No. 84-1288

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK and WILLIAM GRUZINSKI,

Petitioners,

v.

JEFF D. PAULA E., JOHN M., and DUSTY R., Minors, By and Through Their Next Friend, CHARLES JOHNSON, III, Individually and on Behalf of the Class They Represent and MARK CLARY, Intervenor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE COMMITTEE ON LEGAL ASSISTANCE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* ON BEHALF OF RESPONDENT

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INTEREST OF AMICUS[1]

The Association of the Bar of the City of New York was incorporated by act of the New York Legislature in 1871. It was formed, in part, "for the purposes of . . . facilitating and improving the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession. . . ." Constitution, Article II. It is composed of over 14,000 lawyers and judges practicing or residing in the City of New York. This brief is filed on behalf of the Association's Committee on Legal Assistance.

The interest of the Committee in this case is threefold. First, it seeks to encourage access to legal representation for all persons. It pursues this objective both by encouraging attorneys to undertake representation of indigents *pro bono publico* and by supporting the availability of statutory attorneys' fees in civil rights cases. In the opinion of the Committee, negotiation tactics such as those apparently used in this case threaten substantially to undermine the availability of statutory fees in civil rights cases and, therefore, the availability of counsel to indigent civil rights claimants.

Second, along with the Committee on Professional and Judicial Ethics, the Committee is interested in maintaining the high ethical standards of the profession. Its Opinion No. 80-94 (1981) concluded that offers of settlement in civil rights cases conditioned on a waiver of statutory attorneys' fees are professionally unethical. . . . As a corollary, the Association also opined that, in these cases, a defendant's lawyer should not initiate simultaneous negotiations of the merits of the litigation and the issue of attorneys' fees. Subsequently, it issued Opinion No. 82-80, indicating that, during the course of negotiations for settlement on the merits, it is permissible to exchange reasonable information regarding a potential fee request so that the defendant can ascertain the extent of ultimate liability.

Third, along with the Committee on Federal Courts, the Committee is interested in all developments that affect the administration of the federal courts. This case presents major issues of concern in that area.

STATEMENT OF THE CASE:
THE QUESTIONS ACTUALLY PRESENTED

The many briefs filed by various amici on behalf of the petitioners treat the case as posing the question of the propriety of simultaneous negotiations of the merits together with the fees as a single, universal question. While we endorse fully the reasoning of the court below in banning simultaneous negotiations in civil rights cases, that is not, in our view, the primary question presented nor a question necessary to decision in this case. Rather, this case is about the impropriety of a tactic that effectively coerces a waiver of the statutory fee.

This is well illustrated by the different ways in which the district court

1. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

and the court of appeals conceived the case. In approving the fee waiver, the district court considered only the question of the ethical conduct of plaintiffs' counsel in negotiating fees in tandem with the merits.

> [T]he ethical consideration is "Is the attorney in the process of bargaining out to depreciate his client's claim or to proceed in a manner that will be unfair to his client?" And I think the ethical considerations run only to the issue and not to what is fair to the attorney, and therefore I am of the opinion that it doesn't violate any ethical considerations for an attorney to give up his attorney fees in the interest of getting a better bargain for his client.

Reporter's Transcript of Proceedings of April 28, 1983, ("R.T.") at 7.

The Ninth Circuit took a very different view. It noted that plaintiffs bargained for the district court's approval as "a condition on the waiver of fees. . . ." Cert. App. 19a. Thus, it viewed the relevant question as one of the propriety under the statute, 42 U.S.C. Section 1988, and F.R.C.P. 23(e) of the district court's approval of such a waiver when:

> The attorney was asked to choose between foregoing any compensation while obtaining a favorable settlement on behalf of the class, or declining the benefit for the class in hope of eventually receiving a fee award. Plaintiffs' attorney here accepted the benefit for the class and turned to the court for his own protection.

Cert. App. 23a. It concluded that a coerced waiver should not be accepted and that the plaintiffs are entitled to a reasonable fee. *Id.* at 25a.

