Bar Ass'n, Inc., Op. 82-41 (Mar. 11, 1982) (attorney may not make cash advances to indigent clients to enable them to avoid accepting inadequate settlement offer because of financial need).

78. One other means for plaintiffs’ counsel to avoid the merits-fee conflict is suggested by Regalado v. Johnson, 79 F.R.D. 447 (N.D. Ill. 1978). In Regalado the subject of fees was not discussed during settlement negotiations. After settlement was reached and a consent decree entered, however, the plaintiff's attorney moved for an award of attorney's fees in addition to the agreed-upon substantive relief. The court awarded fees despite the defendants' contention that the consent order was intended fully to resolve all outstanding issues. Id. at 449-451. The Regalado court bolstered its holding by citing Prandini for the proposition that it would have been improper for either party's attorney "to inject the question of attorney's fees into the balance of settlement discus-
should decline the representation at the outset. Attorneys may in no way attempt to influence their clients to reject favorable conditional settlement offers; the decision must be left to the client.

IV. The Ethical Obligations of Defense Counsel

Defense counsel are subject to the same obligations of zealous and loyal advocacy on behalf of their clients as are their opponents. As conditional settlement offers are legally and ethically permissible, defense counsel must seek to negotiate fees and merits simultaneously whenever this is in the best interests of the defendant. Due to the potentially large size and the unpredictability of fees.

Other courts have reasoned similarly when presented with settlement agreements silent as to fees. See, e.g., Benitez v. Collazo, 571 F. Supp. 246, 250 (D.P.R. 1983) (court will assume that parties’ silence as to matter of fees is based on ethical and practical problems of simultaneous negotiation, and thus no waiver of fees will be inferred); Jones v. Orange Hous. Auth., 559 F. Supp. 1379, 1384 (D.N.J. 1983) (“indeed, had plaintiff’s attorney initiated any [discussion of fees], she would have been acting improperly”). However, remaining silent about fees in this way is risky at best. Most courts will attempt to make some sort of determination of the parties’ intent, and especially now that the validity of fee waivers is clear, courts may more easily find that a fee award was not intended. Several courts of appeals reached this result prior to Jeff D., all relying at least implicitly on a belief that fee waivers or limitations were permissible. See, e.g., Brown v. General Motors Corp., Chevrolet Div., 722 F.2d 1009, 1012 (2d Cir. 1983) (settlement “without costs” found to show intent to forego fee award); Jennings v. Metropolitan Gov’t, 715 F.2d 1111, 1114 (6th Cir. 1983); see also Chicano Police Officer’s Ass’n v. Stover, 624 F.2d at 131-32 (since settlement agreement is silent as to attorney’s fees, court remands for determination of parties’ intent, noting that fees could have been waived).

The Third Circuit recently reexamined this issue in light of Jeff D. See Ashley v. Atlantic Richfield Co., 794 F.2d 128 (3d Cir. 1986). While acknowledging that its previous decision in Prandini had been effectively overruled by Jeff D., the court relied on a Prandini-like view of the congressional policy of the Fees Act to support its creation of an irrebuttable presumption that settlements silent as to attorney’s fees did not result in a waiver thereof. Id. at 138-39. It remains to be seen whether this rule will find adherents elsewhere.

Although remaining silent about attorney’s fees until after settlement is not expressly proscribed by the ethics codes, it may be inconsistent with the attorney’s duty to avoid even the appearance of impropriety. Code, supra note 26, Canon 9, and to deal fairly and honestly with opposing parties and counsel, see Rules, supra note 27, Rule 3.4, Rule 4.1(a); Code, supra note 26, EC 7-10, EC 7-37. In any case, however, this tactic will probably be of little practical use in the future. When defendants’ attorneys realize that they are ethically obligated to inject the issue of fees into settlement negotiations in all civil rights cases, see infra text accompanying notes 80-86, it will be impossible for plaintiffs’ attorneys to avoid the issue by remaining silent. And once the parties reach an agreement as to fees, the plaintiff’s attorney will not be able to increase his or her award by asking the court to set a reasonable fee. Evans v. Jeff D., 106 S. Ct. at 1537 (court has no power to impose fee award on defendants while keeping remainder of settlement agreement intact, where settlement agreement waived fees).

79. Rules, supra note 27, Rule 1.7; Code, supra note 26, DR 5-101(A), EC 5-1.
80. See supra note 41.
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a recommendation to settle a case without trying to resolve the issue of attorney's fees will rarely be in a defendant's best interests, and could violate the defense attorney's obligation to provide competent representation.  

