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## "Evans v. Jeff D." : Putting Private Attorneys General On Waiver

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# NOTES

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## I. INTRODUCTION

Prior to the Supreme Court's 1986 decision in *Evans v. Jeff D.*,<sup>1</sup> fervent debate centered on the practice of simultaneously negotiating settlement on the merits and the award of attorney's fees in civil rights cases.<sup>2</sup> Reasonable attorney's fees for prevailing plaintiffs in civil rights cases are provided at the discretion of the court under section 1988 of the Civil Rights Attorney's Fees Award Act of 1976<sup>3</sup> (the Fees Act). Sparked largely by the Third Circuit's rejection of the practice of simultaneous negotiations in *Prandini v. National Tea Co.*,<sup>4</sup> wide commentary on the practice soon followed the Fees Act's passage.

Critics of simultaneous negotiations suggest that it creates a conflict of interest between a plaintiff's interest in relief on the merits and his attorney's interest in obtaining fees.<sup>5</sup> Proponents of the practice maintain that judicial policy favors settlement of disputes.<sup>6</sup> They con-

1. 475 U.S. 717 (1986).

2. See, e.g., *Prandini v. National Tea Co.*, 557 F.2d 1015, 1017, 1021 (3d Cir. 1977) (noting that while contemporaneous negotiations may be conducted with diligence and honesty, the potential for abuse raises questions about propriety); *infra* text accompanying notes 20-31; see *Mendoza v. United States*, 623 F.2d 1338, 1353 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981) (strongly discouraging simultaneous negotiations except in special circumstances, such as when a government agency is involved); *infra* text accompanying notes 32-34; see also *Obin v. District No. 9, Int'l Ass'n of Machinists*, 651 F.2d 574, 582 (8th Cir. 1981) (avoiding simultaneous negotiation prevents conflict with the client's interests and the appearance of impropriety); *Lisa F. v. Snider*, 561 F. Supp. 724 (N.D. Ind. 1983) (concluding that fees and merits must be discussed separately). But see *Moore v. National Ass'n of Sec. Dealers*, 762 F.2d 1093 (D.C. Cir. 1985) (holding that simultaneous discussion and fee waiver are permissible when plaintiff voluntarily waives fees, without a demand of waiver by defendant; not abuse of discretion to approve waiver when plaintiff does not have a strong case); *infra* text accompanying notes 39-44. Compare cases cited *supra* with *infra* text accompanying note 268 (containing explanation offered for split of authority).

3. 42 U.S.C. § 1988 (1982). A substantially identical Title VII provision is contained in the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (1982).

4. 557 F.2d 1015 (3d Cir. 1977).

5. 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 Fee Awards Act of 1976*, 29 VILL. L. REV. 597 (1984); Levin, *Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in Which Statutory Attorney's Fees Are Authorized*, 14 CLEARINGHOUSE REV. 515 (1980); Comment, *Settlement Offers Conditioned Upon Waiver of Attorney's Fees: Policy, Legal, and Ethical Considerations*, 131 U. PA. L. REV. 793 (1983); cf. 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 (1984). For a full discussion and criticism of Calhoun's proposals, see *infra* text accompanying notes 207-18.

6. Note, *Conflicts Created by the Simultaneous Negotiation and Settlement of Damages and Statutorily Authorized Attorneys' Fees in a Title VII Class Action—Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977), 51 TEMP. L.Q. 799 (1978).

tend that since attorney's fees in civil rights cases may exceed relief on the merits,<sup>7</sup> bifurcating the process impedes settlement because the defendant cannot fix his total obligation with certainty.<sup>8</sup>

Two versions of the simultaneous negotiation problem have been identified. The version at issue in *Prandini* is referred to in the literature affectionately as the "sweetheart" deal. The "sweetheart" deal arguably preys upon the baser instincts of both the plaintiff's and defendant's counsel. In the "sweetheart" situation the defendant packages a settlement offer with a relatively large award for attorney's fees in hopes that opposing counsel will encourage his client to accept disproportionately meager substantive relief. In this manner, the defendant leverages the potential conflict between opposing counsel and his client to the defendant's net benefit.

Recently, however, the "extortion" deal has been contested more hotly than the "sweetheart" deal. The "extortion" version of the simultaneous negotiation problem occurs when a settlement offer is conditioned upon a waiver of attorney's fees altogether.<sup>9</sup> This "extortion" deal is the type of simultaneous negotiation problem at issue in *Jeff D.*

In *Jeff D.* the plaintiff's counsel argued that a settlement proposal which offered his client essentially all the injunctive relief sought, but which conditioned settlement upon waiver of attorney's fees, placed him in an ethical dilemma. The plaintiff's counsel maintained his ethical duty<sup>10</sup> effectively extorted from him a recommendation that his client accept the settlement offer.<sup>11</sup> In a six to three decision written by Justice Stevens, the Supreme Court rejected the notion that any ethical dilemma is posed by "extortion" deals. Rather, the question, as the

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7. The Court has rejected the notion that reasonable attorney's fees should be proportionate to the monetary award recovered on the merits. See, e.g., *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (\$33,350 recovered in compensatory and punitive damages; \$245,000 awarded in fees); see also *McCann v. Coughlin*, 698 F.2d 112 (2d Cir. 1983) (award of \$50,000 in fees not in error when nominal damages of \$1 were recovered); *Clanton v. Orleans Parish School Bd.*, 649 F.2d 1084 (5th Cir. 1981) (\$24,515 awarded in fees but only \$8,654 recovered by the client); *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (\$160,000 awarded in fees, only \$33,000 recovered in back pay).

8. See *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 454 (1982) (stating that "[i]n considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees"). But see *infra* text accompanying notes 88-106.

9. While a settlement offer conditioned on waiver always will occur during simultaneous negotiation, not all simultaneous negotiations will involve waivers. For example, a type of simultaneous negotiation is the so-called "lump sum" offer. Often, in those cases which involve damages, the defendant will offer plaintiff a lump sum of money, leaving for plaintiff and his counsel the task of apportioning it. The Court's decision in *Marek v. Chesny*, 473 U.S. 1 (1985), found that these offers were appropriate.

10. It is unclear from the reported decisions on which specific provisions of the applicable ethics code plaintiff's attorney Johnson relied.

11. *Jeff D.*, 475 U.S. at 723 & n.6.

Court framed it, was merely whether the Fees Act required the district court to reject settlements conditioned on fee waiver.<sup>12</sup> By looking solely at whether the plaintiff's counsel had an ethical obligation to seek a fee, the Court predetermined its answer and failed to entertain squarely the ethical conduct of the defendant's attorney who offered a settlement conditioned upon fee waiver in the first instance. Arguably, however, if the Court had addressed the ethics question properly, strict construction of applicable ethics codes would have led to the same result.<sup>13</sup>

The purpose of this Note is to suggest that *Jeff D.* represents the most recent and telling sign of undercurrents marking a fundamental shift in the posture toward the vindication of civil rights. To highlight this change in national policy, Part II outlines the historical controversy behind coerced fee waiver. Part III reviews *Jeff D.*, underscoring the tension between the private attorneys general concept and the "bargaining chip" theory which the Court adopts. Part IV undertakes to review possible solutions to "extortion" deals, including the ethical analysis at which the majority in *Jeff D.* refused to look. The conclusion reached is that fee waiver is not unethical under the *ABA Model Code of Professional Responsibility* (*Model Code*)<sup>14</sup> or the *ABA Model Rules of Professional Conduct* (*Model Rules*).<sup>15</sup> On balance, and in light of recent state ethics committee decisions, solution to the harsh effects of "extortion" deals appears beyond an ethics approach. Part IV also reviews certain scholarly proposals aimed at mitigating the effects of the *Jeff D.* result, but concludes that inherent problems render these proposals unequal to the task. While the decision in *Jeff D.* prompted considerable commentary, much of it appears to ratify the Court's conclusion that the professional ethics debate over "extortion" deals is over;<sup>16</sup> the only question remaining is how to fashion effective practices to work around the harsh result that "extortion" deals present.<sup>17</sup> While these proposals represent desirable goals, they are criticized as being limiting in scope, moving cross-current to the trend that favors settlement, or themselves working against the primary goals underlying the

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12. *Id.* at 729.

13. See *infra* text accompanying notes 129-73.

14. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE].

15. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES].

16. See, e.g., Snyder, *Ethics and the Settlement of Civil Rights Cases: Can Attorneys Keep Their Virtue and Their Fees?*, 16 N.M.L. REV. 283 (1986) (stating that *Jeff D.* is a fees problem, not an ethics problem).

17. See Goldstein, *Settlement Offers Contingent upon Waiver of Attorney Fees: A Continuing Dilemma After Evans v. Jeff D.*, 20 CLEARINGHOUSE REV. 693 (1986). For full discussion and criticism of Goldstein's proposals, see *infra* text accompanying notes 177-206.

Fees Act.<sup>18</sup> Because these proposals are unworkable, Part V offers a proposal to amend the Fees Act. It is suggested that this legislative proposal solves the dilemma presented by *Jeff D.* by protecting attorney's fees without burdening the settlement process.

Part VI concludes that, when viewed against the development of case law, a bright line marks the shift in judicial policy away from breaking down old barriers to the vindication of civil rights, with *Jeff D.* representing merely the most recent sign. The Court's unwillingness to resolve ambiguity in the Fees Act against settlements conditioned upon waiver supports the argument that the Fees Act currently is valued more as a tool to implement the judicial policy of encouraging settlement than it is as a means to vindicate civil rights under the private attorneys general concept. Thus, like the congressional response to the Court's decision in *Alyeska Pipeline Co. v. Wilderness Society*<sup>19</sup> which gave rise to the Fees Act, a similar response is needed to *Jeff D.*

## II. CASE LAW LEADING UP TO *JEFF D.*

Barely a year after the Fees Act became law, the Third Circuit ruled in *Prandini v. National Tea Co.*<sup>20</sup> that simultaneous negotiation of merits and fees creates a conflict between the client's interest in merits relief and the attorney's interest in statutory fees.<sup>21</sup> The court held that contemporaneous negotiations, while perhaps entered into in good faith, must be rejected as too susceptible to impropriety, giving rise to possible misunderstanding by the public.<sup>22</sup> The *Prandini* court was concerned with a Title VII "sweetheart" deal. Nevertheless, the decision in *Prandini* serves to illustrate essential elements of attorney-client conflict generic to both "sweetheart" and "extortion" deals in the civil rights context. The *Prandini* decision also highlights early judicial thinking about the importance of the Fees Act in the vindication of civil rights.

The defendants in *Prandini* offered a combined settlement proposal of both merits relief and a fee award. The fee offer amount was unspecified, capped only by a maximum amount.<sup>23</sup> The district court accepted the offer of relief on the merits, but rejected the fee proposal. The court viewed the two components of the offer as one fund,<sup>24</sup> noting

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18. See *infra* text accompanying notes 176-219.

19. 421 U.S. 240 (1975). For a discussion of the *Alyeska* decision, see *infra* text accompanying notes 107-27.

20. 557 F.2d 1015 (3d Cir. 1977).

21. *Id.* at 1020-21.

22. *Id.* at 1017.

23. *Id.* at 1017-18.

24. *Id.* at 1020.

that a defendant's only real interest is in his total liability; allocation of the fund between attorney and client is of little interest to him.<sup>25</sup> The district court was concerned that the defendant's authorization of fees up to a maximum amount, coupled with the plaintiff's request for "reasonable" fees, could result in a portion of the fund going for fees that might otherwise accrue to the benefit of the plaintiff as merits relief.<sup>26</sup>

To counteract the possibility of a "sweetheart" deal, the Third Circuit ordered bifurcated settlement of merits relief and fees. In bifurcated negotiations, all issues related to merits relief are decided before undertaking any consideration of fees. The court admitted such a process might not be particularly appealing to the parties,<sup>27</sup> but it would provide the defendant a continuing economic interest in the process and, therefore, would retain the essential underpinnings of the adversarial system.<sup>28</sup>

If the bifurcated determination of merits relief in *Prandini* was ordered to protect the plaintiff from favorable fee offers at the expense of merits relief,<sup>29</sup> that objective certainly was not realized. Although the requested attorney's fee was reduced by the district court, the net difference was not added to the class merits relief. Further, the facts of *Prandini* do not support the court's determination. The settlement proposal offered by the defendant afforded the plaintiffs ninety-three percent of their total claim,<sup>30</sup> so it is difficult to see how a "sweetheart" deal was operating.

The *Prandini* "per se" rejection of simultaneous negotiations was the subject of considerable debate among commentators prior to *Jeff D.* Early reaction from judges and practitioners generally was favorable,<sup>31</sup> but the circuit courts had a mixed reaction. In *Mendoza v. United States*<sup>32</sup> the Ninth Circuit strongly discouraged simultaneous negotiation. The court observed that potential attorney-client conflict does not disappear when an injunction, rather than money damages, was the subject of settlement.<sup>33</sup> Although the court generally disapproved of simultaneous negotiations, the procedure survived "strict scrutiny" in

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25. *Id.*

26. *Id.* at 1020-21.

27. *Id.* at 1021.

28. *Id.* Arguably, a continued adversarial proceeding works against the possibility of impropriety.

29. *Id.* at 1020 (stating that even though the Fees Act identifies fees as a separate item, there is still a potential conflict).

30. See Note, *supra* note 6, at 811 (citing appellant's brief).

31. See A. MILLER, ATTORNEYS' FEES IN CLASS ACTIONS 223-24 (1980).

32. 623 F.2d 1338 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981). *Mendoza* was a class action desegregation case in which injunctive rather than monetary relief was sought. *Id.* at 1338.

33. *Id.* at 1352-53.

Mendoza because facts were present that mitigated the appearance of impropriety.<sup>34</sup> Circuit court decisions in *Obin v. District No. 9, International Association of Machinists*<sup>35</sup> and *Pettway v. American Cast Iron Pipe Co.*<sup>36</sup> stopped short of the "per se" rule in *Prandini*, but conceded that simultaneous negotiations create at least a potential conflict of interest which warrants close scrutiny. Other decisions, including *Gram v. Bank of Louisiana*<sup>37</sup> and *Chicano Police Officer's Association v. Stover*,<sup>38</sup> neither required bifurcated negotiations nor outlawed fee waiver.

Perhaps the most influential decision concerning fee waiver and simultaneous negotiations decided between *Prandini* and *Jeff D.* was rendered by the District of Columbia Circuit in *Moore v. National Association of Securities Dealers, Inc.*,<sup>39</sup> a Title VII class action. After the parties agreed to a settlement under which all claims for fees and costs were waived voluntarily,<sup>40</sup> Moore, the class representative, changed her mind. Prior to the Rule 23 fairness hearing, Moore requested that the court modify the settlement agreement to include attorney's fees because waiver of fees "would discourage attorneys from pursuing Title VII claims."<sup>41</sup> Review of the fee shifting provisions of both Title VII and the Fees Act convinced the court that Congress had not prohibited or discouraged fee waiver.<sup>42</sup> In deciding to uphold the original agreement, the D.C. Circuit adopted the thinking of a 1983 Judicial Council of the United States Court of Appeals for the District of Columbia Circuit task force charged with studying the problems of simultaneous negotiations and fee waivers.<sup>43</sup> The task force advised against barring simultaneous negotiations and concluded that only a case-by-case analysis could reveal whether the defendant's settlement offer was reasonable.

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34. *Id.* at 1353. The evil of simultaneously negotiated fees was offset because the Department of Justice participated in the settlement and served to neutralize possible conflict by protecting the interests of the class.

35. 651 F.2d 574, 582-83 (8th Cir. 1981)(stating that simultaneous negotiations "may raise a serious ethical concern").

36. 576 F.2d 1157, 1216 n.71 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979) (commenting that simultaneous negotiations of fees and merits weigh heavily against approval).

37. 691 F.2d 728, 730 (5th Cir. 1982) (noting in dictum that plaintiff may waive fees in a Truth in Lending case with statutory award similar to § 1988).

38. 624 F.2d 127, 131-32 (10th Cir. 1980).

39. 762 F.2d 1093 (D.C. Cir. 1985).

40. *Id.* at 1094.

41. *Id.* at 1096. The waiver of fees would have left Moore responsible for attorney's fees already paid (\$3,100), in addition to fees not paid (\$34,000). The attorney representing Moore indicated his firm would not waive fees because Moore knew the extent of her obligation for costs. The attorney also argued that Model Rule 1.8(e) prevented an attorney from subsidizing a client's lawsuit as a matter of professional ethics. *Id.* at 1096-97 & n.3.

42. *Id.* at 1100.