SUMMARY OF ARGUMENT

The principal question in this case concerns the propriety of a negotiation tactic designed to coerce a waiver of statutory fees by pitting the client against his or her interest in a fee. It is a problem peculiar to civil rights practice, arising from the special circumstances that typically govern the attorney/client relationship in such cases. Accordingly, analysis premised on other models of representation—such as contingent fees in tort cases or attorney/client relationships under other fee shifting statutes such as the antitrust laws or the Equal Access to Justice Act—are not only unhelpful, but also misleading.

In this narrow context, the actions of defense counsel in conditioning settlement on waiver of fees tend to make a dead letter of Section 1988 and violate applicable norms of professional ethics. First, it is prejudicial to administration of justice because, contrary to both the congressional intent and the requirements of the canons, it serves to deter counsel from undertaking representation in these cases. Second, because the purpose and effect of the tactic is to place opposing counsel in a conflict of interest, it violates the lawyer's "solemn duty to uphold the integrity and honor of his profes-

sion. . . ." Code of Professional Responsibility EC 9-6.[2]

The tactic is unethical because it is not the product of a good faith interpretation of the law in the client's favor, but rather the exploitation of a disequilibrium in litigating posture not related to the relative merits of the case. It is not a bona fide compromise because it ignores entirely the statutory obligation to pay fees that arises from the offer of relief on the merits that it accompanies. Thus, the use of this tactic by defense counsel runs afoul of the duty to confine zealous representation within the bounds of the law. It also violates the special duty of government counsel to seek a just and fair result.

A court should not enforce a fee waiver that is the result of this form of ethical abuse. Ordinarily, it should merely excise the fee waiver provision because the defendant is not entitled to the benefit of the bargain it has manipulated. But after-the-fact remedies are not sufficient in this context. Because the very existence of the unethical conduct may be masked by the appearance of voluntary waiver, a court may not always be able to police such violations through retrospective remedies alone.

Two alternatives exist. The Court may direct active supervision by the federal district courts of settlement negotiations in these cases. Or, it may ban simultaneous negotiations of fees and the merits in these cases.

Of these two, we respectfully submit that the prohibition of simultaneous negotiations is the better, more efficient remedy. First, it preserves scant judicial resources; because it is self-enforcing, it requires less active involvement of the district court. Second, it will in fact facilitate settlements, both because it encourages more efficient negotiation—encouraging the parties to negotiate on a principled basis and in good faith first on the merits and then, separately, on the plaintiffs' entitlement to fees—and because it better maintains the balance of incentives that ordinarily produces settlement. Third, it better controls other ethical problems that arise during simultaneous negotiations.

ARGUMENT

I. The Problem of Coerced Waiver of Statutory Attorneys' Fees is One Peculiar to Civil Rights Practice, Arising from the Nature of the Attorney/Client Relationship Typical of those Cases

In our view, this case does not turn on the question of the propriety of simultaneous negotiation on the merits and fees in the general run of cases nor on the question whether fees under 42 U.S.C. Section 1988 ("the Act") are subject to settlement on reasonable terms. Rather, the question is whether defendants in a civil rights case may coerce a waiver of statutory fees by knowingly creating a conflict of interest for plaintiffs' counsel, pitting the clients' interest in relief on the merits against counsel's interest in a fee. The availabil-

2. Citations to the Code of Professional Responsibility ("the Code"), which are the governing ethical standards for the New York bar, are directly to the relevant disciplinary rule ("DR"), ethical consideration ("EC"), or canon. Citations to the Model Rules are to ABA Model Rules of Professional Conduct (1983).

ity of this tactic is a function of a narrow set of circumstances typical of civil rights cases but not normally present in most other areas of practice. We first explain how civil rights differs from most other areas of practice. We then show why the ethical issue is one that uniquely plagues the civil rights area.