The Code and Rules do mitigate in some respects the attorney's absolute duty to advance the interests of his or her client. Thus, it would not be improper for a defense lawyer to point out to his or her client the problems faced by civil rights attorneys, legal aid societies, and public interest law firms when confronted with conditional settlement offers. Anything more than this would, however, be unethical. The permissibility of pointing out moral considerations mitigating against the assumption of a certain bargaining position does not give an attorney the right to recommend or attempt to achieve results not in the client's interests. Ultimately, the settlement decision is for the client alone.

In virtually all cases, the defense attorney will be obligated to inject the fee issue into the settlement negotiations, and may rightfully

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81. See Evans v. Jeff D., 106 S. Ct. at 1541-42. Court-awarded attorney's fees in civil rights cases may be quite sizeable. See, e.g., White v. City of Richmond, 713 F.2d 458 (9th Cir. 1983) ($694,000 fee award); Association for Retarded Citizens v. Olson, 713 F.2d 1384 (8th Cir. 1983) ($455,000 award); Keith v. Volpe, 501 F. Supp. 403 (C.D. Cal. 1980) ($2.2 million award); Keyes v. School Dist. No. 1, 439 F. Supp. 393 (D. Colo. 1977) ($360,000 award). Because such awards need not bear any relationship to the value of the relief obtained for plaintiff, defendants find it difficult to estimate their potential liability for fees. See, e.g., City of Riverside v. Rivera, — U.S. —, 106 S. Ct. 2686 (1986) ($245,000 fee award upheld in case where plaintiffs obtained a total judgment of $33,350); Grendel's Den, Inc. v. Larkin, 749 F.2d 945 (1st Cir. 1984) (fee award of $112,000 in suit to obtain liquor license); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (en banc) ($33,000 verdict, $160,000 fee award); see also National Ass'n of Attorneys General, Civil Rights Attorney's Fees Awards Act of 1976, Report to Congress, at 29 (1984) [hereinafter NAAG Report] (states report that their payments for attorney's fee awards in civil rights cases approach or exceed total payments for merits awards); Delta Air Lines, Inc. v. August, 450 U.S. 346, 379 n.5 (1981) (Rehnquist, J., dissenting) ("neither the plaintiff nor the defendant can know with any degree of certainty how much of the attorney's fees a prevailing plaintiff seeks will be allowed by a trial court ... "). Even though the Supreme Court has eliminated some of the causes of variations in fee awards, large differences will of necessity remain from case to case and court to court. See Blum v. Stenson, 465 U.S. 866, 892-902 (1984); Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, — U.S. —, 106 S. Ct. 3088, 3100 (1986) (setting down for reargument the question of whether fee awards may be adjusted upward to account for the risk of losing the case).

82. RULES, supra note 27, Rule 1.1; CODE, supra note 26, DR 6-101(A).

83. RULES, supra note 27, Rule 2.1 & comment, Rule 1.2(d); CODE, supra note 26, EC 7-8, EC 7-9.

84. RULES, supra note 27, Rule 1.3 & comment; CODE, supra note 26, Canon 7 (zealous representation of the client required), DR 7-101(A) (lawyer must pursue client's objectives through all reasonable means and must not prejudice client's interests).

85. RULES, supra note 27, Rule 1.2(a); CODE, supra note 26, EC 7-7, EC 7-8.
expect plaintiff's counsel to bargain in good faith on the issue. As has been demonstrated, plaintiffs' attorneys are ethically barred from avoiding simultaneous negotiation without their clients' informed and uninfluenced consent. In some cases, though, plaintiffs' attorneys may misunderstand or even ignore the command of the ethics codes. What options are available to a defense attorney who is confronted with an attempt by plaintiff's counsel to avoid this issue?

It is clear that the defendant's lawyer cannot simply circumvent opposing counsel's refusal to negotiate by communicating his or her client's settlement offer directly to the plaintiff. If made without the consent of opposing counsel, such communication unethically interferes with the attorney-client relationship and is strictly forbidden.