43. *Id.* at 1103-04.

ble based on the totality of circumstances.<sup>44</sup> The task force had borrowed its reasoning from the Supreme Court's observation in *White v. New Hampshire Department of Employment Security*<sup>45</sup> that "[i]n considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees."<sup>46</sup> Favoring the defendant's right to fix costs with certainty undercuts *Prandini*; bifurcated negotiations make certainty more difficult. On this basis, the *Moore* court declined to follow the "per se" rule in *Prandini* and held that when a plaintiff acts voluntarily and on his own initiative fees may be waived.<sup>47</sup> The court reasoned that any other holding would require placing an unreasonable gloss on the Fees Act.<sup>48</sup>

Prior to *Jeff D.*, attorneys who attempted to attack settlement offers conditioned upon fee waiver after a consent decree was entered generally were unsuccessful. In *Lazar v. Pierce*<sup>49</sup> the First Circuit upheld the fee waiver in a consent decree, even though counsel complained of an ethics violation and the court acknowledged that the waiver was obtained by coercion.<sup>50</sup> The court held that the ethical problem was not the "stark" one contended. The court particularly was concerned that the plaintiff's counsel had planned all along to attack the fee waiver after the consent decree was entered,<sup>51</sup> rather than at the time that the ethical problem arose.<sup>52</sup> In *Chattanooga Branch of the NAACP v. City of Chattanooga*<sup>53</sup> the plaintiff's counsel failed in his petition to have the court block settlement offers conditioned upon fee waiver. Additionally, the court ordered settlement negotiations to resume and instructed the parties not to let fees disputes disrupt the negotiations. After a consent decree was entered, the plaintiff's counsel attempted to have the provision dealing with fee waiver reconsidered. The court refused to reconsider and allowed the consent decree to stand in its entirety.<sup>54</sup>

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44. *Id.* at 1104 n.14.

45. 455 U.S. 445 (1982).

46. *Id.* at 454 n.15.

47. *Moore*, 762 F.2d at 1105. *But see Calhoun, supra* note 5, at 382 (stating that there is no public interest in allowing flexibility to waive voluntarily fees as a lever to increase merits relief on weak claims).

48. *Moore*, 762 F.2d at 1105.

49. 757 F.2d 435 (1st Cir. 1985).

50. *Id.* at 439.

51. *Id.* at 438.

52. *Id.* at 437.

53. No. 79-2111 (E.D. Tenn. Dec. 2, 1981), *appeal dismissed*, Nos. 82-5016, 82-5013 (6th Cir. Apr. 29, 1982) (cited in Comment, *supra* note 5, at 802 & nn.71-75).

54. *Id.* An appeal was filed, but withdrawn. Apparently, the threat of having the entire consent decree set aside prompted plaintiff's counsel to reconsider.

### III. THE *JEFF D.* DECISION: FIXING COSTS AND BARGAINING CHIPS

In 1980 attorney Charles Johnson<sup>55</sup> filed a class action against the Governor and State of Idaho for delivering deficient education and health care services to mentally and emotionally handicapped children under the State's care.<sup>56</sup> Fourteen months after filing the complaint, but before substantial work had been expended on the case, the parties entered stipulations disposing of the part of the suit concerning educational services.<sup>57</sup> No agreement, however, was forthcoming on the health care allegations. On cross-motions for summary judgment, the court ruled that genuine issues of fact remained for trial on the section 1983 claims. Discovery commenced, and the trial was scheduled.<sup>58</sup>

Thirty months after filing suit, and just one week before trial, the defendants offered a proposed settlement which granted "virtually all of the injunctive relief [the plaintiffs] had sought in their complaint"<sup>59</sup> conditioned, however, upon a waiver of attorney's fees and costs.<sup>60</sup> Although Johnson's employer, the Idaho Legal Aid Society, initially instructed him to reject the settlement conditioned on the waiver, he determined that professional ethics required him to recommend acceptance of the offer to his clients.<sup>61</sup> Johnson signed the settlement agreement, but the parties stipulated that the agreement was contingent upon the subsequent approval by the court.<sup>62</sup> Johnson then made a motion for the district court to approve the substantive provisions of the settlement, but to strike the provision dealing with fees and costs.<sup>63</sup> At oral argument, Johnson contended that the fee waiver placed him in an ethical dilemma of "negotiating for his client or negotiating for his attorney's fees."<sup>64</sup>

The district court rejected Johnson's contention, holding that there

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55. Now in private practice, L. Charles Johnson III was 25 years old and one year out of the University of Idaho School of Law when he filed suit. See generally Fitzhugh, *To Win Your Case, Waive Your Fees*, 71 A.B.A. J., Dec. 1985, at 44.

56. Members of the class included over 2000 mentally and emotionally handicapped children. *Jeff D.*, 475 U.S. at 720 n.1; see also Fitzhugh, *supra* note 55, at 45. The Fitzhugh article quoted Johnson who stated "I saw children as young as 11 years old institutionalized with adult mental patients, including some child molesters. There was absolutely no treatment or education of any kind."

57. *Jeff D.*, 475 U.S. at 721.

58. *Id.* at 722.

59. *Id.* (citing Brief for Respondent at 5).

60. *Id.* at 722.

61. *Id.*; see also *id.* at 721 & n.3. The Idaho Legal Aid Society is a private, nonprofit organization which provides free legal services to economically disadvantaged persons and may not represent clients who can pay their legal fees. The status of their clients fairly explains why there was no retainer agreement to cover the contingencies that might arise during settlement.

62. *Jeff D.*, 475 U.S. at 722.

63. *Id.* at 723.

64. *Id.* at 723 n.6 (quoting Johnson's oral argument before the district court).

is no ethical controversy which attends an attorney giving up his fees in return for a favorable bargain for his client. Importantly, the court ruled that the defendants made their offer, without admitting any legal obligation to do so, only if they could fix their total costs.<sup>65</sup> On appeal, the Ninth Circuit reversed.<sup>66</sup>

The appellate court recognized the defendant's contention that Ninth Circuit precedent bound parties and lawyers to their stipulations,<sup>67</sup> but decided to subordinate that rule to the court's Rule 23(e)<sup>68</sup> duty to assess the reasonableness of a class action settlement. Moreover, the court reasoned that its Rule 23(e) duty was heightened by the "clear public policy" underlying the Fees Act to award reasonable fees in civil rights actions.<sup>69</sup> Pursuant to that policy, the court reaffirmed its general acceptance of the Third Circuit's decision in *Prandini*. The court also favorably noted the Third Circuit's precedent of awarding fees to legal service organizations, such as Johnson's employer, because they serve a vital role in the vindication of civil rights under the private attorneys general concept.<sup>70</sup> Due to the split among circuits, and the importance of the issues concerning simultaneous negotiation of the merits and fees,<sup>71</sup> the Supreme Court granted certiorari, and reversed the appellate court's decision.

The Court rejected as erroneous the Ninth Circuit's evaluation of its Rule 23(e) responsibilities. Relying on its then-recent decision in *Firefighters Local Union No. 1784 v. Stotts*,<sup>72</sup> the Court held that in evaluating a proposed class action settlement, a court has three options: (1) it can approve; (2) it can reject and postpone trial, during which

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65. *Id.* at 723.

66. *Jeff D. v. Evans*, 743 F.2d 648 (9th Cir. 1984).

67. *See Herman v. Eagle Star Ins. Co.*, 396 F.2d 427 (9th Cir. 1968).

68. FED. R. CIV. P. 23(e) (stating that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs").

69. *Evans*, 743 F.2d at 650.

70. *Id.* at 651 (citing *Shadis v. Beal*, 685 F.2d 824, 830-31 (3d Cir.), cert. denied, 459 U.S. 970 (1982)).

71. *Jeff D.*, 475 U.S. at 726.

72. 467 U.S. 561 (1984). The issue before the Court was an order enjoining the City of Memphis from giving effect to layoffs in a budgetary shortfall in accordance with its seniority system. In the original complaint, plaintiffs alleged that the City engaged in a discriminatory pattern or practice in awarding promotions. Prior to trial, a consent decree was entered under which certain affirmative relief was granted. Later, when the City announced that the layoffs were needed because of budget constraints, the district court granted an injunction. Despite the fact that the consent decree did not address layoffs, the court modified the decree based on its conclusion that layoffs in accord with the seniority system would have a discriminatory effect. After the Sixth Circuit affirmed, the Court reversed. It held that consent decrees must be interpreted within the four corners of the document. Since the decree did not mention layoffs, the Court could not, of its own accord, write into it an additional provision.

time the parties can consider modifications for the court's further review; or (3) it simply can proceed with trial. The court, however, cannot enter modifications to a settlement to which the parties have not agreed previously.<sup>73</sup>

In one brief paragraph the Court rejected the notion that attorney Johnson faced an "ethical dilemma" in recommending acceptance of the settlement conditioned on waiver of fees and costs. Because Johnson had no ethical obligation to seek a statutory fee award, there could be no conflict with the "ethical duty . . . to serve his clients loyally."<sup>74</sup> Cognizant of the sting attached to a loss of fees, the Court, in consolation, applauded Johnson for acting in a manner "consistent with the highest standards of . . . [his] profession."<sup>75</sup>

The Court's majority opinion failed to look at the ethical underpinnings of the defendant's conduct in proposing the "extortion" deal in the first instance. Rather, as the Court viewed it, the issue of settlements conditioned on waiver is not one of ethics, but one of proper statutory construction of the Fees Act, played off against the Rule 23(e) duty to accept or reject a settlement agreed to by the parties.<sup>76</sup> The Court conceded Congress "expected" that passage of the Fees Act would attract competent counsel to represent civil rights cases. Nevertheless, the Court could not find in the legislative history any congressional intent to require a court to grant fees or "forbid" parties from "exchang[ing] fees] for some other relief."<sup>77</sup> So construed, the purpose of fee awards is viewed simply as a bargaining chip added as one more weapon in a civil rights plaintiff's "arsenal of remedies available to combat violations of civil rights."<sup>78</sup>

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73. *Jeff D.*, 475 U.S. at 727.

74. *Id.* at 727-28. See MODEL CODE, *supra* note 14, at EC 5-1 (professional judgment should be exercised solely for the benefit of the client free from compromising loyalties), EC 5-2 (declining employment where personal interests affect advice given under a reasonable probability standard), EC 7-7 (lawyer should abide by client's decisions on settlement), EC 7-9 (lawyer should always act in the best interests of the client, but where it seems unjust, the lawyer may ask client to forego his interest); see also MODEL RULES, *supra* note 15, at Rule 1.2(a) (lawyer shall accept client's determination on settlement), Rule 1.7(b) (declining representation where personal interests are at issue unless lawyer reasonably believes representation will not be affected or unless client consents), Rule 2.1 (lawyer must render independent judgment and candid advice on the law considering relevant moral factors). Note that the Court does not focus on the conduct of the defendant's attorney in making the settlement offer conditioned upon waiver in the first instance. See MODEL CODE, *supra* note 14, at DR 1-102(A)(5) (lawyer shall not engage in conduct prejudicial to the administration of justice); see also *infra* notes 142-43 and accompanying text.

75. *Jeff D.*, 475 U.S. at 728.

76. *Id.* at 727.

77. *Id.* at 731.

78. *Id.* at 732. In reaching this conclusion, the Court apparently built on its decision in *Marek v. Chesny*, 473 U.S. 1 (1985), where it "implicitly acknowledged" "lump sum" settlement offers represent a possible trade off between merits relief and fees. *Jeff D.*, 475 U.S. at 732-33.

The potential magnitude and alleged imprecision of fixing fees in a bifurcated settlement process appear to weigh far more heavily in the Court's analysis than do the purposes behind the Fees Act. The Court adopted the district court's position that fixing the total cost of settlement is a crucial element in the defendant's "settlement or trial" stratagem.<sup>79</sup> Perhaps, the Court observed, if attorney's fees did not loom so large as a percentage of the total obligation, removing them from merits negotiation would be less problematic. But the Court takes considerable care to point out that the obligation to pay fees often overshadows the actual damage award or cost of injunctive relief.<sup>80</sup> In the Court's estimation, because a judge must go beyond a basic "lodestar" fees calculation, adjusting for reasonable attorney expenditures in light of the results obtained,<sup>81</sup> it is possible that a large number of civil rights cases will go to trial because the parties will refuse to settle if attorney's fees liability remains an open issue.<sup>82</sup>

Finally, in the Court's view, putting attorney's fees on the table as a bargaining chip in the negotiations worked to fashion an extremely favorable relief for the plaintiffs and underscored how effective waiver can be as a weapon for the vindication of civil rights.<sup>83</sup> The Court generously does not preclude the possibility that some "extortion" deals might be unreasonable, but it holds that a case-by-case analysis is appropriate.<sup>84</sup>

While the possibility that putting fees up for grabs will serve, in the aggregate, to repel competent counsel from the civil rights arena is not ignored by the Court, the consideration is relegated to footnote

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Deferring to a defendant's legitimate interests in settling rather than going to trial, state ethics committees find lump sum settlement offers ethical. *See* District of Columbia Bar Legal Ethics Comm., Op. 147 (1985) [hereinafter D.C. Opinion 147], reprinted in 113 DAILY WASH. L. REP. 389, 394 (1985); Georgia State Bar Disciplinary Bd., Op. 39 (1984) [hereinafter Ga. Opinion 39].

79. *Jeff D.*, 475 U.S. at 734 (stating that "[m]ost defendants are unlikely to settle unless the cost of the predicted judgment, discounted by its probability, plus the transaction costs of further litigation, are greater than the cost of the settlement package"); *see also* White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 454 n.15 (1982) (noting that "[i]n considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees").

80. *Jeff D.*, 475 U.S. at 734-35.

81. *Id.* at 735-36; *see* Blum v. Stenson, 465 U.S. 886 (1984) (stating that nonprofit legal services attorneys were entitled to compensation based on prevailing market); Hensley v. Eckerhart, 461 U.S. 424 (1983) (offering lodestar approach with no precise formula for determining fees); *see also* MODEL CODE, *supra* note 14, at DR 2-106 (listing factors for determining fees).

82. *Jeff D.*, 475 U.S. at 736.

83. *Id.* at 741.

84. *Id.* at 742. Analysis should take account of "the strength of the plaintiff's case, the stage at which the settlement is effective, the substantiality of the relief obtained on the merits, and the explanations of the parties as to why they did what they did." *Id.* at 742 n.35 (quoting *Moore v. National Ass'n of Sec. Dealers*, 762 F.2d 1093, 1113 (D.C. Cir. 1985) (Wald, J., concurring)).

treatment.<sup>85</sup> Further, even if allowing fee waiver does work to reduce the pool of competent counsel, the Court suggests that Congress is best suited to address the problem.<sup>86</sup> In the Court's view, however, such an event is so "remote" that current comment would be "premature."<sup>87</sup>

#### A. Simultaneous Negotiations Cannot Be Supported By The Need To Fix Costs With Certainty

The Court's unanimous acceptance in *Jeff D.* of simultaneous negotiation of fees and merits relief does not rest easily on the fact that a defendant cannot fix his costs with certainty in the absence of simultaneous negotiations. Under case law prior to the Fees Act, the *Jeff D.* holding had some merit. For example, in *Johnson v. Georgia Highway Express, Inc.*,<sup>88</sup> the determination of reasonable fees meant weighing twelve factors.<sup>89</sup> This process, fraught with considerable subjectivity, also is followed in the *Model Code*,<sup>90</sup> *Model Rules*,<sup>91</sup> and cited in the legislative history of the Fees Act.<sup>92</sup> Recent decisions of the Supreme Court, however, fix the calculation of fees with considerably more specificity, particularly when coupled with information available upon request by the defendant during discovery and settlement negotiations.

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85. *Jeff D.*, 475 U.S. at 741 n.34.

86. *Id.* at 741-42 & n.34.

87. *Id.* at 741 n.34 (noting ACLU counsel statement that fee waivers are requested in the majority of civil rights cases litigated). Note also the opinion in *Evans*, 743 F.2d at 652, in which the Ninth Circuit mentions Levin, *supra* note 5, at 517 n.7 (stating that "virtually every legal services attorney involved in consumer cases has been confronted with such offers"). The Court's surprising conclusion in this regard comes despite its express recognition that the practice of conditioning settlement upon waiver of fees is both often practiced and widely reported. *Jeff D.*, 475 U.S. at 717 n.31.

88. 488 F.2d 714 (5th Cir. 1974).

89. The factors cited by the court are:

1. Time and labor required;
2. Novelty and difficulty of the question presented;
3. Requisite skill needed to perform properly the legal representation;
4. Preclusion of other employment due to acceptance of the instant representation;
5. Customary fee;
6. Nature of the fee arrangement, fixed or contingency;
7. Time limitations imposed;
8. The amount in controversy and results obtained;
9. Experience, reputation, and ability of the attorneys;
10. Undesirability of the case;
11. Nature and length of professional relationship with the client;
12. Awards in similar cases.