A. The Nature of Civil Rights Cases

The basic fact, recognized by the Congress that passed the Act, is that civil rights claimants are typically indigent and cannot afford to pay legal fees.[3] Unlike ordinary tort or commercial litigation, civil rights cases rarely produce a fund sufficiently large also to cover the lawyer's fee.[4] Because of this, the typical retainer agreement between a civil rights claimant and private counsel does not obligate the client to pay the fee, or even a substantial portion of it. It could not, either as a matter of practicability or ethics.[5] Thus, while retainer agreements often require the client to pay a portion of the costs or to advance a modest retainer, they usually recite that the lawyer's fee will be covered by a court award of attorney's fees. Congress was aware of this important difference in practice between civil rights cases and other forms of contingent fees. 122 Cong. Rec. Section 17052 (daily ed. Sept. 29, 1976) (Remarks of Senator Kennedy as sponsor).

In addition, there is an entire (and large) class of civil rights counsel *precluded by law* from contracting for a fee from the client. This includes the federal Legal Services Corporation, which provided counsel in this case and is barred by federal statutes from charging a fee, and many private civil rights organizations. In New York, for example, private organizations that provide legal assistance are chartered by the courts as legal aid societies. Although they may accept court awarded fees, they are prohibited from collecting a fee from the client. In addition, since many of these organizations hold tax exempt status under Section 501(c)(3), they cannot and do not charge fees.

B. These Dynamics of Civil Rights Practice Result in Significantly Different Ethical Considerations

An offer of settlement on the merits conditioned on the waiver of statutory fees is a practice unique to civil rights cases because the circumstances that make it effective rarely exist in other fee shifting contexts such as under the Equal Access to Justice Act[6] or the antitrust laws. For example, in an

3. S. Rept. No. 94-1011, 94th Cong. 2d Sess., 2 (June 29, 1976); *accord* H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., 1, 3 (Sept. 15, 1976); *Lipscomb v. Wise*, 643 F.2d 319, 320 (5th Cir. 1981); *Regalado v. Johnson*, 79 F.R.D. 447, 451 (N.D. Ill. 1973).

4. H.R. Rep. No. 94-1558, *supra* n.3; S.Rep. No. 94-1011, *supra* n.3, at 6.

5. *See* DR 2-106(B)(4) (prohibiting excessive fee; reasonableness of fee linked to "amount involved and result obtained"); *accord* Model Rule 1.5(a)(4); *see also* EC 2-24, EC2-25 (duty to represent indigents).

6. The Solicitor General's arguments concerning the quandary imposed by the ruling below on the government when it litigates cases covered by the Equal Access to Justice Act, 28 U.S.C. § 2412(d), ("EAJA") are completely inapposite. *See* Brief for the United States as Amicus Curiae at 13-14. For a variety of reasons, offers by the government to settle the merits of

antitrust case brought by a corporation, the attorney will have a retainer agreement that spells out the fee. If the defendant offers a flat percentage of the damage request in settlement, implicit in that offer will be a request to waive statutory fees. But no ethical dilemma is presented. The attorney explains to the client that the offer means the client will receive the settlement figure less the amount of the agreed fee.

Even when there is a traditional contingent fee, expressed as a percentage of the recovery, the interests of the lawyer and the client do not diverge. They are in fact parallel: the larger the client's recovery, the larger the fee. If the client and lawyer disagree on the adequacy of the amount offered, it is the client's decision whether the offer is sufficient in light of its bottom line value. *See* M.F. Derfner & A.D. Wolf, 2 COURT AWARDED ATTORNEYS FEES Par. 21.03 n.36 (1984).

Contrast a civil rights case for injunctive relief brought by a class of indigents. Defendants' counsel offer to settle the merits conditioned on a waiver of fees. If plaintiffs accept the offer, counsel, who may have invested significant time, will receive no fee whatsoever. The clients, who will benefit from the relief on the merits, are nevertheless unburdened by any liability for the lawyers' fees: either because they have no contractual fee obligation, as is usual, or in any case because they are judgment proof.