A permissible remedy is to bring the impasse in negotiation to the attention of the court in one of several ways. The least aggressive means of doing this is an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure, specifying the defendant's total settlement offer, including costs and attorney's fees. This offer can then be filed with the court, thus informing it of the current status of the negotiations and indicating the existence of plaintiff's attorney's conflict of interest. The mere fact that the court has

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86. See supra text accompanying notes 57-79. There may, however, still be some legal limitations on a defendant's right to request fee waivers. In Jeff D. the Supreme Court left open the possibility that such offers might be invalid in three situations: (1) where defendant has adopted a policy or practice of demanding fee waivers in all suits; (2) where the defendant had no reasonable defense on the merits; and (3) where the waiver was requested pursuant to "a vindictive effort to deter attorneys" from bringing civil rights actions. Evans v. Jeff D., 106 S. Ct. at 1543-44. The resolution of these legal questions is beyond the scope of this Current Topic. It should be noted, however, that no ethics rule would be violated if a defendant adopted a policy of demanding fee waivers in all suits. Where the second or third factors mentioned by the Supreme Court are also present, however, defense counsel probably cannot ethically demand fee waivers, since making such a request could violate their obligations to avoid taking wholly unjustified, frivolous positions and to treat opposing counsel and parties fairly when possible. RULES, supra note 27, Rule 3.1, Rule 3.4; CODE, supra note 26, DR 7-102(A)(1), EC 7-10, EC 7-37.

87. RULES, supra note 27, Rule 4.2; CODE, supra note 26, DR 7-104(A)(1); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1348 (1975) (attorney may not send opposing party a settlement offer, even if he has reason to believe opposing counsel is not communicating offers to his client). But see infra note 89. Moreover, the attorney may not request or advise his or her client or a third party to communicate with the opposing party. The attorney need not forbid such contact, however, so long as he or she does not motivate or suggest it in any way. See San Diego County Bar Ass'n Legal Ethics and Unlawful Practices Comm., Op. 1983-2 (1983).

88. FED. R. CIV. P. 68; see also Marek v. Chesny, — U.S. —, 105 S. Ct. 3012, 3015-6 (1985) (lump sum offers that do not differentiate among damages, attorney's fees, and other costs qualify as Rule 68 offers).

89. FED. R. CIV. P. 5 provides, inter alia, that defendants' offers of judgment are to be served on opposing parties' counsel and that a copy of such offers shall be filed with the
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been made aware of the settlement offer may be enough to cause the plaintiff’s attorney to enter into good faith negotiations. It could also, of course, serve to limit defendant’s exposure in the event the case proceeds to trial, since if the plaintiff obtains a final judgment that is less favorable to him or her than was the Rule 68 settlement offer, the defendant will not be liable for any attorney’s fees or costs incurred after the offer was made.\textsuperscript{90}

In addition to a Rule 68 offer, defense counsel can bring the problem to the court’s attention more directly by means of a request for a pretrial conference to discuss the parties’ inability to settle.\textsuperscript{91} Such conferences are intended, among other things, to facilitate settlement negotiations, and failure of an attorney to participate in the conference in good faith may result in sanctions.\textsuperscript{92} This would therefore provide a suitable forum for revealing the impasse and requesting the court’s assistance in determining whether plaintiff’s counsel’s actions are justified.\textsuperscript{93} Given the crowded state of federal district court civil dockets,\textsuperscript{94} the judge is likely to be sympathetic to the defendant’s desire to settle, and may be willing to bring considerable pressure to bear on a recalcitrant plaintiff’s attorney if that is necessary to encourage meaningful settlement negotiations.

Attempting to bring charges of unethical conduct is the most drastic option available to defense counsel. Of course, such charges are generally looked upon with disfavor.\textsuperscript{95} They are nonetheless

\textsuperscript{90}FED. R. Civ. P. 68. In determining whether a Rule 68 offer exceeds the judgment at trial, the court must compare the offer amount with the sum of the damages awarded at trial and the costs and attorney’s fees accrued \textit{at the time the settlement offer was made}. Chesny v. Marek, 720 F.2d 474, 476 (7th Cir. 1983), \textit{rev’d on other grounds}, — U.S. —, 105 S. Ct. 3012 (1985). If the defendant’s offer of judgment does not exceed the costs and fees accrued to date, it will by definition be smaller than any judgment plaintiff obtains at trial. Rule 68 provides a particularly strong incentive for early settlement offers in civil rights cases, because it allows defendants to “lock in” a low attorney’s fee award.

\textsuperscript{91}See \textsc{Fed. R. Civ. P. 16(a)(5).}

\textsuperscript{92}FED. R. CIV. P. 16(f).