*Id.* at 717-19.

90. See MODEL CODE, *supra* note 14, at DR 2-106(B).

91. See MODEL RULES, *supra* note 15, at Rule 1.5(a).

92. See S. REP. NO. 1011, 94th Cong., 2d Sess. 6, reprinted in 1976 U.S. CODE CONG. & ADMIN. News 5908, 5913 [hereinafter 1976 U.S. CODE].

In *Hensley v. Eckerhart*<sup>93</sup> the Court adopted a lodestar approach, multiplying the number of hours reasonably expended by a reasonable hourly billing rate in order to fix the starting point for fee determination when the plaintiff only partially prevails.<sup>94</sup> The same basic formula is applied to a settlement situation.<sup>95</sup> While the lodestar result may be adjusted up or down in consideration of the results obtained,<sup>96</sup> in *Blum v. Stenson*<sup>97</sup> the Court held that adjustment upward should occur only in "exceptional" circumstances.<sup>98</sup> Normally, the lodestar computation should dictate the fee.<sup>99</sup>

The "results obtained" approach is more difficult in settlement situations such as *Jeff D.* Because *Hensley* was a case concerning fixing fees after adjudication, not settlement, an argument can be mounted that even combining *Blum* and *Hensley* does not produce the calculus necessary to determine fees with precision. After all, the very nature of the settlement presumes the possibility of including relief unrelated to the claims presented. The question arises whether an adjustment for "results obtained" means only those results which have a basis in law, such as back pay in a Title VII case,<sup>100</sup> or whether it includes all beneficial relief offered for which the lawsuit served as a catalyst.<sup>101</sup> The circuits are split on this question, although there is considerable support for the view that fees should not be awarded unless they are based on a statutory obligation.<sup>102</sup> In his dissent from the Supreme Court's denial

93. 461 U.S. 424 (1983).

94. *Id.* at 433.

95. See *Gagne v. Maher*, 455 F. Supp. 1344, 1346 (D. Conn. 1978), *aff'd*, 594 F.2d 336 (2d Cir. 1979), *aff'd*, 448 U.S. 122 (1980).

96. *Hensley*, 461 U.S. at 434.

97. 465 U.S. 886 (1984).

98. *Id.* at 897 (quoting *Hensley*, 461 U.S. at 435).

99. *Id.*

100. See 42 U.S.C. § 2000e-5(g) (1982). But see *Ross v. Saltmarsh*, 500 F. Supp. 935 (S.D.N.Y. 1980) (holding that terms of the settlement were not completely related to underlying legal claims).

101. See, e.g., *Illinois Welfare Rights Org. v. Miller*, 723 F.2d 564 (7th Cir. 1983).

102. The leading cases on both sides of this issue are *Bonnes v. Long*, 599 F.2d 1316 (4th Cir. 1979), *cert. denied*, 455 U.S. 961 (1982), and *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978). Under *Long*, attorney's fees are awarded under the applicable statutes if the relief offered in settlement is merely a causally related catalyst to the underlying claims in the lawsuit. See also *Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127, 131 (10th Cir. 1980) (holding that relief only needs to be causally related); *Dawson v. Pastrick*, 600 F.2d 70, 79 (7th Cir. 1979). *Nadeau* adopts a second prong, requiring that the defendant's conduct in response to the relief offered must be conduct required by the applicable statute on which the claims are based. *Nadeau*, 581 F.2d at 281. The *Nadeau* test has significant support in other jurisdictions and has been applied to fee shifting statutes other than the Fees Act. See *Diver v. Goddard Memorial Hosp.*, 783 F.2d 6 (1st Cir. 1986); *J&J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985); *Johnston v. Jago*, 691 F.2d 283 (6th Cir. 1982); *Williams v. Leatherbury*, 672 F.2d 549 (5th Cir. 1982); *Harrington v. DeVito*, 656 F.2d 264 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982); see also *Citizens Coalition for Block Grant Compliance, Inc. v. City of Euclid*, 717 F.2d 964 (6th Cir. 1983) (applied to Equal Access to

of certiorari to *Bonnes v. Long*,<sup>103</sup> then-Justice Rehnquist adopted this statutory obligation standard. Under this standard it is not necessary for the court to look to the merits of the case, even in a class action. Additionally, because it allows a firm basis from which the defendant can estimate his total settlement costs, the statutory obligation standard has considerable utility for curing the Court's concern about fixing costs with precision.

The Supreme Court's failure to clarify this issue notwithstanding, a court's lodestar computation can be made just as easily by the defendant to determine a "worst case" fee determination of settlement costs. From a practical standpoint, the plaintiff's attorney must identify the general subject matter of his time expenditures for particular claims; an attorney risks losing the fee award if he does not so particularize.<sup>104</sup> Because the attorney for a prevailing party cannot charge his adversary for amounts that he would not charge his client,<sup>105</sup> records must be maintained by which to fix the fee obligation with considerable precision. Thus, this billing information can be acquired from the plaintiff's counsel in order to aid the defendant in fixing costs with certainty.

Because lodestar computation provides the defendant with a worst case figure on which to base a settlement offer in all but exceptional situations, it is hard to justify rejecting a bifurcated approach founded on either a defendant's concern for fixing his fee liability with certainty or a claim that bifurcation induces a defendant to set aside a cushion from the merits relief offer in order to offset the fee calculation.<sup>106</sup>

### *B. Bargaining Chips: The Result of Competing Policies*

Any adequate accounting for the widely divergent views concerning settlements conditioned on waiver of fees ultimately rests not on professional ethics, but rather on the tension between two competing policies: the judicial policy favoring settlement of disputes on the one hand, and the legislative intent to vindicate civil rights by casting individual litigants as private attorneys general on the other.

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Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1982)); *United Handicapped Fed'n v. Andre*, 622 F.2d 342 (8th Cir. 1980) (applied to Rehabilitation Act of 1973, 29 U.S.C. § 794a(b) (1982)).

103. 455 U.S. 961, 966-67 (1982) (Rehnquist, J., dissenting). Because this formulation is applied widely and because it would give defendants all the precision necessary to fix their costs in making settlement offers, it should be adopted if, and when, *Jeff D.* is reconsidered.

104. See, e.g., *Nadeau*, 581 F.2d at 279 (stating that it is not abuse of discretion to award a low fee when the attorney has not provided "a proper basis" for determining the time spent on particular claims).

105. *Hensley*, 461 U.S. at 434 (stating that "[h]ours that are not properly billed to one's client also are not properly billed to one's adversary") (quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) (emphasis omitted)).

106. See, e.g., *Snyder*, *supra* note 16, at 312.

There are now well over one hundred federal statutes shifting the burden of paying attorney's fees away from the prevailing party.<sup>107</sup> Despite one commentator's recent quantitative analysis suggesting a quiet repeal,<sup>108</sup> the traditional rule<sup>109</sup> is that litigants are responsible for their own attorney's fees. This rule was reinforced by the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*,<sup>110</sup> at least to the extent that the legislature has not provided affirmatively for a shifting of fees. The *Alyeska Pipeline* decision reversed the trend of awarding fees to prevailing plaintiffs under a private attorneys general concept in civil rights and Title VII cases prior to the Fees Act.<sup>111</sup> Reaction to the "anomalous gaps" left by *Alyeska Pipeline* led Congress to enact the Fees Act.<sup>112</sup> Arguably, the Fees Act floated a congressional signal to encourage the Court to refocus its attention on the language of its decisions prior to *Alyeska Pipeline*. These decisions portrayed civil rights litigants as private attorneys general "vindicating a policy that Congress considered of the highest priority," and suggested a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."<sup>113</sup> It has long been settled that a plaintiff may be considered as "prevailing" through the settlement process when he has won substantially all the relief originally sought.<sup>114</sup>

The legislative policy behind the Fees Act was to remove potential

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107. See 3 M. DERFNER & A. WOLF, COURT AWARDED ATTORNEY FEES §§ 29.01-45.07 (1988) (containing list of federal statutes dealing with fee shifting); 6 ATT'Y FEE AWARDS REP., Dec. 1982, at 2 (listing federal statutes authorizing the award of attorney's fees); see also *Marek v. Chesny*, 473 U.S. 1, 44-51 (1985) (Brennan, J., dissenting) (containing list of fee-shifting statutes).

108. Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321 (1984). See generally 47 LAW & CONTEMP. PROBS. 347 (1984) (bibliography of commentary concerning fee-shifting statutes).

109. For a general discussion of the "American Rule," see *Snyder*, *supra* note 16, at 289-96.

110. 421 U.S. 240 (1975).

111. *Id.* at 269; see, e.g., *Incarcerated Men of Allen County Jail v. Fair*, 507 F.2d 281 (6th Cir. 1974); *Fowler v. Schwarzwalder*, 498 F.2d 143 (8th Cir. 1974); *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972).

112. See S. REP. NO. 1011, *supra* note 92, at 1, reprinted in 1976 U.S. CODE, *supra* note 92, at 5909; see also *Hensley*, 461 U.S. at 429. The Court in *Hensley* stated that "[i]n *Alyeska Pipeline Service Co.* . . . , this Court reaffirmed the "American Rule" that each party in a lawsuit ordinarily shall bear its own attorney's fees . . . . In response Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976." *Id.*

113. *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968). It should be noted that this case involved Title II of the Civil Rights Act of 1964. However, in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975), the Court made clear that the principles of *Piggie Park* applied to Title VII. The fee-shifting provisions are virtually identical.

114. S. REP. NO. 1011, *supra* note 92, at 4-5, reprinted in 1976 U.S. CODE, *supra* note 92, at 5912 (explaining that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief"). See *Maher v. Gagne*, 448 U.S. 122 (1980); *Ashley v. Atlantic Richfield Co.*, 794 F.2d 128 (3d Cir. 1986).

impediments to individuals victimized by discrimination. More effective than legislation alone,<sup>115</sup> Congress enacted the Fees Act as a necessary ingredient to obtain compliance with civil rights laws.<sup>116</sup> Without the award of attorney's fees, potential plaintiffs who are disadvantaged economically could not afford to engage competent attorneys to represent them in protracted civil rights lawsuits.<sup>117</sup> By ordinarily awarding reasonable fees to a prevailing plaintiff for results obtained, Congress intended for the Fees Act to act as an incentive to members of the private bar to undertake civil rights cases.

If motivating the private bar to engage in civil rights litigation was the policy behind the Fees Act, then can it reasonably be denied that the attorney has an equitable interest in the fee? After all, attorneys who cannot count on reasonable compensation for their efforts are not likely to continue to involve themselves in the civil rights arena. Motions for attorney's fees are made in the name of the party, but written opinions of the Court contain numerous examples of language acknowledging that the fee is really for the attorney.<sup>118</sup> Yet, despite these exam-

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115. Using public education as an analogy, one only needs to recount the painfully slow evolution of the law during the six decades after *Plessy v. Ferguson*, 163 U.S. 537 (1896), to grasp the undercurrents at play which justified congressional motivation to use the Fees Act as an adjunct to mere legislation. See, e.g., *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Education*, 347 U.S. 483 (1954).

116. S. REP. NO. 1011, *supra* note 92, at 2, reprinted in 1976 U.S. CODE, *supra* note 92, at 5909-10. As stated by the report of the Senate Committee:

[The Fees Act] is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866. . . . All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

*Id.*

117. *Id.*, reprinted in 1976 U.S. CODE, *supra* note 92, at 5910. As the Senate Committee Report on the Fees Act noted:

In many cases . . . , the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

*Id.*

118. See *Maher v. Gagne*, 448 U.S. 122, 126 (1980) (noting that fees were paid to "respondent's counsel"); *Hutto v. Finney*, 437 U.S. 678, 693 (1978) (adding that fees went "to counsel for the prevailing parties"); *Miller v. Amusement Enters., Inc.*, 426 F.2d 534, 539 (5th Cir. 1970) (stating that fee awards "compensate for legal services rendered and will not go to the litigants"); *Regalado v. Johnson*, 79 F.R.D. 447, 451 (N.D. Ill. 1978) (stating that "[a fee request,] although made in the name of the plaintiff, is really one by the attorney"); cf. *James v. Home Constr. Co.*, 689 F.2d 1357, 1358-59 (11th Cir. 1982) (noting that an action under the Truth in Lending Act "creates a right of action for attorneys to seek fees awards after settlement of the plaintiff's claim" and "it is the attorney who is entitled to fee awards in a TILA [Truth in Lending Act] case, not the client").

The relevant attorney's fees section of the Truth in Lending Act, Puh. L. No. 90-321,

bles, when directly addressing the issue, the weight of authority adopts the view that the award of attorney's fees is an interest accruing to the party, not the lawyer.<sup>119</sup> If, by holding form over substance, fee awards belong to the client, and if he is free to waive them to procure more attractive substantive relief, then the purpose of the Fees Act is clearly at risk.

Set against the argument that the private attorneys general concept ultimately is made moot if competent counsel cannot be attracted to civil rights cases is the judicial policy that favors settlements. This sentiment runs through case law,<sup>120</sup> the Federal Rules of Civil Procedure,<sup>121</sup> and the Federal Rules of Evidence.<sup>122</sup> The preference for settlement rather than litigation is applicable equally to civil rights cases.<sup>123</sup> Importantly, even circuits which rejected simultaneous negotiations prior to *Jeff D.* conceded that the settlement of disputes must be encouraged given increasingly crowded court dockets.<sup>124</sup> Indeed, com-

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§ 130(a)(2), 82 Stat. 146, 157 (1968) (codified as amended in scattered sections of 15 U.S.C.), reads: “[A]ny creditor who fails [to comply] . . . is liable. . . [for] a reasonable attorney's fee as determined by the court.”

119. In *Brown v. General Motors Corp.*, 722 F.2d 1009 (2d Cir. 1983), an attorney brought an action in his own name for fees under the Fees Act. The client had prevailed through settlement. However, the attorney was discharged previously and replaced. The court stated that “[u]nder the Act it is the prevailing party rather than the lawyer who is entitled to attorney's fees.” *Id.* at 1011. In addition, the court saw a conflict of interest where client and attorney have independent entitlements in the same action. In that situation, the attorney could thwart the desires of his client by refusing to settle unless his fees were protected. The court saw no reason to believe that the Fees Act was meant to diminish the attorney's duty of undivided loyalty to the client. *Accord Willard v. City of Los Angeles*, 803 F.2d 526 (9th Cir. 1986).

120. See *Jeff D.*, 475 U.S. at 738 n.30 (assuming 90% of individual civil rights cases settle); *Blum v. Stenson*, 465 U.S. 886, 902 n.19 (1984) (stating that courts have “a responsibility to encourage agreement”); *Patterson v. Stovall*, 528 F.2d 108, 114 (7th Cir. 1976) (if settlement is reached, then the court should not determine merits); *Heit v. Amrep Corp.*, 82 F.R.D. 130, 132 (S.D.N.Y. 1979) (great weight given the policy favoring settlement).

121. FED. R. CIV. P. 16(c)(7) (authorizing a pretrial conference which, among other purposes, may seek out “the possibility of settlements . . . to resolve the dispute”).

122. FED. R. EVID. 408 advisory committee's note (stating that offers to compromise are not admissible to evidence because of the “public policy favoring the compromise and settlement of disputes”); see also E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 274 (3d ed. 1984).

123. See *Lazar v. Pierce*, 757 F.2d 435, 440 (1st Cir. 1985) (stating that “removal of attorney's fees from the arena of voluntary and ethical negotiation in civil rights cases would present an unnecessary discouragement to nonlitigious disposition of these controversies”); *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826, 846 (5th Cir. 1975) (stating that “it cannot be gainsaid that conciliation and voluntary settlement are the preferred means for resolving employment discrimination disputes”), cert. denied, 425 U.S. 944 (1976); *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970) (stating that “the central theme of Title VII is ‘private settlement’ as an effective end to employment discrimination”); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968) (noting that there is “great emphasis in Title VII on private settlement . . . without litigation”).

124. *Prandini v. National Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1977); see also *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. Unit A Feb.) (stating that “our limited review rule is a

ments by some jurists boldly assert that the policy favoring settlement should take precedence over the congressional purposes behind the Fees Act.<sup>125</sup>

The decision in *Jeff D.* deflects the thrust of attorney Johnson's ethical arguments and parries with its own argument based on statutory construction. Clearly, the Fees Act does not speak directly to the problem of fee waivers, but the Court makes no effort to go beyond the statute's mere "bark." Just as easily, the statute could have been read to find whatever is within the Act's reason is within the Act.<sup>126</sup> It is valid statutory construction to hold that there is a distinction between words making fees discretionary and words making them mandatory.<sup>127</sup> But it is equally valid to hold that words granting discretion may be read as mandatory if doing so will effectuate the statute's purpose or public policy.<sup>128</sup>

By deciding the case on the basis of statutory construction, the Court chooses an arena that provides it the utmost in flexibility. By failing to look at the case in terms of the ethics of the defendant's conduct, the court merely chooses its own policy favoring settlement, rather than the congressional policy to effectuate the vindication of civil rights. Adventure into ethics would have forced the Court to hold that coerced fee waiver, while not unethical, is a practice it surely must find normatively repugnant.