The offer thus creates a conflict of interest between lawyer and client, which would preclude the representation as an initial matter.[7] *See* DR 5-101(A) ; Model Rule 1.7(b). When the terms of the settlement agreement are favorable, his duty "always to act in a manner consistent with the best interests of his client. . . .," EC 7-9, comes in conflict with his legitimate interest in a fee.[8] The lawyer is required to communicate the settlement offer to the

such litigation in exchange for a release of liability for fees under that Act rarely present similar ethical concerns.

Under the EAJA, the government is only liable for fees if "the position of the United States was not substantially justified." 28 U.S.C. § 2412(d)(1)(B). Thus, unlike cases governed by § 1988, the private citizen litigating against the federal government is not entitled to fees under the EAJA simply because he or she prevails; it depends, instead, on the degree to which the government's position was unreasonable. The EAJA was passed not to encourage counsel to accept cases against the government, but merely to compensate citizens unreasonably forced to court by the government's unjustified conduct. *See* H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 5908-14. Often, these litigants are economic enterprises that can afford counsel. Accordingly, the retention of counsel in most cases within the coverage of the EAJA is exceedingly unlikely to be premised upon an agreement that all fees will be provided by a court award under the EAJA. Thus, the disassociation between the lawyer's and the client's interests in recovering a fee that makes the tactic coercive is entirely absent from the government's litigation in EAJA cases.

7. This conflict of interest "cannot be resolved by the attorney resigning from the case. Plaintiffs in [these cases] must, of necessity, be represented by counsel and any attorney representing plaintiffs under these circumstances falls victim to the same statutorily created conflict." Opinion No. 17 of Overseers of the Bar (Maine) at 2 (1981) ("Maine Bar Op. No. 17").

8. This conflict cannot be resolved by "prepar[ing] for the dilemma with a retainer agreement" as suggested by the Equal Employment Opportunity Advisory Council, Brief as Amicus Curiae at 6 and by *Moore v. National Assoc. of Securities Dealers*, 765 F.2d 1093, 1105 n.17 (D.C. Cir. 1985). A retainer agreement which provides that the client will defer to counsel's

client,[9] who has the final say whether to accept it.[10] The predictable result is that the client will be induced to accept the settlement offer to the lawyers' detriment; whenever a waiver offer is made in these cases, "counsel can foresee themselves subject to being euchred out of their fee." *Lazar v. Pierce*, 757 F.2d 435, 438 (1st Cir. 1985).

This dilemma is intensified in a case like *Jeff D.* when the client class consists of incompetent minors.

> Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities on his lawyers.

EC 7-12; *see* Model Rule 1.14; Comment to Rule 1.4. In that circumstance, the lawyer is "compelled . . . to make decisions on behalf of the client. . .," and must "act with care to safeguard and advance the interests of the client." EC 7-12. Faced with a favorable offer of prompt relief, the lawyer must "exercise independent professional judgment on behalf of the client," Canon 5, "free of compromising influence and loyalties . . .," EC 5-1; forego his pecuniary self-interest; and accept the offer.

The suggestion from some quarters that it is "not an ethical no-no" for counsel "to insist on a reasonable fee" even if that is "detrimental to the client's successful settlement," *Lazar*, 757 F.2d at 438, has no support in either the standards of an ethical profession[11] or common sense. Consider the case

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pecuniary interest and refuse settlement would be unethical and unenforceable. EC 5-1. Nor could the retainer agreement require the client, though indigent, to bear the fee—that would be unethical too. *See* discussion *supra*. If the retainer provides that counsel would give up the fee, it just achieves the same result as the coercive waiver tactic.

The suggestion that the retainer agreement could vest the statutory fee recovery in the client presents the same problems and more. Such a retainer would have to provide that counsel would be paid a reasonable fee contingent on success. Presumedly, it would specify hourly rates. But this is a nonsolution.