\textsuperscript{93}However, the court’s ability to determine the validity of a refusal to negotiate by the plaintiff’s attorney might be limited by assertions of the attorney-client privilege.

\textsuperscript{94}In the twelve-month period ending June 30, 1986, 254,828 civil cases were filed in United States District Court, and 265,771 civil cases were terminated. 1986 \textsc{Annual Report}, \textit{supra} note 36, Tables C3, C4.

\textsuperscript{95}See Black v. Missouri, 492 F. Supp. 848, 860 (W.D. Mo. 1980); \textsc{Rules, supra} note 27, Rule 1.7 comment (\textit{Conflict Charged by an Opposing Party}).
permissible, and have sometimes been effective.\textsuperscript{96} Although the general rule is that only a present or former client has standing to object to a conflict of interest,\textsuperscript{97} anyone may raise an ethical issue when the public interest or the fair administration of justice is threatened.\textsuperscript{98} Such challenges are most likely to succeed in the class action context, since the class attorney’s failure to negotiate on behalf of the class goes directly to the issue of adequacy of representation,\textsuperscript{99} and cannot be cured by consent of the class representative.

Charging the plaintiff’s lawyer with misconduct is a course that should be followed only as a last resort, and only where defense counsel has reasonable grounds for believing an ethical violation exists. In bringing such charges, defense counsel runs a serious risk: an unfounded ethical complaint may itself be grounds for sanctions against the complaining attorney.\textsuperscript{100} Except in a class action situation, the mere refusal of a plaintiff’s attorney to negotiate fees would not generally support such a complaint, since it is entirely possible that the plaintiff might refuse to waive or limit his statutory fees without having been subjected to any improper suggestion or coercion by counsel.

These techniques are not completely satisfactory; a defense attorney will probably be unable to force an unwilling plaintiff’s attorney to negotiate fees if the latter adamantly refuses to do so. However, it seems likely that singleminded refusal will not be a common phe-

\textsuperscript{96} In re Gopman, 531 F.2d 262, 265 (5th Cir. 1976); Estates Theatres, Inc. v. Columbia Pictures Indus., 345 F. Supp. 93, 98 (S.D.N.Y. 1972) (defendants successfully challenged continued representation by plaintiffs’ attorney whose representation conflicted with the interests of another of his clients, where the latter client did not consent).

\textsuperscript{97} Celanese Corp. v. Lessona Corp. (In re Yarn Processing Patent Validity Litig.), 530 F.2d 83, 88 (5th Cir. 1976); Black v. Missouri, 492 F. Supp. at 861.

\textsuperscript{98} In re Gopman, 531 F.2d at 265 (counsel can and should raise issue of opposing counsel’s ethical violation); Estates Theatres, 345 F. Supp. at 98; Black v. Missouri, 492 F. Supp. at 861. An attorney is also obligated to report ethics violations to the appropriate professional authority. \textit{Rules}, supra note 27, Rule 8.3(a); \textit{Code}, supra note 26, DR 1-103(A). However, fulfilling this obligation would not solve the immediate problem of the need to negotiate fees.


Even after class certification, the court has the authority to review the conduct of the class representatives and their counsel, and to impose appropriate conditions on them. \textit{Fed. R. Civ. P.} 23(d).

\textsuperscript{100} \textit{See Rules}, supra note 27, Rule 3.1 (lawyer must not assert frivolous or unfounded claims); \textit{Code}, supra note 26, DR 7-102(A)(1) (lawyer must not take actions solely to harass opponent); cf. \textit{Rules}, supra note 27, Rule 8.4(c), (d); \textit{Code}, supra note 26, DR 1-102(A)(4), (5). However, defense counsel’s potential liability may be limited. \textit{See, e.g.,} Kerpelman v. Bricker, 23 Md.App. 628, 329 A.2d 423 (1974) (attorney who filed ethics complaint with state bar association was protected by absolute privilege against subsequent suit for libel); \textit{see also} Wiener v. Weintraub, 22 N.Y.2d 330, 239 N.E.2d 540 (1968).
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nomenon. Most plaintiffs' attorneys will presumably continue to act ethically in conducting settlement negotiations, and defense counsel will be able to ensure good faith bargaining by merely informing their opponents of their obligations with regard to conditional settlement offers.\footnote{101} The possibilities of censure from the court or disciplinary action by the bar will provide additional incentives to act ethically for those attorneys who might otherwise be tempted to ignore their obligations to their clients.