#### IV. UNDER THE HOLDING IN *JEFF D.*, THERE IS NO SOLUTION TO THE "EXTORTION" DEAL

##### A. Professional Ethics Do Not Support Sanctions For "Extortion" Deals

If settlement offers conditioned upon fee waiver pit the judicial policy of settlement against the legislative purpose behind the Fees Act in a sort of tug-of-war, then stretched between them are the *Model Code* and *Model Rules*. In his dissenting opinion to *Jeff D.*, Justice Brennan proposes alternative "avenues of relief" for attorneys faced with an "extortion" deal. He solicits the state bar ethics committees to

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product of the strong judicial policy favoring the resolution of disputes through settlement"), *cert. denied*, 459 U.S. 828 (1982).

125. Chicano Police Officer's Ass'n v. Stover, 624 F.2d 127, 133 (10th Cir. 1980) (Seth, C.J., dissenting) (stating that "[a]gain, the fact that fees are authorized should not assume such importance as to overcome accepted methods for settlement and overshadow the merits").

126. See, e.g., *Flynn v. Prudential Ins. Co.*, 207 N.Y. 315, 100 N.E. 794 (1913).

127. See, e.g., *Koch & Dryfus v. Bridges*, 45 Miss. 247 (1871).

128. See, e.g., *Jennings v. Suggs*, 180 Ga. 141, 141-42, 178 S.E. 282, 283 (1935); *Ewing v. Union Cent. Bank*, 254 Ky. 623, 627, 72 S.W.2d 4, 7 (1934).

take action making such offers unethical,<sup>129</sup> citing with favor a New York City bar opinion.<sup>130</sup> Although it seems clear the *Jeff D.* decision does not preempt state bar ethics committees from accepting Justice Brennan's invitation,<sup>131</sup> recent decisions indicate that many bar ethics committees will refuse his suggestion.

In *Marek v. Chesny* Chief Justice Burger asserted that there is no evidence that Congress, in enacting the Fees Act, had the intention to treat civil rights claims any differently from other civil claims insofar as settlement is concerned.<sup>132</sup> If that characterization is accurate, it is difficult to see why coerced fee waivers are a matter of ethics, and not simply a fees problem of the type which shrouds all attorney-client relationships. Both the *Model Code* and the *Model Rules* specifically place the decision whether to accept or reject a settlement offer in the hands of the client, not the attorney.<sup>133</sup> If specific *Model Code* and *Model Rules*' provisions placing settlement offers in the client's hand are to co-exist peacefully with the purposes of the Fees Act, then the assertion in *Marek* that civil rights settlements are on no different footing than other civil actions has some force. When the ABA took pains to draft specific provisions, one would expect them to take precedence over more general provisions. Because an attempt to include a ban of coerced fee waivers in the *Model Rules* was made and rejected<sup>134</sup> after the enactment of the Fees Act, the *Marek* assertion cannot be dismissed lightly. A number of state bar ethics committees considered the problem of simultaneous negotiation of fees and fee waiver prior to *Jeff D.*, although the decisions lacked any consensus on the issue.

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129. *Jeff D.*, 475 U.S. at 765 (Brennan, J., dissenting).

130. *Id.*; see *infra* note 133 and accompanying text.

131. See Comment, *Evans v. Jeff D. and the Proper Scope of State Ethics Decisions*, 73 V.A.L.REV. 783 (1987) (finding that *Jeff D.* undermines, but does not preempt, state bar ethics decisions on fee waivers).

132. *Marek v. Chesny*, 473 U.S. 1, 10 (1985) (stating that plaintiffs can give up their statutory entitlement to fees as part of the settlement arrangement).

133. The *Model Code* contains Canons which are "statements of axiomatic norms," Ethical Considerations which are "aspirational in character," and the Disciplinary Rules "below which no lawyer can fall without being subject to disciplinary action." The *Code's* only direct comment on settlements is contained within an ethical consideration and states:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer . . . .

MODEL CODE, *supra* note 14, at EC 7-7.

Unlike the *Code*, the *Model Rules'* comment on accepting settlements is not aspirational, but mandatory. MODEL RULES, *supra* note 15, at Rule 1.2(a) (stating that "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter").

134. See A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 506-07 (2d ed. 1984).

### 1. Ethics Opinions Prior to *Jeff D.*

An early position taken by the Ethics Committee of the Association of the Bar of the City of New York<sup>135</sup> adopted the stance taken in *Prandini* and found simultaneous negotiations and fee waivers "per se" unethical. Similarly, the District of Columbia found unethical offers conditioned upon complete fee waiver, but, on the other hand, found acceptable lump sum settlement offers that failed to differentiate between fees and merits relief.<sup>136</sup> In direct contrast, ethics committee opinions from Virginia,<sup>137</sup> Connecticut,<sup>138</sup> and New Mexico<sup>139</sup> found neither simultaneous negotiations nor fee waiver unethical. The vastly divergent opinions on simultaneous negotiation and fee waivers is evidence of the two competing policies: the judicial policy favoring settlement of disputes versus the legislative intent to vindicate civil rights.

Close scrutiny of the New York ethics opinion issued prior to *Jeff D.* reveals a syllogism based on the Fees Act itself. Because the Fees Act encourages a private attorneys general concept for the vindication of civil rights, and coerced fee waiver by civil rights defense attorneys undermines the congressional purpose behind the Fees Act, then settlements conditioned upon fee waiver impede the administration of justice and are unethical. Support for the committee's reasoning is found in DR 1-102(A)(5) of *Model Code*, a rule which prohibits conduct that is prejudicial to the administration of justice.<sup>140</sup> The use of DR 1-102(A)(5) to make "extortion" deals unethical is a strained interpretation, at best. Cases that have analyzed attorney conduct in light of this regulation generally have been concerned with either direct affronts to the court or with illegality.<sup>141</sup>

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135. Comm. on Professional and Judicial Ethics of the New York City Bar Ass'n, Op. 80-94 (1980) [hereinafter N.Y. Opinion 80-94], reprinted in *Settlement Offers in Public Interest Litigation Conditional On Waiver of Statutory Fees*, 36 REC. A.B. CITY N.Y. 507 (1981) [hereinafter *Settlement Offers*], reaffirmed, Op. 82-80 (1982) [hereinafter N.Y. Opinion 82-80] (forced waiver interferes with the administration of justice and the ability to make counsel available to those who cannot afford it); see also Maryland State Bar Ass'n, Op. 85-74 (1985) (finding that settlements based on fee waiver are prejudicial to the administration of justice).

136. D.C. Opinion 147, *supra* note 78, reprinted in 113 DAILY WASH. L. REP., 389, 389 (1985); see also Ga. Opinion 39, *supra* note 78 (lump sum offers not unethical).

137. Virginia State Bar, Op. 536 (1983); see also Tennessee State Bar, Op. 85-F-96 (1985) (comparable provision).

138. Connecticut Comm. on Professional Ethics, Informal Op. 85-19 (1985).

139. State Bar of New Mexico, Op. 1985-3 (1985) [hereinafter N.M. Opinion 1985-3].

140. MODEL CODE, *supra* note 14, at DR 1-102(A)(5).

141. See, e.g., *In re Snyder*, 472 U.S. 634 (1985) (stating that disrespectful letter to the court not a DR 1-102(A)(5) violation); *In re Evans*, 801 F.2d 703 (4th Cir. 1986) (noting that letter accusing magistrate of incompetence found to be a DR 1-102(A)(5) violation), cert. denied, 107 S. Ct. 1349 (1987); Standing Comm'n. on Discipline v. Ross, 735 F.2d 1168 (9th Cir.) (concluding that malicious, frivolous lawsuits against the state violate DR 1-105(A)(5)), cert. denied, 469 U.S. 1081 (1984). This is true even in New York which, prior to *Jeff D.*, had an exacting prohibition against

No more compelling an argument can be constructed by consulting the *Model Rules'* provisions comparable to DR 1-102(A)(5). Rule 8.4(d) of the *Model Rules* also states that it is professional misconduct to engage in conduct prejudicial to the administration of justice.<sup>142</sup> However, the scope of Rule 8.4(d) does not go beyond the constraints of DR 1-102(A)(5), except perhaps to include as professional misconduct the practice of law in violation of a jurisdiction's regulations.<sup>143</sup> A companion provision, Rule 8.4(a), states that it is misconduct to induce another to violate any of the *Model Rules*.<sup>144</sup> On the surface, combining Rule 8.4(a) and Rule 8.4(d) seems to suggest a method for finding "extortion" deals unethical. It hardly can be denied that the term "induce" means to influence an act or conduct, or to incite by motive. Because it is a violation of the *Model Rules* not to abide by the client's settlement decision,<sup>145</sup> it may be asserted persuasively that the defendant's offer of settlement conditioned on the plaintiff's attorney renouncing an equitable interest in his fee is inducement not to accept his client's settlement decision once made. At the least, the defendant's conditional offer of settlement induces the attorney to exert pressure during the making of the plaintiff's decision. Unless one is prepared to argue that clients, especially economically disadvantaged civil rights plaintiffs, do not lean heavily upon their attorney for advice, an "extortion" deal appears to be misconduct under the *Model Rules*. Unfortunately, this analysis does not withstand scrutiny any better than does the "administration of justice" argument. The few reported cases ruling on the applicability of Rule 8.4(a) have involved conduct bordering on illegality.<sup>146</sup> The hold-

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"extortion" deals. *In re Burgess*, 129 A.D.2d 252, 517 N.Y.S.2d 648 (1987) (grand larceny); *In re Devine*, 128 A.D.2d 1024, 513 N.Y.S.2d 844 (1987) (refusing to comply with subpoena).

142. MODEL RULES, *supra* note 15, at Rule 8.4(d).

143. See MODEL CODE, *supra* note 14, at DR 3-101(B), EC 3-9, EC 8-3. It is important to note that in the proposed final draft of the *Model Rules*, drafters sought to delete the phrase "prejudicial to the administration of justice" in the reformulation of DR 1-102(A)(5) into Rule 8.4(d). The drafters felt that it was redundant and vague. Rules 3.1 to 3.9, 8.2, and 8.3 covered in precise terms what was meant by the phrase contained in DR 1-102(A)(5). For example, the drafters cited the following cases as examples subsumed under the "administration of justice" concept: *State v. Nelson*, 210 Kan. 637, 504 P.2d 211 (1972) (holding that false statements concerning judicial officers covered by Rule 8.2); *In re Howe*, 257 N.W.2d 420 (N.D. 1977) (concluding that false bar admissions statements covered in Rule 8.1); and *Toledo Bar Ass'n v. Fell*, 364 N.E.2d 872 (Ohio 1977) (stating that deception of the court covered in Rule 3.3). MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(d) legal background (Proposed Final Draft, May 30, 1981) [hereinafter MODEL RULES OF CONDUCT].

144. MODEL RULES, *supra* note 15, at Rule 8.4(a).

145. *Id.* at Rule 1.2(a).

146. See, e.g., *In re Edison*, 108 N.J. 464, 530 A.2d 1246 (1987) (advising client to manufacture false evidence). Rule 8.4(a) is similar to DR 1-102(A)(1) (lawyer shall not violate a Disciplinary Rule), DR 1-102(A)(2) (lawyer shall not circumvent a Disciplinary Rule through another person), DR 2-103(E) (lawyer shall not accept employment resulting from another's conduct violating a Disciplinary Rule), and DR 7-102 (proscriptions against zealous representation which would

ing in *Jeff D.* instructs the bar that "extortion" deals are not illegal.

Assuming, *arguendo*, that the New York City Bar's syllogism represents valid, sound reasoning, the "administration of justice" argument has been countered. The dissent in that opinion argued persuasively that "extortion" deals raise questions of law, not questions of ethics. Whether the determination of ethics questions and legal questions should be addressed separately appears to be an open issue, but Supreme Court decisions suggest that the two areas should remain distinct.<sup>147</sup>

There is more than an intuitive attraction to the notion that ethics committee decisions should be restricted to matters clearly prohibited by the governing code of ethics, retaining questions of law for the province of the court. Comments to Rule 5.1 of the *Model Rules* state that a lawyer has no disciplinary liability, other than through Rule 5.1 and Rule 8.4, for the conduct of lawyers with whom he is associated. It further states that civil and criminal liability for the conduct of another lawyer is a question of law, beyond the scope of the *Rules*.<sup>148</sup>

The *Model Code* does not speak specifically to fee waivers. In addition, other than "administration of justice" under the *Model Code* and "inducement" under the *Model Rules*, it is difficult to isolate other support which would find that "extortion" deals are unethical. Critics of "extortion" deals may seek comfort in the argument that fee waivers reduce access to legal representation by making compensation in civil rights cases less attractive, thus ensuring the plaintiff's attorneys will not practice in this field. DR 2-108(B) of the *Model Code* prohibits lawyers from entering into agreements that restrict their right to practice law.<sup>149</sup> In addition, EC 2-1 of the *Model Code* calls for lawyers to assist

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condone fraud, malicious injury, illegal acts or false evidence). *MODEL CODE*, *supra* note 14, at DR 1-102(A)(1), DR 1-102(A)(2), DR 2-103(E), DR 7-102. All of these provisions involve illegality or depend on a specific disciplinary sanction. *Jeff D.* determined that coerced fee waivers were not illegal, and, therefore, no disciplinary rule unambiguously encompasses such offers.

147. The Supreme Court is seemingly hesitant to enter determinations concerning state ethics regulation. *See Nix v. Whiteside*, 475 U.S. 157, 176 (1986) (Brennan, J., concurring). Justice Brennan stated that "[t]his Court has no constitutional authority to establish rules of ethical conduct for lawyers practicing in the state courts. Nor does the Court enjoy any statutory grant of jurisdiction over legal ethics."

148. *MODEL RULES*, *supra* note 15, at Rule 5.1 comment. Rule 5.1 involves the ethical responsibility of partners and supervisory lawyers in a law firm. If sanctions are limited, a lawyer cannot be sanctioned for the acts of opposing counsel. On the constraints against ethics committees determining questions of law, see N.Y. Opinion 82-80, *supra* note 135 (dissent) (stating that "legislative purpose . . . raises only issues of law, rather than ethics, and is thus beyond the jurisdiction of this Committee"). *See also* Ga. Opinion 39, *supra* note 78 (stating that "to the extent that the . . . questions involve interpretations of . . . law . . . the state Disciplinary Board is without authority to consider those aspects").

149. *MODEL CODE*, *supra* note 14, at DR 2-108(B).

in making counsel available to the public.<sup>150</sup> Nevertheless, both DR 2-108(B) and EC 2-1 seem ill-suited to remedy the consequences of "extortion" deals.<sup>151</sup>

The *Model Code's* aspirational call to make lawyers available superficially seems attractive. ABA notes to EC 2-1 suggest that severe gaps separate the public's need for legal services and the delivery of those services.<sup>152</sup> Several aspects of this provision, however, particularly are noteworthy. First, this call to ensure the availability of counsel is only aspirational in nature; therefore, it does not serve as a source on which to base lawyer sanctions. Second, the Disciplinary Rules in the section of the *Model Code* containing EC 2-1 relate to lawyer advertising, statements of specialization, recommending professional employment, and the reasonableness of fees.<sup>153</sup> It is doubtful, therefore, that architects of the *Model Code* contemplated the problem of settlement offers conditioned upon waiver of fees when they drafted this section of the *Model Code*. If the Court construed the Fees Act narrowly, presumably it also would construe narrowly various aspirational code provisions. Third, this analysis appears susceptible to a counterargument: a lawyer should not complain about fee waiver because he fulfilled his obligation to make counsel available, even if counsel availability means an attorney's service is a sacrificial conduit in order for the client to obtain sufficient merits relief.<sup>154</sup>

Finally, the state bar ethics committees<sup>155</sup> have relied on *Model Code* provision EC 2-25<sup>156</sup> to find unethical a defendant's attorney's offer of an "extortion" deal. Similar to EC 2-1, EC 2-25 calls for lawyers

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150. *Id.* at EC 2-1.