First, it would not work for organizational counsel who cannot charge a fee. Second, it would not solve the coercive waiver problem. If the judgment-proof client accepts the settlement, does counsel sue the indigent client for the fee he or she cannot pay? "Retainer agreements are useful devices for disclosing to clients the conflict of interest inherent in a case in which an attorney expects to be paid under a fee statute but, as a practical and legal matter, they are unsatisfactory devices for eliminating the conflict of interest." Calhoun, *Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U.S.C. § 1988*, 55 Colo. L. Rev. 341, 353-56 (1984).

9. Model Rule 1.4(a); Comment to Rule 1.4 ("A lawyer who receives from opposing counsel an offer of settlement in a civil controversy should promptly inform the client of its substance. . . ."); *see also* EC 7-7.

10. EC 7-7 ("it is for the client to decide whether he will accept a settlement offer. . . ."); Model Rule 1.2(a) ("A lawyer shall abide by a client's decision whether to accept an offer of settlement. . . .").

11. Every bar association that has considered the issue has concluded that it would be unethical for counsel to turn down an offer of settlement in these circumstances. *See* Formal Opinion C-235 (May 1985), *reprinted in* Michigan Bar Journal 508, 553 (June 1985); Maine Bar Op. No. 17 at 4; Vermont Bar Association Opinion No. 85-3 at 2-3 (1985); District of Columbia Bar, Legal Ethics Committee, Opinion No. 147 at 5-6, *reprinted in* 113 *Daily Washington Law Reporter* 389, 394 (1985); Op. No. 80-94 at 6a-7a (1981). No bar association has ruled other-

of an unemployed client who was denied a job because of his race. The defendant offers him a job and back pay, conditioned on counsel waiving the fee. Counsel could not in good conscience block the settlement and, at the least, postpone relief because their pecuniary interest is more important than that of the indigent client.

In this case, the safety of mentally ill children confined by the state was in jeopardy because they were housed with an adult population that included child-molesters. The settlement contained detailed provisions designed to eliminate that problem. Cert. App. 3a-4a. Counsel might have rejected the settlement offer because of the fee waiver condition, forcing the case to trial. But suppose that, in the interim before relief was granted, even one child was assaulted, molested or raped. Would the lawyer have acted in a manner consistent with his ethical responsibility to the client? To proceed to trial under these circumstances because of the lawyer's interest in a fee would clearly fail to "promote public confidence in our system and in the legal profession." EC 9-1; *see also* EC 9-6.

In these situations, the ethical conflicts that face plaintiffs' counsel are extraordinary. Because of that, the temptation to employ the coercive fee waiver is strong. Indeed, various amici suggest that if fee waivers are approved they may be required to use them. *See, e.g.,* Brief for the States as Amici Curiae at 52-53. A fair, rational legal system deserving of the public's respect and confidence would not allow that to occur.

II. Given These Circumstances, a Defendant's Lawyer who Makes an Offer of Settlement Conditioned on the Waiver of the Required Statutory Fee Violates Accepted Norms of Professional Ethics

This Association was the first to address squarely the issue of coercive waiver. It has since been joined by the D.C. Bar. Both have concluded that the tactic is unethical. *See n. 11 supra.*[12] Even those courts that have approved waivers in particular cases have noted the questionable nature of defendants' conduct[13] or otherwise intimated that important ethical considerations are raised by such conduct.[14]

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wise to our knowledge. The D.C. Bar Opinion does conclude that all future settlement offers that violate the opinion need not be conveyed to the client, although they should be.

12. In addition to the bar opinions cited in n.11 *supra*, the Georgia Bar has approved lump sum offers in Title VII cases. State Bar of Georgia, Advisory Opinion No. 38, *reprinted in* 10 *Georgia State Bar News* 5 (1984). Like the opinions of the Michigan, Maine, and Vermont bars, it does not discuss the waiver issue.