V. The Impact of Simultaneous Negotiation

The rules of ethics, like the Fees Act itself, forbid a plaintiff's lawyer from avoiding on his or her own initiative the conflict of interest created by conditional settlement offers. Members of the civil rights plaintiffs' bar have expressed the fear that permitting fee waivers will severely weaken enforcement of civil rights by drastically reducing the number of attorneys willing to take such cases.\footnote{102} Despite these gloomy predictions, however, simultaneous negotiation is not likely to reduce the volume of meritorious civil rights litigation significantly, and is in fact justifiable from a policy standpoint.

In reality, the funding of public interest and legal aid organizations does not depend to any critical degree on statutory attorney's fees. Available data indicate that, at most, only about twenty percent of the funding of these law firms comes from this source.\footnote{103} The fact that fee waivers are now permissible will probably not reduce even this figure substantially.\footnote{104} Certainly in civil rights suits...

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\footnotetext{101}{See Kraus, supra note 25, at 627-28; cf. Levin, supra note 25, at 520-21 (arguing that conditional settlement offers are probably unethical, and that merely confronting defense counsel with this fact will often result in withdrawal of such offers).}

\footnotetext{102}{Bennett, supra note 71, at 13 (simultaneous negotiation's "long-range implication for civil rights litigation, especially by the private bar, would be devastating"); Report of the Third Circuit Task Force: Court Awarded Attorney Fees 41, reprinted in 108 F.R.D. 237, 267 (1985) [hereinafter Third Circuit Report].}

\footnotetext{103}{See, e.g., Practicing Law Institute, Litigation Course Handbook Series, No. 124, Court Awarded Fees in "Public Interest" Litigation 277 (1978); NAACP Brief, supra note 62, at 6; see also Oversight of Certain Activities of the Legal Services Corporation, Focusing on Policies at the Corporation and Political Activities: Hearings Before the Senate Comm. on Labor and Human Resources, 98th Cong., 1st Sess. 2, 505 app. (1983) (Opening Statement of Senator Hatch; Appendix II, Legal Fee Awards For Legal Services Corporation Grantees) (total fee awards to Legal Services Corp. grantees amounted to 0.9% of budget in 1981 and 1.8% in 1982); cf. Brief of Lawyers' Committee for Civil Rights Under Law as Amicus Curiae at 2, White v. New Hampshire Dept' of Employment Sec., 445 U.S. 455 (1982) (section 1988 is "becoming a significant income source for the Lawyers' Committee").}

\footnotetext{104}{In contrast, the Supreme Court's Alyeska decision, which prevented federal courts from awarding attorney's fees in any civil rights cases, see 421 U.S. at 271, had an immediate and substantial impact on the civil rights bar. See, e.g., H.R. Rep. No. 1558.
seeking only monetary damages, simultaneous negotiation will not significantly reduce attorneys’ compensation. Defendants’ settlement offers will consist of lump sums to be divided between plaintiffs and their lawyers as they or the court determine. Since the plaintiff’s attorney’s fee will be paid solely out of the plaintiff’s award, rather than as a separate payment by the defendant, plaintiffs will obviously demand larger sums in settlement of their claims. This will not be a deterrent to settlement, however. As defendants will not remain liable for any further fees after settling the merits, they will be able to increase the size of their offers accordingly.

In suits asking for both equitable relief and monetary damages, or in suits for equitable relief only, fee waivers may have more of an effect. Even in these cases, though, the ultimate impact should be minimal. First of all, not all defendants will make settlement offers that are satisfactory on the merits; in these situations a trial will still be necessary, and the court will award fees to prevailing plaintiffs as always. Similarly, some plaintiffs will refuse fee waiver settlement offers even if they contain satisfactory relief for themselves, perhaps out of a sense of loyalty to their attorney or his or her organization, or perhaps out of a desire to punish the defendants to the fullest extent of the law. Although members of the private civil rights bar may become less interested in taking these cases since their chances of earning fees are reduced, this group of lawyers has never been a

supra note 11, at 3 (after Alyeska, private attorneys refused to take certain types of civil rights cases).

105. Of course, the amount of the attorney’s fee is also subject to the constraints of the ethics codes, which require that the fee be reasonable. RULES, supra note 27, Rule 1.5; CODE, supra note 26, DR 2-106; see also Schlesinger v. Teitelbaum, 475 F.2d 137 (3d Cir.), cert. denied, 414 U.S. 1111 (1973) (court has inherent power to review terms of contingent fee agreements).