151. The prohibition on agreements which restrict the practice of law historically are concerned with affirmative agreements by lawyers not to represent other individuals similarly situated to settling clients, or with covenants restricting the geographic location of law practice. Moreover, if that reasoning is applied to "extortion" deals, the same reasoning should apply any time a lawyer fails to receive compensation. Any failure to receive compensation reduces an attorney's flexibility in accepting future employment opportunities. *Id.* at DR 2-108(A) n.93; see also MODEL RULES, *supra* note 15, at Rule 5.6(a) comment [1], Rule 5.6(b) comment [2].

152. ABA notes to EC 2-1 state: "[O]ne reason . . . is poverty and the consequent inability to pay legal fees," and "[t]he maxim, 'privilege brings responsibilities,' can be expanded to read, exclusive privilege to render public service brings responsibility to assure that the service is available to those in need of it." MODEL CODE, *supra* note 14, at EC 2-1 nn.3-4 (citing Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 UCLA L. Rev. 438, 443 (1965)).

153. See MODEL CODE, *supra* note 14, at DR 2-101 to DR 2-107.

154. *Id.* at EC 8-3 (stating that "[t]hose persons unable to pay for legal service should be provided needed services").

155. See, e.g., D.C. Opinion 147, *supra* note 78, reprinted in 113 DAILY WASH. L. REP., 389, 389 (1985); N.Y. Opinion 82-80, *supra* note 135, reaffirming N.Y. Opinion 80-94, *supra* note 135, reprinted in *Settlement Offers*, *supra* note 135, at 507.

156. MODEL CODE, *supra* note 14, at EC 2-25.

to support all proper efforts to provide counsel for those who cannot pay for it. Presumably, potential use of "extortion" offers by the defendant will result in fewer attorneys who are willing to represent indigent plaintiffs, and, therefore, undercuts the policy promoted by the Fees Act. However, construing EC 2-25 in this manner is unpersuasive and easily can be challenged. Indeed, the same provision states that "[e]very lawyer . . . should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer . . .".<sup>157</sup> It can be asserted effectively that even if faced with a coerced fee waiver, the plaintiff's counsel should not complain because he is fulfilling his EC 2-25 *pro bono* obligations. Thus, the public policy argument that the negative aggregate effect of such attorney sacrifices will detract, over time, from the basic purpose of the Fees Act seems no stronger as a matter of ethics than it does when construing the Fees Act as a matter of law.

Because the *Code* originally was adopted in 1970, some six years before the enactment of the Fees Act, it is not surprising that it fails to address specifically coerced fee waivers. On the other hand, both the *Model Code* and *Model Rules* do place the settlement decision in the client's hands.

Importantly, the New York City ethics opinion makes it unethical conduct for the defendant's attorney to propose "extortion" deals in the first instance. It, however, does not address itself to, or provide relief from, the ethical dilemma created for the plaintiff's counsel once an offer actually is made. In a class action, this defect could be overcome if such offers were unethical. Presumably the court's responsibility for class actions under Rule 23(e) requires it to reject any unethical settlement offers conditioned on waiver of fees and to initiate disciplinary action against the defendant's counsel.<sup>158</sup> However, only about one percent of civil rights actions seek class relief.<sup>159</sup> The resolution of conditional settlement offers is not clear in individual civil rights actions.

If a consent decree is sought, and the judge is aware of a fee "extortion" offer made by the defendant's counsel, he has a responsibility to institute disciplinary measures.<sup>160</sup> But if the judge is not aware, or if the

157. *Id.*

158. See CODE OF JUDICIAL CONDUCT Canon 3(B)(3) (1972) [hereinafter JUDICIAL CONDUCT] (stating that "[a] judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware").

159. See *Jeff D.*, 475 U.S. at 738 n.30 (citing ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, AN ANALYSIS OF THE WORKLOAD OF THE FEDERAL COURTS FOR THE TWELVE MONTH PERIOD ENDED JUNE 30, 1985 (1986)).

160. See *United States v. Vague*, 697 F.2d 805 (7th Cir. 1983) (stating that controversy over fee charge should be referred to ethics committee); see also *Rosquist v. Soo Line R.R.*, 692 F.2d

defending party himself makes the offer, the court's intervention is an unlikely source of relief. Once an offending offer is made, the plaintiff's counsel's general duty of loyalty and EC 7-7 place the settlement decision with the client.<sup>161</sup> It appears to be impossible to deny the attorney's ethical obligation once a settlement offer conditioned upon fee waiver reaches the client's ears. Thus, perhaps the Fees Act can be construed most properly as a mere "bargaining chip," one used at an individual client's discretion.<sup>162</sup> Additionally, perhaps one should dismiss as mere conjecture the negative long term aggregate effect "extortion" deals will have on the private attorneys general concept in the vindication of civil rights.<sup>163</sup>

## 2. Ethics Decisions in the Aftermath of *Jeff D.*

The *Jeff D.* decision leaves no room to deny that the syllogistic reasoning on which the early New York City bar opinions were based has been undermined severely. While the Fees Act may exist to encourage a private attorneys general concept to vindicate civil rights, the majority in *Jeff D.* held that settlement offers conditioned upon fee waiver by defendants do not undermine what Congress plainly intended.<sup>164</sup> According to the majority, fees may be a bargaining chip, or a weapon, but they certainly are not an automatic entitlement.<sup>165</sup>

If the second premise of the syllogism is eliminated, the conclusion that the practice of coercing fee waiver is unethical cannot be reached. Recognizing that its logic had been shattered, the Ethics Committee of the New York City Bar in May, 1987, retracted its earlier opinions

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1107, 1111 (7th Cir. 1982) (noting that "courts [have] inherent right to supervise the members of its bar"). Possibly, if plaintiff is assertive and well versed in his rights, upon plaintiff's request a court may intervene in settlement negotiations where the attorney is believed not to be acting in the plaintiff's interests. See *Chesny v. Marek*, 720 F.2d 474, 478 (7th Cir. 1983) (dictum), *rev'd*, 473 U.S. 1 (1985).

161. Under EC 7-8 plaintiff's counsel may urge his client not to accept the offer because it is morally unjust, but that option is open no matter what the legal or ethical status of "extortion" deals. See MODEL CODE, *supra* note 14, at EC 7-8.

162. See, e.g., *Moore v. National Ass'n of Sec. Dealers*, 762 F.2d 1093, 1099 (D.C. Cir. 1985) (stating that "waiver provides the plaintiff with a bargaining chip"); see also *id.* at 1112 (Wald, J., concurring) (noting that fees as bargaining chips can be used to the advantage of plaintiff and defendant). But see *id.* at 1112-13 (Wald, J., concurring) (commenting that "I agree that [the policy of routine fee waiver offers] is not only unfair to opposing counsel, but over the long haul would deter attorneys from bringing meritorious Title VII claims and thereby frustrate an entitlement that Congress deemed vital for the success of the statute"); *id.* at 1114 (Wright, J., dissenting) (stating that "[b]ecause I believe that permitting fees and costs to become a bargaining chip in Title VII negotiations undermines the important purposes of statutory fee shifting, I dissent").

163. See *id.* at 1116-18 (Wright, J., dissenting).

164. *Jeff D.*, 475 U.S. at 741-43.

165. *Id.*

holding unethical simultaneous negotiation and coerced fee waivers.<sup>166</sup> The Committee continued to use DR 1-105(A)(5) and EC 2-25 as the foundation for its opinion. Like *Jeff D.*, the new provision permits fee waiver offers on a case-by-case basis. Determination of a proper situation is accomplished in light of nine listed factors.<sup>167</sup> Interestingly, the Committee's opinion seeks to accommodate the plaintiff's counsel by stating that he is not required ethically to accept a waiver of attorney's fees as a condition of settlement.<sup>168</sup>

In deference to *Jeff D.*, the New York opinion retreats noticeably from its earlier decisions that follow the reasoning in *Prandini*. If the decisions on settlement offers are to accept or to reject, and if the attorney is not required to accept, then the opinion ultimately provides that it is not unethical either to offer an "extortion" deal or to refuse it. In reaching its conclusion, the Committee presumably avoids the *Model Code*'s provision that places the settlement decision in the hands of the client by underscoring the fact that the provision is only aspirational, not mandatory. If this distinction is the basis for the Committee's conclusion, it is difficult to see how the decision can be supported as a model for use in states that have adopted the *Model Rules*. To do so requires reading the *Model Code* and *Model Rules* to reach completely opposite results applied to the same facts. This result particularly is troublesome because, as of January 29, 1988, a majority of states have adopted the *Model Rules*.<sup>169</sup>

Traditionally, the prevailing party, not the lawyer, was entitled to recover attorney's fees.<sup>170</sup> Moreover, the client's authority to make set-

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166. Comm. on Professional and Judicial Ethics of the New York City Bar Ass'n, Op. 87-4 (1987) [hereinafter N.Y. Opinion 87-4], withdrawing N.Y. Opinion 80-92, *supra* note 135, reprinted in *Settlement Offers*, *supra* note 135, at 507, reaffirmed, N.Y. Opinion 82-80, *supra* note 135.

167. N.Y. Opinion 87-4, *supra* note 166. The nine factors enunciated by the committee are: (1) whether the lawyer expects compensation; (2) whether the client is represented by the legal services organization; (3) whether a retainer agreement anticipates fee waiver; (4) whether the fee arrangement is contingent; (5) whether a money judgment or injunction is sought; (6) whether it is a class action requiring a Rule 23 determination by the court; (7) whether the defendant seeks waiver or merely simultaneous negotiation; (8) whether there is a clear legislative policy to shift fees away from the prevailing party; and (9) whether the waiver is initiated by the plaintiff or defendant.

*Id.*

168. *Id.*

169. Kansas, on January 29, 1988, was the twenty-sixth state to adopt the *Model Rules* to be effective March 1, 1988. 4 Law. Man. on Prof. Conduct (ABA/BNA) No. 2, at 34 (Feb. 17, 1988). Interestingly, Kansas modifies Rule 1.5 so that the court is required, upon application of an attorney's client, to assess a retainer agreement for the reasonableness of fee provisions. If fee provisions are not reasonable, the court must set reasonable fees. It is unclear whether this provision will cover retainer provisions making the client responsible for fees in the event they are waived pursuant to settlement negotiations within a § 1988 context. *Id.*

170. *Brown v. General Motors Corp.*, 722 F.2d 1009 (2d Cir. 1983).

tlement decisions is mandatory under the *Model Rules*. A client can disavow a settlement to which he did not agree,<sup>171</sup> or sue his lawyer for malpractice if the settlement is enforced.<sup>172</sup> Consequently, despite a lawyer's right<sup>173</sup> to bring a generally unsuccessful<sup>174</sup> action for fees after a consent decree is entered, it appears the long standing principle giving clients, not lawyers, the authority to make settlement decisions continues in force despite an included fee waiver provision. It is one thing for an ethics committee to try to stretch the provisions of the *Model Code* to cover conduct it fails to address specifically.<sup>175</sup> It is quite another thing to shrink coverage by saying it is not unethical for a plaintiff's attorney to reject an "extortion" deal when such actions are denounced by case law, forbidden by the *Model Rules*, and condemned under EC 7-7 of the *Model Code*.

It is a failing proposition to base arguments against the result in *Jeff D.* by using the codes of professional ethics. Settlement offers that extort fee waivers may violate our sense of normative values, but as a matter of right conduct, the *Model Code* and *Model Rules* fail to address the issue fully. The new ruling from the New York City Bar simply confuses an already difficult dilemma. A better response appears to be to tip the balance in favor of the legislative purpose behind the Fees Act, that is the vindication of civil rights, and away from the judicial policy favoring settlement. In *Jeff D.* the Court continues the trend in retreating from just such an opportunity to vindicate civil rights.

### B. Traditional Approaches to the Dilemma Left by *Jeff D.*

Any traditional solution to the *Jeff D.* dilemma must recognize the continuing tension between the legislative policy behind the Fees Act and the judicial policy encouraging settlement. The success of any proposed solution also must start with the assumption that like cases ought to be treated alike.<sup>176</sup> The Fees Act serves a single purpose in all civil rights actions, notwithstanding the various nuances among them. Thus, the viability of any proposal must be examined in light of hypothetical circumstances that test its ability to serve the prophylactic function of the Fees Act without violating the rule laid down in *Jeff D.* A hypothetical backdrop against which to view solutions to *Jeff D.* is that of the

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171. See, e.g., *Johnson v. Tesky*, 57 Or. App. 133, 643 P.2d 1344 (1982).

172. See, e.g., *Capital Dredge & Dock Corp. v. City of Detroit*, 800 F.2d 515 (6th Cir. 1986); *Glazer v. J.C. Bradford & Co.*, 616 F.2d 167 (5th Cir. 1980).

173. See, e.g., *Lipscomb v. Wise*, 643 F.2d 319 (5th Cir. Unit A Apr. 1981).

174. See, e.g., *Lazar v. Pierce*, 757 F.2d 435 (1st Cir. 1985).

175. New York stretched the language of the *Model Code* by trying to use DR 1-102(A)(5) to support finding fee waiver unethical. See N.Y. Opinion 87-4, *supra* note 166.

176. See generally H. HART, THE CONCEPT OF LAW (1961).

economically disadvantaged individual plaintiff, represented by a private, nonprofit legal aid society. This hypothetical eliminates some solutions which neglect the premise that like cases should be treated alike. For example, positing an individual plaintiff, rather than a class, eliminates the court's Rule 23 responsibility in class actions to review proposed settlements for fairness. Additionally, any increase in court supervision that is proposed as part of a solution in individual actions raises the problem of crowded dockets, already a factor in the judicial policy favoring settlement. Positing an economically disadvantaged plaintiff renders far more tenuous retainer provisions that make the plaintiff responsible to pay any fee waived, agreements not to waive, and assignment of interest in the fee. Both before and after the *Jeff D.* decision, commentators offered proposals to deal with the "ethical" dilemma presented by the "extortion" deal. Review of the various potential solutions, however, fails to reveal an approach that meets the formidable task of protecting fees without making coerced fee waivers *per se* illegal.

### 1. Rule 16 Pretrial Conferences

According to recent commentary by Goldstein,<sup>177</sup> even in individual civil rights actions the hardship of "extortion" deals can be eliminated by using a Rule 16<sup>178</sup> pretrial conference to consider settlement negotiations.<sup>179</sup> Rule 16 does offer some potential relief, but only if the court uses its discretion to hold such a conference, if the plaintiff's attorney can schedule the conference immediately after the suit is filed, and if the court is willing, at such an early stage, to reject the possibility of fee waiver. The number of contingencies suggests obvious problems with this approach. First, pretrial conferences are held at the discretion of

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177. Goldstein, *supra* note 17; see also N.M. Opinion 1985-3, *supra* note 139 (stating that retainer agreements may provide that attorney's fees may be subtracted from merits relief if the client waives fee pursuant to settlement negotiations).

178. See Fed. R. Civ. P. 16(a)(5), 16(c)(7).

179. Goldstein, *supra* note 17, at 698-99. Goldstein's proposals for solving the *Jeff D.* dilemma by pretrial conferences or by retainer agreements appear to be based on a footnote discussion contained in *Moore v. National Association of Security Dealers*, 762 F.2d 1093 (D.C. Cir. 1985), where the court stated:

[I]t does not appear that plaintiffs' counsel is without ability to avoid the potential ethical dilemma. . . . [C]arefully drafted retainer agreements could minimize the potential conflicts—e.g., by vesting the statutory fee recovery in the client. By this method, the attorney and client would no longer have the independent claims for fees which create the conflicts of interest in simultaneous negotiations. Plaintiffs' counsel is always free to, and should, move the district court under Fed. R. Civ. P. 16 or 23 for an on-the-record conference to discuss the status of the case, including any particular dilemma involving simultaneous negotiations.

*Id.* at 1105 n.17 (citations omitted). The retainer agreement proposal is discussed in the next section.

the court.<sup>180</sup> Second, under the *Jeff D.* case-by-case analysis, the established parameters for determining when a fee waiver is appropriate<sup>181</sup> cannot be reasonably determined at this early stage in the proceedings. It is doubtful that the court can give the plaintiff's attorney any assurance that a fee waiver offer will be rejected. Rejection of a settlement offer at a pretrial conference, before any meaningful discovery takes place, is tantamount to admitting that the Fees Act precludes "extortion" deals, a conclusion that is contrary to the *Jeff D.* decision. Moreover, at a pretrial conference nothing prevents the defendant from maintaining that any settlement offers which are made will be lump sum, possibly generating the same result as waiver, or that any settlement will include a waiver because the plaintiff cannot prevail at trial.<sup>182</sup> In the absence of contrary evidence, surely the court cannot reject the possibility of fee waiver. A final pretrial conference scheduled under Rule 16(d)<sup>183</sup> is the more appropriate time to present the court with an opportunity to address the possibility of fee waiver. Final pretrial conferences are held as close to trial as reasonable under the circumstances.<sup>184</sup> Unfortunately, addressing settlements conditioned on fee waiver at this point often is too late to avoid the harsh effect of any fee waiver allowed. In *Jeff D.*, for example, the offensive settlement offer was made one week before trial, thirty months after the suit was filed.<sup>185</sup> The question becomes how far in advance of trial can a final pretrial conference be held and still be reasonable? Notwithstanding the timing problem, even here the parameters set forth in *Jeff D.* are likely indeterminable. The results obtained remain unclear unless a settlement offer already has been made. The rule in *Jeff D.* appears to anticipate consideration of fee waivers only after the offending offer has been extended. If so, Rule 16 is not a viable solution for the individual civil rights plaintiff. Once an offer is made, it is for the client to decide to accept or reject it.