13. In *Lazar v. Pierce*, the First Circuit observed of the waiver offer in that case: "We are . . . critical of the Housing Authority. It seems apparent that it was playing on counsel's difficult dilemma in exactly the manner plaintiff asserts. This was not a bona fide compromise." 755 F.2d at 437. It continued: "While there may have been no consciously unethical conduct, to object to going to court, and to object to paying any fee, does not . . . commend itself." *Id.* at n. 1.

14. In *Moore v. National Association of Securities Dealers*, the court approved an express waiver "at least where a demand for such has not been made by a defendant." 762 F.2d at

This should not surprise. Whatever the considerations that govern other aspects of settlement negotiations in these cases, the use by defense counsel of the coercive waiver tactic violates accepted norms of professional responsibility. It runs afoul of the duty "to maintain . . . the integrity of the legal profession . . .," Canon 1; the "duty to make legal counsel available . . ." Canon 2; the duty to confine zealous representation of a client "within the bounds of the law . . ." Canon 7; and the duty to "avoid even the appearance of professional impropriety. . . ." Canon 9.

A. The Use of the Waiver Tactic is Prejudicial to the Administration of Justice

"A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent services of a lawyer. . . ." EC 1-1. There is a special responsibility to provide or support legal assistance to the poor. EC 2-25; EC 8-3.

> [T]he provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally. . . . Every lawyer should support all proper efforts to meet this need for legal services.

Model Rule 6.1, Comment to Rule 6.1; *accord* Canon 2; EC 2-1.

These obligations arise not merely as a matter of *noblesse oblige*, but from the requirements of the legal system itself. "The fair administration of justice requires the availability of competent lawyers. . .," EC 8-3, because "[t]he legal system in its broadest sense functions best when persons in need of legal assistance are represented by their own counsel." EC 7-18.[15] Thus, the lawyer's obligation under Canon 2 to assist in making legal counsel available merges with the injunction of DR 1-102 (A)(5): "A lawyer shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice." *Accord* Model Rule 8.4 (d). But this is precisely the effect of the waiver tactic.

The purpose of the Act was to provide legal representation to indigent civil rights claimants by the award of fees "adequate to attract competent counsel." S. Rep. No. 94-1011 at 6; H.R. Rep. No.94-1558 at 9. Congress knew that:

> Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [§ 1988] is designed to give such persons effective access to the judicial process. . . .

1099. It further acknowledged "that such offers present some difficulty for plaintiffs' counsel." *Id.* at 1105 n. 17 (citing D.C. Bar Op. No. 147).

15. The Preamble to the Model Rules explains that: "A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done."

Id. at 1. But "the long term effect of persistent demands for the waiver of statutory fees is to prejudice a vital aspect of the administration of justice and undermine efforts to make counsel available to those who cannot afford it. . ." Op. No. 80-94 at 13a; *accord* D.C. Bar Op. No. 147 at 7. The knowledge that counsel can be forced to forgo a fee by means of the waiver tactic spreads quickly; it deters lawyers from accepting representation of indigent civil rights claimants.[16]

The bar has long recognized that settlement agreements which serve to restrict access to legal representation violate the rules of ethics. In the late sixties, there was

> an ever-increasing practice accompanying the settlements in [antitrust] cases of taking from the plaintiff's counsel covenants not to sue or to aid in any suit against the settling defendants.

ABA Informal Opinion 1039 at 1 (1968). Although there were "not . . . canons clearly covering the matter," *id.* at 3, the Committee nevertheless condemned the practice because it "affects the right of the client to obtain the benefit of the services to which he is entitled from his own lawyer," *id.* at 44. This ruling has been codified in both DR 2-108 (B) and Model Rule 5.6(b).

The availability of a settlement provision such as that prohibited by DR 2-108 (B) encouraged the defendants to settle. It is nevertheless unethical because it interferes with the ability of those in need of legal assistance to retain counsel who are competent in the subject matter. Informal Opinion 1039 at 4-5. The waiver tactic is more harmful. Not only does it affect the lawyer in the particular case, it also deters all other lawyers from accepting civil rights cases because they can be forced to give up their fee. Use of this tactic prejudices the administration of justice because it threatens to undermine the very device Congress found necessary to provide legal representation in civil rights cases.