106. If anything, the total recovery to plaintiffs and their attorneys should increase in this situation. When they were forced to settle the merits before discussing fees, defendants had to include a substantial cushion between their offer on the merits and the total amount they were willing to pay in settling the case, in order to leave room for their unknown attorney’s fee liability. If we assume that defendants are risk-averse — a reasonable assumption for defendants who are interested in settling, since risk avoidance is a primary reason for settlement — the optimizing defendant would tend to offer a merits settlement which, when added to the expected amount of attorney’s fees to be assessed, would be less than the total offer defendant would be willing to make in settling both merits and fees simultaneously. This is so because the risky component of the bifurcated settlement, i.e., the estimated value of the unknown fee award, must be increased by an amount reflecting the defendant’s aversion to risk. Settling fees and merits simultaneously eliminates the understandable tendency of risk-averse defendants to overestimate the necessary “cushion” for future attorney’s fees awards, thus helping to ensure that plaintiffs are not shortchanged.
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significant presence in this type of case. In any event, legal aid and public interest organizations, with their alternative sources of funding, will continue to litigate these cases.

It is important to note that although many, if not most, jurisdictions have permitted fee waivers for a considerable period of time, no deleterious impact on civil rights enforcement is discernible. Simultaneous negotiation of fees and merits in civil rights cases is simply not a major threat to the vindication of civil rights. Conditional settlement offers may actually enhance the ability of the judicial system to handle fairly and efficiently the large number of civil rights cases which it faces each year. As has been demonstrated above, early settlement of many cases will be encouraged by use of the simultaneous negotiation method. Moreover, the *Prandini* rule may have created more problems for both sides than it solved. Since many defendants absolutely refused to settle without knowing their exposure for attorney's fees, simultaneous negotiation did in fact occur frequently; the parties were simply forced to negotiate behind the court's back. Even members of the civil rights plaintiffs' bar have acknowledged that a complete prohibition on fee negotiation is unworkable. Permitting conditional fee waivers thus fulfills the mandate of the ethics codes without significantly weakening civil rights enforcement, and at the same time eliminates the need for the unseemly secret fee negotiations which were the necessary byproduct of the *Prandini* rule.

107. See, e.g., Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U.Pa.L.Rev. 281, 313-15 (1977); Kraus, supra note 25, at 633-34 ("private civil rights practitioners are few in number").

108. See cases cited supra notes 20-21; see also supra note 36. E. Richard Larson, former national staff counsel for the ACLU, estimated in 1982 that fee waivers were requested in more than half of all civil rights cases. See Winter, *Fee Waiver Requests Unethical: Bar Opinion*, 68 A.B.A.J. 23 (1982).

109. In the twelve-month period ending June 30, 1986, 17,872 private civil rights actions were filed in federal district court, and 18,205 such cases were terminated. 1986 Annual Report, supra note 36, Tables C3, C4. The United States Courts of Appeals disposed of 3,406 appeals in private civil rights cases during the same period. Id., Table B1A.

110. See supra note 35. There is a clear judicial policy favoring settlement of cases over trials. See, e.g., Evans v. Jeff D., 106 S. Ct. at 1540-41; Parker v. Anderson, 667 F.2d 1204, 1209 (5th Cir. Unit A), cert. denied, 459 U.S. 828 (1982). This policy is particularly strong in the area of attorney's fee litigation; as one study observed, "[o]ne can hardly conceive of a less socially valuable use of resources than fees litigation." NAAG Report, supra note 81, at 3; see also Hensley v. Eckerhart, 461 U.S. 424, 442 (1983) (Brennan, J., dissenting).

111. See Third Circuit Report, supra note 102, at 41, 108 F.R.D. at 267; El Club del Barrio, Inc. v. United Community Corps., Inc., 735 F.2d 98, 101 n.3 (3d Cir. 1984) ("Prandini may be... more honored in the breach.").

112. See, e.g., Bennett, supra note 71, at 13-14.
Conclusion

That opposing counsel in civil rights cases are now ethically obligated to negotiate fees and merits simultaneously does not present an insurmountable ethical dilemma for the attorneys involved, nor does it significantly threaten the future enforcement of civil rights in this country. It may even be beneficial to some degree. But in any case, so long as the ethical standards governing the practice of law require each attorney to further his or her client's interests within the constraints of the adversary system, simultaneous negotiation of fees and merits in civil rights cases will be an ethical and practical necessity.