## 2. Restructured Retainer Agreements

Goldstein also suggests using restructured retainer agreements as a source of attorney protection against "extortion" deals.<sup>186</sup> Provisions in

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180. FED. R. CIV. P. 16(a).

181. These parameters include strength of the claims presented, stage at which the settlement is effective, and results obtained. See *Jeff D.*, 475 U.S. at 742 n.35.

182. This latter reason was noted favorably by the district court in *Jeff D.*, 475 U.S. at 741-42.

183. FED. R. CIV. P. 16(d).

184. *Id.* (stating that "[a]ny final pretrial conference shall be held as close to the time of trial as reasonable").

185. *Jeff D.*, 475 U.S. at 722.

186. Goldstein, *supra* note 17, at 699-701.

the retainer agreement contractually bind a client to consider settlement offers only if the merits are negotiated apart from fees. Ostensibly, these restructured retainer agreements protect the plaintiff's attorney from being placed in a "sweetheart" or "extortion" situation<sup>187</sup> and arrive at *Prandini* by a different route. The notion that defendants want to know their total costs is handled under this proposal by providing the defendant with information about fee awards that the plaintiff's attorney has received in similar cases.<sup>188</sup> Obviously, the plaintiff and his attorney can decide later not to enforce this provision,<sup>189</sup> particularly if they want to merge the issues of fees and merit for use as a bargaining chip. The possibility that settlement strategy will make the merger of fees and merits negotiations desirable prompts yet another retainer provision to protect the attorney from sacrificing his fee unreasonably. The proposed retainer agreement requires the client to seek a "reasonableness" opinion from the court prior to accepting any combined settlement offer contingent upon fee waiver.<sup>190</sup>

These restructured retainer provisions do not come without real costs. Using the posited hypothetical, in order for an economically disadvantaged plaintiff to secure competent counsel, he not only must be willing, at the outset, to give up his interest in entertaining settlement offers that combine merits relief and fees, but also he must be willing to give up the opportunity to accept attractive merits relief if it is conditioned upon fee waiver. Setting aside, for the moment, the contention that the proposed retainer provisions violate the spirit of the Fees Act, Goldstein recognizes that such retainer provisions arguably may have ethical problems. He maintains,<sup>191</sup> however, that these proposals neither place the attorney's personal and financial interests over those of the client,<sup>192</sup> nor unethically restrict the client's authority to settle a case.<sup>193</sup>

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187. The following retainer provision is recommended: "If during the litigation, there are to be any settlement discussions, I (the client) agree that in such discussions the issues of the merits of the lawsuit and any statutorily authorized attorney fees award must be treated/negotiated separately and that any settlement offer must treat these issues separately." *Id.* at 699.

188. Projecting future fee awards solely on the basis of prior awards seems insufficient, but not terminal. This part of Goldstein's proposal can be salvaged by supplementing prior awards information with current billing rates and hours expended, allowing a basic lodestar computation as a starting point for determining fee liability. See *supra* notes 88-106 and accompanying text.

189. Goldstein, *supra* note 17, at 699.

190. The proposed provision reads:

If a settlement offer made by the defendant is contingent upon counsel foregoing what he or she believes to be a federal statutory right to a reasonable fee award, I (the client) agree that prior to responding to the offer, counsel may seek the opinion of the court regarding the reasonableness of the fee award. Only if the court determines that the proposed fee award is reasonable will I respond to the settlement offer.

*Id.* at 701.

191. *Id.* at 700.

192. See MODEL CODE, *supra* note 14, at EC 5-1 (noting that professional judgment should

Rather than placing the attorney's interest above the client's, Goldstein argues that the intent is to do just the opposite. The retainer agreement contractually ensures that the attorney will not be put in a tempting situation.<sup>194</sup> Other commentators essentially have offered the same analysis, stating that "[t]he plaintiff's authority to accept or reject the settlement does not include authority to mandate modification of a proper fee agreement."<sup>195</sup>

It probably is accurate to say that the very existence of the Fees Act gives the attorney an equitable interest in the fee award.<sup>196</sup> While the premise may be accepted, there are strong reasons for not accepting the conclusions reached by Goldstein. If the lawyer already is bound by a disciplinary rule not to be "tempted," and subject to disciplinary sanction or malpractice for a violation of that rule,<sup>197</sup> then the provisions essentially serve to exact additional consideration from the client that may be insufficient under reasoning that is analogous to the pre-existing duty rule in contract law.<sup>198</sup> Ethics committees have based, in

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be exercised solely for the benefit of the client, free of compromising influences and loyalties; a sort of fiduciary obligation), EC 5-2 (stating that a lawyer should not assume a position tending to give less protection to the client), DR 5-101(A) (stating that "[e]xcept with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment . . . reasonably may be affected by his own financial, business, property, or personal interests"); see also MODEL RULES, *supra* note 15, at Rule 1.7(b) (noting that lawyer's own interests prevent representation when they may limit materially his responsibilities unless he reasonably believes it will not affect adversely his judgment and the client consents).

193. See MODEL CODE, *supra* note 14, at EC 7-7.

194. Goldstein, *supra* note 17, at 700.

195. Snyder, *supra* note 16, at 315. The reasoning behind this conclusion is:

The answer to the fee waiver dilemma is that the plaintiff does not have the right to require her attorney to waive fees under a settlement offer. The ethical precept that the client has the ultimate authority to decide whether or not to forego trial and compromise a claim does not grant the client the authority to decide whether or not her attorney may get his fee. If a fee agreement exists between plaintiff and her counsel, the attorney is not obliged to accept the client's request for a reduced fee. In such a case, the plaintiff would not merely be accepting or rejecting the settlement offer; she would also be modifying the fee agreement she previously entered into with her attorney.

*Id.*

196. Since an attorney does have a right of action against the defendant to collect a fee award once it is made, arguably he has an interest in the award itself. See Lipscomb v. Wise, 643 F.2d 319 (5th Cir. Unit A Apr. 1981); see also FED. R. CIV. P. 60(b); cf. James v. Home Constr. Co., 689 F.2d 1357 (11th Cir. 1982).

197. See MODEL CODE, *supra* note 14, at DR 5-101(A); MODEL RULES, *supra* note 15, at Rule 1.7(b); see also MODEL CODE, *supra* note 14, at EC 2-23 (stating that "[a] lawyer should be zealous in his efforts to avoid controversies over fees with clients").

198. Of course, prior to the client and attorney signing a retainer agreement there is no contract. Strictly speaking, therefore, the pre-existing duty rule announced in *Alaska Packers' Association v. Domenico*, 117 F. 99 (9th Cir. 1902), is not on point, but rather merely is an attractive analogue. Under Uniform Commercial Code § 2-302, for example, merchant contracts may be unconscionable, in whole or in part. See, e.g., *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969). Under common law, such a contract as Goldstein proposes may not

part, ethical prohibitions of "extortion" deals on the bar's goal to make counsel available to the public under EC 2-1. It also seems logical to view this foundation as one of public duty. If so, the retainer provisions urged by Goldstein arguably are void as against public policy under section 73(b) of the *Restatement (Second) of Contracts*.<sup>199</sup> This section exacts additional consideration for the performance of a public duty. In light of Goldstein's own acknowledgement that acquiring an interest in the case is to be avoided ethically,<sup>200</sup> an even stronger argument is mounted against these retainers when viewing the lawyer as a fiduciary. Under section 173 of the *Restatement*, a contract is voidable when a fiduciary contracts as to matters within the scope of his responsibilities.<sup>201</sup> In light of the overriding purpose of civil rights laws, retainer provisions cannot be fair if their terms usurp the client's right to settle, especially when coupled with the fact that fees accrue to the party, not the lawyer.

These retainer provisions require that the client give additional consideration to secure loyalty, which the lawyer ethically must provide in any event. Consequently, these retainer provisions are based on insufficient consideration and are unenforceable on grounds that they violate the public policy behind civil rights law.<sup>202</sup>

Goldstein admits that the issue of whether defendants should be

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be enforced by the court when the consideration given, in this case a promise not to be "tempted," is deemed to be nominal. *See, e.g., In re Greene*, 45 F.2d 428 (S.D.N.Y. 1930).

199. The *Restatement* provides:

*Public duties; torts and crimes.* A legal duty may be owed to the promisor as a member of the public, as when the promisee is a public official. In such cases there is often no direct sanction available to a member of the public to compel performance of the duty, and the danger of express or implied threats to withhold performance affects public as well as private interests. A bargain by a public official to obtain private advantage for performing his duty is therefore unenforceable as against public policy. . . . And under this Section performance of the duty is not consideration for a promise.

RESTATEMENT (SECOND) OF CONTRACTS § 73 comment b (1981) [hereinafter RESTATEMENT]; *see also* *Gillespie v. Brewer*, 602 F. Supp. (D.W.V. 1985) (stating that contract clauses waiving statutory fees are violative of public policy and unenforceable). *But see Model Code, supra* note 14, at EC 2-16 (stating that "[t]he legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered").

200. *See supra* notes 192-93 and accompanying text.

201. Section 173 states: "If a fiduciary makes a contract with his beneficiary relating to matter within the scope of the fiduciary relation, the contract is voidable by the beneficiary, unless (a) it is on fair terms . . . ." RESTATEMENT, *supra* note 199, at § 173.

202. *Cf. id.* § 178. This reasoning comports with the view held by the drafters of the *Model Rules*. Legal background cited in the proposed final draft of the *Model Rules* to support Rule 1.2(a) specifically states that employment contracts which forbid a client to settle a case without the lawyer's consent are against public policy. MODEL RULES OF CONDUCT, *supra* note 143, at Rule 1.2(a). *See Giles v. Russell*, 222 Kan. 629, 567 P.2d 845 (1977) (holding that at any time, a client may, without his attorney's knowledge or consent, settle with the opposing party despite an employment contract to the contrary); *see also Hayes v. Eagle-Picher Indus.*, 513 F.2d 892 (10th Cir. 1975) (concluding that settlement without client's consent ineffective).

prohibited from making settlement offers conditioned on fee waiver is the analogue to the question of whether an attorney should be allowed to use a retainer agreement precluding fee waiver.<sup>203</sup> Presumably, Goldstein adopts the position that for every weapon there is a counter-weapon. However, serious problems remain. These retainer provisions simply elevate the analysis of the real problem to a new level of abstraction. If critics of *Jeff D.* are correct, coerced fee waiver is irreconcilable with the public policy behind the Fees Act. Rather than treating the cause of the illness, these retainer provisions would address only the symptoms. Vindication of civil rights conditioned on the use of the retainer agreement proposed forces plaintiffs to put their settlement rights at risk in order to retain counsel. Such a proposition recalls the sixty years of struggle before *Brown v. Board of Education*<sup>204</sup> which sought to vindicate fourteenth amendment rights by using affirmatively the "separate but equal" doctrine announced in *Plessy v. Ferguson*.<sup>205</sup> The Court ruled in *Brown* that "separate but equal" has no place" in public education<sup>206</sup> under the fourteenth amendment. Similarly, actions that condition the vindication of civil rights on the assignment of settlement rights to one's attorney has no place in the implementation of the purposes behind the Fees Act.

Securing attorney's fees is simply a means to accomplish the primary end sought—vindicating civil rights. Admittedly, the Fees Act was implemented to give attorneys the assurance of reasonable compensation, but retainer provisions to secure statutory fees, even admitting that they retain competent practitioners for future litigation, should not be implemented if doing so requires snatching from today's litigant a chance for substantial relief. The negative consequences of "extortion" deals are not eliminated by the proposed retainer provisions, but merely are countered with an equal and opposite evil.

### 3. Nonnegotiable Fee Awards

One solution to the *Jeff D.* problem is recognized in the dissent by Justice Brennan. While rejecting the idea of coerced fee waiver, Justice Brennan adopted the majority's view that Congress did not mean for the Fees Act to prohibit simultaneous negotiations of fees and merits.<sup>207</sup> Justice Brennan acknowledged that defendants may have a right to

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203. Goldstein, *supra* note 17, at 701 n.56.

204. 347 U.S. 483 (1954).

205. 163 U.S. 537 (1896). In *Brown* it was recognized that physically comparable school facilities, and not integrated schools, were only a half step toward the vindication of constitutional rights. See *Green v. County School Bd.*, 391 U.S. 430 (1968).

206. *Brown*, 347 U.S. at 495.

207. *Jeff D.*, 475 U.S. at 761-65.

know their total costs in any settlement proposal. However, he viewed settlements conditioned upon fee waiver as a separable issue, one which in no way implicates a defendant's right to fix his costs.<sup>208</sup> Under Justice Brennan's view, "reasonable" fees would be required<sup>209</sup> and, therefore, simultaneous negotiations might even strengthen the effectiveness of the Fees Act.<sup>210</sup>

Calhoun also suggested making fees nonnegotiable.<sup>211</sup> Superficially, fee nonnegotiability is attractive. Unlike Goldstein's proposals, nonnegotiability does not rest upon Rule 16 pretrial conferences or retainer provisions. Moreover, nonnegotiable fee provisions substantially eliminate attorney-client conflict, further the purpose of the Fees Act by ensuring competent counsel will not forfeit his fees, and encourage early settlement if the plaintiff has a strong case because the defendant will not want the suit to linger in hopes of using fees as a bargaining chip.<sup>212</sup>

Identifying the court's source of power to make fees nonnegotiable is critical to Calhoun's proposal, which was offered prior to the decision in *Jeff D.* Calhoun admits that the Fees Act does not support directly a requirement of fee nonnegotiability. The plain language of the statute does not address whether or not fees should be negotiable.<sup>213</sup> But Calhoun asserts that the court's discretionary power over fee awards is enough to allow the court to make fees nonnegotiable.<sup>214</sup> Calhoun maintains that the judicial policy favoring settlement, however, has resulted in courts being unwilling to render section 1988 fees nonnegotiable,<sup>215</sup> and she cites holdings in which the court has retained for itself the determination of fee awards, thereby indicating that it would not be bound by agreements between the parties.<sup>216</sup>

The continued viability of Calhoun's approach and the possibility that courts will assume such a breadth of authority seem to be eliminated by the *Jeff D.* decision. The Court ruled that judges only have the authority to accept or reject a settlement proposal, not the retained power to modify it.<sup>217</sup> Indeed, Calhoun acknowledged that "[i]f settle-

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208. *Id.*

209. *Id.*

210. *Id.* at 765. See generally Calhoun, *supra* note 5.

211. Calhoun, *supra* note 5. The tenor of this proposal parallels that of Justice Brennan's dissent in *Jeff D.*

212. *Id.* at 371-73.

213. *Id.* at 370.

214. *Id.* at 386. After all, "[i]t is the defendant's interest in *knowing* the limits of liability, not necessarily in being able to bargain about items constituting that liability, which is valuable." *Id.* (footnote omitted) (emphasis in original).

215. *Id.* at 388.

216. *Id.* at 387 (citing *Boyd v. Bechtel Corp.*, 485 F. Supp. 610 (N.D. Cal. 1979) (Title VII case)).

217. *Jeff D.*, 475 U.S. at 726.

ment of fees is to be encouraged, nonnegotiable fees, by definition, are unacceptable."<sup>218</sup> There can be little question that the decision in *Jeff D.* views attorney's fees as such a "bargaining chip."<sup>219</sup> Against this backdrop, the prospects are quite dim for the courts to assert their section 1988 discretionary authority in a way that would render fees nonnegotiable.

Taken as a whole, these proposals fail to protect the plaintiff's attorneys from "extortion" deals and simultaneous negotiation of fees and merit. These proposals fail for numerous reasons: because attempts to find "extortion" deals unethical have little support within the language of the *Model Code*; because pretrial conferences will not satisfy the test set forth in *Jeff D.*; because retainer provisions usurp from the client his right to settle and violate the spirit of the Fees Act; and because courts have no source of power upon which to make fees nonnegotiable.