B. The Use of the Waiver Tactic Undermines the Integrity of the Legal Profession

Canon 1 provides that: "A lawyer should assist in maintaining the integrity . . . of the legal profession." This duty not only requires the lawyer to "maintain high personal standards of professional conduct" himself, but also to "encourage fellow lawyers to do likewise." EC 1-5. This duty stems, in part, from the principles of Canon 9, that "[a] lawyer should promote public confidence in our system and the legal profession." EC 9-1; *see also* EC 9-6 ("Every lawyer owes a solemn duty to uphold the integrity and honor of his profession. . ."). The Model Rules express the same concept in plain and unmistakable terms: "it is professional misconduct for a lawyer to . . . knowingly assist

16. *See* Kraus, *Ethical and Legal Concerns in Compelling the Waiver of Attorney's Fees by Civil Rights Litigants in Exchange for Favorable Settlement of Cases Under the Civil Rights Attorney's Fees Awards Act of 1976*, 29 Vill. L. Rev. 597, 674-95 (1984).

or induce another to [violate or attempt to violate the rules of professional conduct]... ." Model Rule 8.4 (a) (emphasis added).

Defendants' counsel who make settlement offers designed to create a conflict of interest between opposing counsel and the client plaintiff act in a manner inconsistent with their duty to the profession. At the worst, they induce plaintiffs' counsel to abandon their clients' interest in favor of their personal, pecuniary interest. But, the integrity of the profession may be undermined even when ethical plaintiffs' counsel resist the conflict. Ensnared in the conflict created by the waiver tactic, well meaning counsel have often acceded to the coercive demand of waiver expecting subsequently to challenge it before the district court. Although one state bar has approved such a challenge as ethical, Vermont Bar Association Opinion No. 85-3, some courts have condemned the "secret plan to rescind" as "exactly the wrong way" to "in effect, build upon a misrepresentation." *Lazar,* 757 F.2d at 438-39; *see also Moore v. National Association of Securities Dealers,* 762 F.2d 1093, 1110 (D.C. Cir. 1985). In addition, courts have been "even more critical of" defense counsel for "playing on counsel's difficult dilemma." *Lazar,* 757 F.2d at 437.

C. *The Use of the Waiver Tactic Is Inconsistent with the Lawyer's Duty to Act within the Bounds of the Law*

Defendants and their amici vigorously disclaim any unethical conduct and instead argue that the use of coercive waiver offers is justified by their ethical duty under Canon 7 to provide their clients with zealous representation. They err, however, because Canon 7 requires that zealous representation must be contained "within the bounds of the law." Analysis of the dymanics of the coercive waiver tactic and the bounds of the law under § 1988 demonstrates that the waiver tactic is unacceptable and unethical.

We start from the same initial premise as the Code.

> The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law . . . . . Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Preamble and Preliminary Statement at 1.[17] "To lawyers especially, respect for law should be more than a platitude." EC 1-5. This means, of course, that positions espoused on behalf of clients are not ethical solely because they are "favorable to the client." EC 7-4. Rather, they must also be "supported by the law . . . , supportable by a good faith argument for an extension, modifi-

17. As expressed in the Preamble to the Model Rules: "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. . . ." The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general."

cation, or reversal of the law." *Id. Accord* DR 7-102(A)(1) & (2); *see also* DR 2-109(A)(2).