## V. A LEGISLATIVE PROPOSAL TO AMEND THE FEES ACT

In light of the Court's holding in *Jeff D.*, the Fees Act is inadequate to fulfill its intended purposes. Civil rights lawyers have no means by which to assure themselves adequate compensation and the alternatives discussed in this Note do not resolve the dilemma. Simple amendment to the Fees Act, however, can rehabilitate it without burdening the courts further with excessive supervision of the settlement process. A bill to amend 42 U.S.C. section 1988 might read as follows:

### THE MANDATORY CIVIL RIGHTS ATTORNEY'S FEE AWARDS ACT OF 1989

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT THIS ACT MAY BE CITED AS "THE MANDATORY CIVIL RIGHTS ATTORNEY'S FEE AWARDS ACT OF 1989."

SEC. 2. THAT 42 U.S.C. 1988 IS AMENDED BY DELETING: "IN ANY ACTION OR PROCEEDING TO ENFORCE A PROVISION OF SECTION 1981, 1982, 1983, 1985, AND 1986 OF THIS TITLE, TITLE IX OF PUBLIC LAW 92-318, OR TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, 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." SUBSTITUTE FOR THE ABOVE SENTENCE THE FOLLOWING LANGUAGE: "EXCEPT FOR EXCEPTIONAL CIRCUMSTANCES DETERMINED AT THE DISCRETION OF THE COURT, A PREVAILING PLAINTIFF'S ATTORNEY, OTHER THAN ONE FOR THE UNITED STATES, IN ANY SETTLEMENT, ADMINISTRATIVE, ARBITRAL, OR ADJUDICATIVE ACTION OR PROCEEDING PURSUANT TO A CAUSE OF ACTION UNDER SECTIONS 1981, 1982, 1983, 1985, AND 1986 OF THIS TITLE, TITLE IX OF PUBLIC LAW 92-318, OR TITLE VI AND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, SHALL BE AWARDED REASONABLE FEES,

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218. Calhoun, *supra* note 5, at 388.

219. *Jeff D.*, 475 U.S. at 731.

PROVIDED: THE TYPE OF RELIEF OBTAINED MUST HAVE BEEN REQUESTED IN PLEADINGS PURSUANT TO THOSE SECTIONS AFOREMENTIONED. A PREVAILING DEFENDANT'S ATTORNEY WILL NOT BE AWARDED FEES UNDER THIS ACT EXCEPT WHEN A PLEADING, MOTION, OR ANY OTHER PAPER FILED BY A PLAINTIFF IS RULED TO BE IN VIOLATION OF FED. R. CIV. P. 11, IN WHICH CASE THE DEFENDANT'S ATTORNEY SHALL BE AWARDED REASONABLE FEES INCURRED IN DEFENDING AGAINST ANY AND ALL OF THE OFFENDING PLEADINGS, MOTIONS, OR OTHER PAPERS.

#### *A. Summary Comparison of the Proposed Act and the Fees Act*

The Proposed Act departs from the Fees Act in a number of ways. The Proposed Act makes an award of attorney's fees mandatory except in undefined exceptional circumstances, while the Fees Act made an award of fees subject to the discretion of the court. The Proposed Act requires that an attorney for a prevailing party be awarded fees only for relief that is obtained properly pursuant to a statutory obligation under the enumerated civil rights statutes. Under the Fees Act, the various circuit courts reflected a split of opinion on this matter. Some circuits awarded fees to prevailing plaintiffs in settlement when the suit was only a causal catalyst to the relief obtained. Other circuits awarded fees only in cases in which the relief obtained was of the type prayed for in the complaint and which stemmed from a statutory obligation owed by the defendant. The Proposed Act provides that an award of fees is made to the attorney of the prevailing party. The courts interpreted the Fees Act as a provision under which fees were awarded to the prevailing party and not to his attorney. The Proposed Act also defines the specific circumstances under which fees may be awarded to the attorney of a prevailing defendant. The Fees Act was silent as to the circumstances in which a prevailing defendant might be awarded fees. The Proposed Act does not prohibit an attorney who otherwise would be awarded statutory fees from waiving his fees, whereas the Fees Act is silent as to the waiver of fees. Finally, the Proposed Act clarifies that fees may be awarded in "any settlement or administrative, arbitral, or adjudicative action or proceeding." Under the Fees Act, fees were awardable in "any action or proceeding" without any definitional limitations.

#### *B. Mandatory Fees Under the Proposed Act*

As a prior amendment to 42 U.S.C. section 1988, the Fees Act allowed the courts, in their discretion, to award attorney's fees to prevailing parties in enumerated civil rights actions. The Fees Act was a congressional response to "anomalous gaps" left by *Alyeska Pipeline*

*Co. v. Wilderness Society.*<sup>220</sup> Congress viewed *Alyeska* as a potential impediment to individuals victimized by discrimination. Thus, by enacting the Fees Act, Congress specifically intended to vindicate civil rights by casting individual litigants as private attorneys general. In retrospect, congressional response to *Alyeska* was not unique: well over one hundred statutes have been enacted during the ensuing years to shift the prevailing party's attorney's fees to the losing party.<sup>221</sup>

In *Alyeska* the Supreme Court reversed the trend of awarding fees to prevailing civil rights plaintiffs under a private attorneys general concept and reaffirmed the traditional American rule that individual litigants must pay their own attorney's fees unless otherwise provided for by Congress. At the same time, however, *Alyeska* acted as a stark disincentive to members of the private bar who otherwise would be inclined to undertake the representation of economically disadvantaged plaintiffs. For that reason, Congress rejected the result in *Alyeska*. Thus, the Fees Act was designed to remove the disincentive to private litigants by allowing attorney's fees for prevailing parties at the discretion of the court.<sup>222</sup> The Fees Act has a fee shifting provision similar to the one contained in Title VII. Following the decisions construing the Title VII provision, the Supreme Court interpreted the Fees Act to mean that a prevailing plaintiff ordinarily should recover attorney's fees unless special circumstances render such an award unjust.<sup>223</sup> The Court also recognized that a party may prevail through settlement.<sup>224</sup> A plaintiff is eligible for attorney's fees if he files an action and thereafter settles the claim as long as significant portions of the relief sought are obtained. Moreover, this statutory right to fees can be enforced in a separate claim, unless the settlement specifically waives the plaintiff's right to do so.<sup>225</sup> Even when the parties stop short of formal settlement, fees may be awarded if a defendant unilaterally alters a practice in response to the plaintiff's complaint.<sup>226</sup> Thus, the private attorneys gen-

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220. 421 U.S. 240 (1975); see *Munson v. Friske*, 754 F.2d 683 (7th Cir. 1985).

221. See *supra* note 107 and accompanying text.

222. See, e.g., *Kaimowitz v. Howard*, 547 F. Supp. 1345 (E.D. Mich. 1982), *aff'd*, 751 F.2d 385 (6th Cir. 1984).

223. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975) (applying the fee-shifting language of *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968), a Title II case, to a Title VII case); see also *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) (citing with approval *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976), which applied the Piggie Park language to Title VII cases).

224. See *Maher v. Gagne*, 448 U.S. 122 (1980); *Seaway Drive-In, Inc. v. Clay*, 791 F.2d 447 (6th Cir. 1986).

225. *El Club Del Barrio, Inc. v. United Community Corp.*, 735 F.2d 98 (3d Cir. 1984).

226. *Chicano Police Officers Ass'n v. Stover*, 624 F.2d 127, 131 (10th Cir. 1980); see also *Gekas v. Attorney Registration & Disciplinary Comm'n*, 793 F.2d 846 (7th Cir. 1986); *Williams v. Leatherbury*, 672 F.2d 549 (5th Cir. 1982).

eral concept embodied in the Fees Act is founded on the notion that when individual litigants enforce civil rights, the country benefits as a whole. Interpretation of the Fees Act by the courts, however, led to its own "anomalous gaps." The Proposed Act makes it clear that the courts did not give a broad enough effect to the congressional intent of the Fees Act.

From one perspective, the Proposed Act serves to broaden the scope of the Fees Act because, as the title of the Proposed Act indicates, an award of fees to attorneys of prevailing plaintiffs is made mandatory in the enumerated civil rights actions except in exceptional circumstances. The Proposed Act intends that a court's discretion as to "exceptional circumstances" should be drawn very narrowly. Currently, only cases in which unlicensed plaintiffs act as *pro se* litigants will the exercise of the retained discretion be warranted.<sup>227</sup> Because unanticipated situations may arise in the future, however, the Proposed Act retains for the courts a slight measure of flexibility.

### *C. Plaintiff's Attorney's Fees May be Awarded Only When Prevailing Under a Statutory Obligation*

While the Proposed Act broadens the scope of the Fees Act by making an award of fees mandatory, from another perspective the scope of the Fees Act is narrowed by the proposed amendment. The conditions under which a party may be considered as "prevailing" is altered. For a party to prevail under the Fees Act, final relief must be secured on some substantive issue.<sup>228</sup> Securing favorable rulings on preliminary, procedural, or evidentiary concerns do not qualify for fees unless it is followed by final relief on the substantive issue to which the preliminary matters related.<sup>229</sup> The Proposed Act further limits recovery by defining what it means to prevail on substantive issues through settlement.

The circuits have differed as to what may be considered as prevailing on substantive issues, particularly as applied to the settlement of claims. In *Bonnes v. Long*<sup>230</sup> the court held that fees may be awarded if underlying claims in the lawsuit serve merely as a causally related catalyst to the relief offered in settlement. This rule also is followed in the

227. Cf. *Duncan v. Poythress*, 777 F.2d 1508, 1510 n.10 (11th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1129 (1986); *Pitts v. Vaughn*, 679 F.2d 311 (3d Cir. 1982); *Wright v. Crowell*, 674 F.2d 521 (6th Cir. 1982). Licensed attorneys proceeding *pro se*, however, are entitled to attorney's fees. See *Lanasa v. City of New Orleans*, 619 F. Supp. 39 (E.D. La. 1985); *Duncan*, 777 F.2d at 1515.

228. See *Uviedo v. Steve's Sash & Door Corp.*, 738 F.2d 1425 (5th Cir. 1984).

229. *Smith v. University of N.C.*, 632 F.2d 316 (4th Cir. 1980).

230. 599 F.2d 1316 (4th Cir. 1979), *cert. denied*, 455 U.S. 961 (1982).

Seventh and Tenth Circuits.<sup>231</sup> But in *Nadeau v. Helgemoe*<sup>232</sup> the court held that the relief offered must be related directly to the underlying statute on which the plaintiff's compliant is based in order for fees to be obtained. In other words, the relief offered must be a remedy provided for by the applicable statute pursuant to a defendant's statutory obligation. The Proposed Act adopts this latter view for two reasons: the need to fix costs with certainty and the underlying intent of the private attorneys general concept.

Attorney's fees often represent a far greater cost to the defendant than the cost of implementing the substantive relief obtained.<sup>233</sup> The Proposed Act recognizes and supports the long standing judicial practice of encouraging settlement. Because fee awards may represent a defendant's greatest liability, the settlement process may be impeded if defendants cannot fix their obligation for fees with certainty.<sup>234</sup> The Proposed Act helps the defendant to calculate his potential fee obligation in settlement situations with more certainty. Fees may be awarded only for that relief which is obtained pursuant to a statutory obligation. Under the Proposed Act a party may prevail in settlement in any of the following situations as long as the agreement results in a change of conduct to comply with statutory obligations: consent decrees, out-of-court settlements, voluntary cessation of unlawful practices or other mooting of the case.<sup>235</sup>

The private attorneys general concept is intended to be a method by which individual litigants can contribute to the vindication of civil rights for the benefit of society as a whole. Society does not benefit when individual litigants obtain relief that is simply more convenient for the defendant or more attractive to the plaintiff, but which does not alter the violative conduct giving rise to the cause of action. Convenience and attraction do not foster conduct that increases compliance with our civil rights laws. Neither the Fees Act nor the Proposed Act should be construed as attorney's relief acts. The Proposed Act is intended to enforce civil rights laws that the government cannot enforce effectively alone. Certainly litigants are free to negotiate settlement according to their individual interests, but they should do so under the prevailing American rule that litigants pay their own attorney's fees.

In cases in which a plaintiff partially prevails, or when he succeeds in obtaining additional relief beyond that provided for by statute, the

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231. See *Dawson v. Pastrick*, 600 F.2d 70, 78 (7th Cir. 1979); *Stover*, 624 F.2d at 131.

232. 581 F.2d 275, 281 (1st Cir. 1978).

233. See *supra* note 7 and accompanying text.

234. See *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 453 n.15 (1982) (dicta).

235. Cf. *Doe v. Busbee*, 684 F.2d 1375 (11th Cir. 1982).

Proposed Act awards fees only for those claims against a course of conduct in which the plaintiff prevailed pursuant to the statute, eliminating fees for the time spent on claims involving a different course of conduct, different individuals, different decisions, or meritless claims.<sup>236</sup> Fees, however, would be awarded for pursuing unsuccessful or alternative claims that share a common core of facts or are based on related legal theories to those claims on which the plaintiff does prevail. Thus, when claims are based on relief provided for in a civil rights statute for a course of conduct prohibited by the statute and the plaintiff prevails on these claims, all the services rendered by the attorney are subject to a fee award.<sup>237</sup>

An award of fees to a plaintiff's attorney under the Proposed Act also is limited by Federal Rule of Civil Procedure 68, which is in accord with the Supreme Court's decision in *Marek v. Chesny*.<sup>238</sup> A plaintiff who rejects a defendant's settlement offer that is more favorable than the relief obtained at trial shall not be awarded fees for any services rendered after the date of the offer.

#### D. Fee Awards Are for the Attorney of the Prevailing Party

The Proposed Act intends to make it clear that the mandatory award of fees is to the attorney of a prevailing plaintiff and not merely to the prevailing party. The intent of Congress in the Fees Act was to attract competent counsel to support the vindication of civil rights. Perhaps Congress intended to convey that the fees granted under the Fees Act were properly those of the attorney by using the possessive form in the title: *The Civil Rights Attorney's Fees Awards Act of 1976*. Had Congress intended fees to be for the prevailing party, it simply might have used the singular or plural form. Implicitly, many courts have realized who was the intended beneficiary of the fee award.<sup>239</sup> However, in the few cases specifically deciding the issue of whether fees were for the party or the party's attorney, courts have found that fees are awarded to the party. For example, in *Brown v. General Motors Corp., Chevrolet Div.*, the court found that "[u]nder the Act it is the prevailing party rather than the lawyer who is entitled to attorney's fees."<sup>240</sup> The Proposed Act rejects this reasoning.

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236. See *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983).

237. See *Hensley v. Eckerhart*, 461 U.S. 424 (1983); see also *Jordan v. Multnomah County*, 694 F.2d 1156 (9th Cir. 1982); *Reel v. Arkansas Dep't of Correction*, 672 F.2d 693 (8th Cir. 1982); *Littlefield v. Deland*, 641 F.2d 729 (10th Cir. 1981).

238. 473 U.S. 1 (1985).

239. See *supra* note 118 and accompanying text.

240. 722 F.2d 1009, 1011 (2d Cir. 1983). *Accord Willard v. City of Los Angeles*, 803 F.2d 526 (9th Cir. 1986).

A question presented by the Proposed Act is whether an award of fees to the attorney of the prevailing party creates a conflict of interest under the *Model Code* or *Model Rules* as adopted, modified, and interpreted currently by the various states. Notwithstanding, the clear and manifest purpose of the Proposed Act is to aid in the vindication of civil rights by ensuring that competent counsel will receive reasonable compensation. The Proposed Act envisions the vindication of civil rights to be of such importance as to necessitate comprehensive federal regulation which preempts contrary state law.

State laws may be preempted expressly by a federal statute's language or implicitly by the statute's structure and purpose.<sup>241</sup> The doctrine of preemption is derived from the Supremacy Clause of the United States Constitution.<sup>242</sup> The Supremacy Clause provides that the Constitution and the federal statutes derived from it "shall be the supreme law of the Land; and the Judges in every State shall be bound thereby," regardless of state law to the contrary.<sup>243</sup>

The *Model Code* and *Model Rules* may require an attorney to inform his client prior to employment that statutory fees will be awarded if the client prevails.<sup>244</sup> Assuming that this obligation has been fulfilled, the Proposed Act sees it as a physical impossibility<sup>245</sup> for an attorney to accept federally mandated fees under the Proposed Act but to have the states view these fee awards to attorneys as an unethical interest in the litigation, violating the provisions of Model Code DR 5-101(A) and Model Rule 1.7(b). Under these provisions, an attorney may not accept employment if professional judgment reasonably may be affected by the attorney's own interests. The Proposed Act, therefore, preempts state laws that would subject an attorney to sanctions for accepting mandatory statutory fees under the Proposed Act.

The Fees Act ordinarily has been interpreted not to entitle prevailing defendants an award of attorney's fees.<sup>246</sup> The purpose of the Fees Act was to vindicate important civil rights. When a plaintiff prevails, the decision suggests that a defendant has engaged in conduct which violates federal law. When a defendant prevails, however, the plaintiff has not violated any federal law. Based on this distinction, the Proposed Act would adopt the prevailing judicial approach that a prevail-

241. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *see also Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984).

242. *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 152 (1982).

243. U.S. CONST. art. VI, cl. 2.

244. *See MODEL CODE*, *supra* note 14, at EC 2-3, EC 2-19, EC 2-21; *MODEL RULES*, *supra* note 15, at Rules 1.5(b), 1.7(b), 1.8(f).

245. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (holding preemption of state law when compliance with both state and federal law impossible).

246. *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

ing defendant ordinarily is not awarded fees unless the claim was "frivolous, unreasonable, or groundless, or that plaintiff continued to litigate the claim after it clearly became so."<sup>247</sup>

Adding to this reasoning, the Proposed Act brings new specificity to those circumstances under which fees are to be granted to a prevailing defendant. Under Federal Rule of Civil Procedure 11, if a party is represented by an attorney, all pleadings, motions, and other papers must be signed by the attorney of record. The signature indicates the attorney's belief, based on reasonable inquiry, that the papers are "well grounded in fact and [are] warranted by existing law or a good faith argument for [a change in] existing law, and . . . not interposed . . . to harass or to cause unnecessary delay or needless increase in the cost of litigation." When this standard has been violated, Rule 11 requires that the court issue appropriate sanctions, either *sua sponte* or by motion. Under Rule 11, sanctions may include an order to pay "reasonable expenses incurred . . . , including a reasonable attorney's fee." With this as a backdrop, the Proposed Act requires that when Rule 11 is violated in proceedings covered by the Proposed Act, an appropriate sanction must include reasonable attorney's fees incurred in defending against the violative pleadings, motions, or other papers.

The intent of Proposed Act is that Rule 11 violations should be the only circumstance under which fees will be awarded to an attorney of a prevailing defendant. For example, under the Proposed Act a defendant is not entitled to fees as a part of his costs when a plaintiff rejects a settlement offer that was more favorable than the award obtained at trial pursuant to Federal Rule of Civil Procedure 68. Although an award of fees for a defendant in this situation appears to be a reasonable construction of the Proposed Act, such a result would move cross-current to the underlying intent of the Proposed Act.<sup>248</sup> Admittedly, any fees for the attorneys of a prevailing defendant are contingent upon the willingness of federal courts to enforce Rule 11; but recent case law suggests the presence of such a willingness.<sup>249</sup> Because of this judicial willingness to enforce Rule 11, there seems a significant benefit to be gained from setting out a black letter test for the award of attorney's fees to counsel for a prevailing defendant, which simultaneously may prompt greater use of Rule 11 sanctions.

247. *Id.*; see also *Munson v. Friske*, 754 F.2d 683 (7th Cir. 1985); *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820 (7th Cir. 1984).

248. See *Delta Air Lines v. August*, 450 U.S. 346 (1981); *Christianburg Garment*, 434 U.S. at 412.

249. See, e.g., *Eastway Constr. Co. v. City of New York*, 762 F.2d 243 (2d Cir. 1985).

### E. Waiver of an Attorney's Fees

The Proposed Act neither prohibits an attorney from waiving his statutory fees nor requires a waiver. The Proposed Act, however, does not authorize an attorney to assign his fees to his client. Assignment of fees likely will violate *Model Code* provisions DR 3-102 and DR 3-103 and *Model Rules* provisions 5.4(a) and (b). These provisions prevent an attorney from sharing legal fees with a nonattorney or from forming a partnership with a nonattorney.

Fee waiver often becomes an issue in settlement negotiations. In *Jeff D.* the Supreme Court held that simultaneous negotiation of fees and substantive merits was permissible. Because statutory fees were for the benefit of the plaintiff and not the lawyer, the Court reasoned that negotiation and settlement contingent upon the waiver of statutory fees also was permissible. The Proposed Act specifically rejects the holding in *Jeff D.*, providing instead that fees are for the attorney of the prevailing plaintiff and are mandatory. The defendant, therefore, cannot condition settlement upon the waiver of fees. Similarly, the plaintiff may not waive fees in order to seek more favorable substantive relief. The Proposed Act suggests that the bifurcated approach adopted by the Third Circuit in *Prandini* is unnecessary.

The Proposed Act is not intended to affect the traditional notion that the decision to settle a claim is a decision for the client to make, not the attorney.<sup>250</sup> Because fees are mandatory under the Proposed Act, however, a defendant may not offer a settlement without including fees, unless the relief offered is not based on a statutory obligation. If an offer is made without a provision for fees as part of a formal consent decree, then the court must reject it. Other than in a formal consent decree, the Proposed Act envisions that an attorney may bring an independent cause of action in his own name to enforce the fee award. If the attorney is successful, fees also will be awarded in litigating the fees dispute.<sup>251</sup> The Proposed Act also envisions that the various states will want to consider whether a defendant's attorney who proposes settlement without a fees provision has engaged in unethical professional conduct, either interfering with the administration of justice or promoting an appearance of impropriety.<sup>252</sup> Moreover, the court may have a responsibility to initiate appropriate disciplinary actions against a defendant's attorney who makes a settlement offer contingent upon the

250. See *MODEL CODE*, *supra* note 14, at EC 7-7; *MODEL RULES*, *supra* note 15, at Rule 1.2(a).

251. See *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980). *Contra North Carolina Dep't of Transp. v. Crest St. Community Council, Inc.*, 107 S. Ct. 336 (1986).

252. See *MODEL CODE*, *supra* note 14, at DR 1-102(A)(5); *MODEL RULES*, *supra* note 14, at Rule 8.4(a).

waiver of fees pursuant to the ABA Code of Judicial Conduct.<sup>253</sup>

#### *F. Actions in Which Fees may be Awarded*

The fee shifting provision in Title VII and the Fees Act, while similar, have been interpreted differently on the issue of whether a suit must be filed in order to recover fees. In *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*<sup>254</sup> the Court interpreted the Fees Act to require that a suit must be filed before fees can be collected. A mere administrative charge under Title VI did not entitle the prevailing plaintiff to an award of attorney's fees. In *New York Gaslight Club, Inc. v. Carey*,<sup>255</sup> a Title VII action, however, fees were awarded for a prevailing plaintiff after filing an EEOC charge, while in *Mertz v. Marsh*<sup>256</sup> a Title VII claimant was denied fees when the claim was settled without filing suit. The Proposed Act clarifies this issue. The fee shifting provision of Title VII is subsumed under the ambit of the Proposed Act and fees are to be awarded if a plaintiff prevails, regardless of whether a suit is filed.

#### *G. Full Force and Effect Given to the Private Attorneys General Concept*

The Proposed Act suggests that treating attorney's fees as a bargaining chip is at odds with the private attorneys general concept and should be eliminated. Elimination of the bargaining chip may reduce some of the plaintiff's flexibility. The advantage of elimination, however, is that it sets out the ground rules of litigation in a way that would be understood in advance by all parties. Moreover, this reduction in flexibility partially may be offset, particularly when the plaintiff has a strong case. Because fees would be mandatory, defendants earnestly may seek settlement at an earlier stage in the litigation. Defendants no longer would be able to pit the plaintiff against his attorney in a fees or merits dilemma.

Defendants will be in a position to calculate their total obligation with greater certainty under the Proposed Act, thus overcoming the Court's concern in *Jeff D.* The defendant merely needs to obtain particularized billing records from opposing counsel in order to calculate settlement offers with reasonable precision. Because the plaintiff's attorney is required to keep detailed time expenditures regardless, this proposal presents no undue burden. Moreover, this proposal adds virtu-

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253. JUDICIAL CONDUCT, *supra* note 158, Canon 3(B)(3).

254. 107 S. Ct. 336 (1986).

255. 447 U.S. 54 (1980).

256. 786 F.2d 1578 (11th Cir. 1986).

ally no work for the court. Under the Proposed Act the court would approve settlements that included attorney's fees and reject those settlements that did not.

The Proposed Act makes fees mandatory in both Title VI and Title VII cases, in addition to other statutes previously enumerated in the Fees Act. Fee awards to the attorney of a prevailing party in any settlement, administrative, arbitral, or adjudicative action or proceeding are mandatory.<sup>257</sup> The Proposed Act is intended to be construed as broadly as possible and is to be applied in any adversarial situation implicating the enumerated statutes. No suit is required to be filed if the relief obtained otherwise satisfies the Proposed Act. Moreover, fees are to be awarded for actions in state courts or agencies if such an action is a prerequisite to the pursuit of a cause of action listed in the Proposed Act in federal courts or agencies. Finally, the Proposed Act encourages the use of alternative dispute resolution, including arbitration. To that end, arbitrators must award fees under the same standards as those followed by the judiciary.<sup>258</sup>

The only exception to an award of fees is for a *pro se* litigant who is not an attorney. Mandatory fees also shall be awarded to the defendant's attorney who defends against a plaintiff's motions, pleadings, or other papers that violate Federal Rule of Civil Procedure 11. While fees may be waived by an attorney, any fees awarded may not be assigned to the party whom he represents. Additionally, states are prohibited from enacting laws or codes that would subject an attorney to sanctions for accepting these mandatory statutory fees.

Admittedly, restricting fee awards to relief grounded in the defendant's statutory obligations may work to reduce the overall fee award in some cases. The Fees Act, however, was enacted to vindicate civil rights, not to serve as an attorney's relief act. In addition to ensuring the plaintiff's attorney that he will not be faced with a coerced fee waiver, the Proposed Act recognizes that fees are for the attorney. This provision should encourage attorneys to pursue relief based on the defendant's statutory obligations in order to maximize his fee. In so doing, the private attorneys general concept will be given full force and effect.

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257. Cf. *Foster v. Boorstin*, 561 F.2d 340 (D.C. Cir. 1977) (fees awarded after settlement); *Patton v. Andrus*, 459 F. Supp. 1189 (D.D.C. 1978) (stating that fees may be awarded by federal administrative agencies in Title VII case). *Contra Noble v. Claytor*, 448 F. Supp. 1242 (D.D.C. 1978) (only courts are authorized to award fees under 42 U.S.C. § 2000e-16(b); administrative agencies are not authorized to award fees).

258. Cf. *White v. City of Richmond*, 559 F. Supp. 127 (N.D. Cal. 1982), *aff'd*, 713 F.2d 459 (9th Cir. 1983) (stating that fee not reduced because mediators played a significant role in forging a consent decree).

## VI. CONCLUSION

During the decade after the enactment of the Fees Act, healthy controversy surrounded the issues of simultaneous negotiations and coerced fee waiver. Far more important than the fact that the circuits split in their reaction to *Prandini*, however, is the recognition of the chronological context in which they occurred.

Circuit decisions in *Prandini v. National Tea Co.*,<sup>259</sup> *Mendoza v. United States*,<sup>260</sup> *Obin v. District No. 9, International Association of Machinists*,<sup>261</sup> and *Pettway v. American Cast Iron Pipe Co.*<sup>262</sup> viewed simultaneous negotiations and coerced fee waivers as an actual or potential ethical problem. Importantly, these decisions occurred between 1977 and 1981. Only one case after 1981, a district court decision in *Lisa F. v. Snider*,<sup>263</sup> found an ethical conflict in the simultaneous negotiation of fees and merit. In stark contrast, none of the decisions in *Moore v. National Association of Securities Dealers, Inc.*,<sup>264</sup> *Lazar v. Pierce*,<sup>265</sup> *Chattanooga Branch of the NAACP v. City of Chattanooga*,<sup>266</sup> or *White v. New Hampshire Department of Employment Security*<sup>267</sup> found an ethical conflict. These decisions all occurred after 1980.<sup>268</sup>

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259. 557 F.2d 1015 (3d Cir. 1977).

260. 623 F.2d 1338 (9th Cir.), *cert. denied*, 450 U.S. 912 (1980).

261. 651 F.2d 574 (8th Cir. 1981).

262. 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979).

263. 561 F. Supp. 724 (N.D. Ind. 1983).

264. 762 F.2d 1093 (D.C. Cir. 1985).

265. 757 F.2d 435 (1st Cir. 1985).

266. No. 79-2111 (E.D. Tenn. Dec. 2, 1981), *appeal dismissed*, Nos. 82-5016, 82-5013 (6th Cir. Apr. 29, 1982) (cited in Comment, *supra* note 5, at 802 & nn.71-75).

267. 455 U.S. 445 (1982).

268. No suggestion is made that the fundamental governmental balance has shifted to allow the executive branch direct control over the judiciary. However, the chronological break in the treatment of simultaneous negotiation of fees and merits, coinciding as it does with the Reagan Presidency, seems more than coincidental; the Reagan Administration's apathy towards civil rights is noted widely. Detailing its halting approach to the enforcement of civil rights and public interest litigation looms considerably beyond the scope of this Note. Nonetheless, one should take note of the Administration's attempts to restrict severely the application of various fee-shifting statutes during this same period. It is suggested that an analysis demonstrating a causal linkage between the Administration's proposals for fee-shifting legislation and the trend which culminates in *Jeff D.* is one which would bear fruit. For a full discussion of the Reagan Administration's fee-shifting proposals, see Percival & Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 233. The Reagan Administration has made two proposals to restrict severely the application of fee-shifting statutes. The 1981 proposal died without a sponsor. The proposal was aimed at restricting fee awards in suits against the federal government. Fee awards only would be awarded to private, paying clients, handled on a straight fee basis. No fees would be awarded, as they were in the *Jeff D.* situation, which involved a legal service organization receiving government funds, contrary to *Blum v. Stenson*, 465 U.S. 886 (1984). Moreover, fee awards would have been based on a more restrictive formula than outlined in *Hensley v. Eckert*, 461 U.S. 424 (1983), and all fee awards where a money judgment was obtained would be

Defendants do have clear means by which to fix their fees with near precision. Since attorneys must keep particularized records on their time expended, any remaining uncertainty easily can be resolved by awarding fees only for relief which has a legal basis in law under the applicable statute. Despite the fact that fees readily can be determined, the Court in *Jeff D.* chose to value the Fees Act far more heavily as a bargaining chip to support its own judicially created policy to encourage settlements than as a tool by which to effectuate the congressional purpose behind the Fees Act.

The professional codes of ethics do not support a finding that settlement offers conditioned upon waiver are unethical without resort to an interpretation of the Fees Act, a task now completed by the Court. The trend in the courts clearly seems to favor a defendant's right fix his costs over a civil rights plaintiff's access to the courts. Those proposals attempting to work around *Jeff D.* seem deficient.

It has been suggested that the only viable remedy for this imbalance of policy priorities is for Congress to amend the Fees Act, declare "extortion" deals per se illegal, and require that all simultaneous negotiations be subjected to court supervision.<sup>269</sup> The legislative proposal in Part V of this Note adopts an approach that requires less judicial activism. Nevertheless, unless prodded by the legislature, or otherwise encouraged by the executive branch, little incentive exists for the judiciary to look beyond their concern of crowded dockets and abort an entrenched policy to encourage settlement. Because it does not appear that the executive branch will take action, only legislative measures, like the swift congressional reaction to *Alyeska Pipeline* giving rise to the Fees Act, seem to be an appropriate solution.

This Note concludes that the climate surrounding civil rights enforcement has shifted since the enactment of the Fees Act. The lack of affirmative influence to enforce civil rights simply encourages the shift away from affording broad judicial interpretation and effect to the Fees Act. The Fees Act shifted fees to the losing party, removed a severe impediment to litigation, and, thus, increased the access to justice. The common theme running through all the fee shifting statutes, including the Fees Act, is the congressional intent to offer private parties an incentive to bring actions that effectuate important public policies. While that intent is well documented, the plain language of the Fees Act simply does not prohibit fee waiver. Decisions by the judiciary since the

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reduced by 25% of the money judgment. The author suggests that the premise behind the Reagan proposals, that fee awards have been excessive, is not supported by solid data. To the contrary, he reports that only a small percentage of public interest organization's budgets are from fee awards. *Percival & Miller, supra*, at 242-46.

269. *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 266-67 (1986).

beginning of this decade seem to resist going beyond the Fees Act's plain language. As a practical matter, if the courts sense apathy by the co-equal branches of the government toward the vindication of civil rights, it is unlikely that they will be moved to give the broad interpretation that would be necessary in order to find a prohibition on coerced fee waivers within the language of the Fees Act. Thus, it is time for the legislature to act.

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