Thus, to analyze the ethics of an offer of settlement conditioned on a waiver of fees it is necessary to explore the basis of the defendant's negotiating position. One could not ethically argue to a court that fees should be denied to a prevailing plaintiff because the defendant disapproves of that expense or believes that the policy of the Fees Act is wrong. Under the Act, a prevailing plaintiff is entitled to a "reasonable attorney's fee," which he or she "should ordinarily recover . . . unless special circumstances would render such an award unjust." S. Rep. No. 94-1011 at 4; H.R. Rep. No. 94-1558 at 6 (quoting *Newman v. Piggie Park Enterprises,Inc.*, 390 U.S. 400, 402 (1968)).[18]

Congress provided for fees for three reasons. The first was retrospective: to compensate the individual litigant, *see* S. Rep. No. 94–1011 at 2, imposing on civil rights defendants the obligation to pay the transaction costs of their violations. But it also had two prospective purposes: "to encourage individuals injured by racial discrimination to seek judicial relief . . .," *Newman*, 390 U.S. at 402, and to provide a disincentive to future violators.[19]

Defendants are not ethically free to seek to evade these obligations, although that would serve their pecuniary interest. Defendants' counsel may take any good faith position regarding what is a "reasonable attorney's fee" in a given case. But, absent special circumstances, counsel cannot argue that a prevailing plaintiff should be deprived of a reasonable fee and still be "within the bound of the law."

Nor may lawyers seek in settlement that which is contrary to law. DR 7-102. When defendants' counsel seek to coerce a waiver of fees, they are attempting to effectuate precisely the opposite of what Congress intended: to make the indigent civil rights claimant bear his or her own costs in the particular case and to make civil rights litigation unattractive generally.

True, settlement normally encompasses a compromise of the full measure of relief on the basis of the likelihood of success. But that does not salvage a settlement offer of less than a reasonable fee, let alone an offer of no fee at all. Under § 1988, a settlement offer of substantial relief on the merits and no fee is, in terms, an offer not premised on the likelihood of success. For Congress explicitly considered when a settling plaintiff is entitled to fees and adopted a purely functional approach: Plaintiffs are entitled to fees if "they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. No. 94-1011 at 5; *accord* H.R. Rep. No. 94-1558 at 7. Indeed, even when "a defendant might voluntarily cease the unlawful practice . . ., [a] court should still award fees" if the filing of the lawsuit was the catalyst for such

18. The intimation that awards of counsel fees are wholly discretionary, *see* Petitioners' Brief at 13, is inaccurate. *See New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980) ("the court's discretion to deny a fee award to a prevailing plaintiff is narrow.")

19. Congress determined that "the *effects* of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance." S. Rep. No. 94-1011 at 5 (emphasis added).

"voluntary" compliance. H.R. Rep. No. 94-1558 at 7; *accord* S. Rep. No. 94-1011 at 5. Thus, under the Act, the obligation to pay fees arises not from success at trial —which is estimated in settlement— but from the accomplishment by plaintiff of the desired end.[20] Under the Act, a defendant that offers favorable relief on the merits obligates itself to pay a reasonable fee.[21] A negotiation tactic that evades that obligation is not within the bounds of the law.

Contrast a case in which § 1988 would not obligate the defendant to pay counsel fees. A defendant, for example, may have identified and moved to rectify a civil rights violation before the plaintiffs' suit is begun. Because the relief measures antedate the suit — and, therefore, plaintiffs were not the catalyst for relief — a defendant could assert in good faith that it is not required to pay fees under the Act. In this "noncatalytic" case, a defendant could combine relief on the merits with a waiver offer and still be "within the bounds of the law"[22] — although, as we show in Pt. III, it would also be unecessary as a practical matter.

A comparative analysis of the dynamics of the waiver offer in these very different circumstances is instructive. In a "noncatalytic" suit, the waiver offer is premised on a good faith interpretation of the law and the facts in the client's favor. It is effective because of the strength of defendant's legal position alone. And, one might add, it achieves a fair and expeditious resolution of the dispute, providing plaintiffs with no less than they are entitled to.

In the ordinary case, however, the waiver demand is not premised on a good faith reading of the law. It is effective regardless of the merits of the case or the likelihood of success. And while it provides plaintiffs with a compromise measure of relief with respect to one aspect of the case (the merits), it provides no relief whatsoever with regard to the second aspect of the case (the statutory entitlement to attorneys' fees).

In the ordinary case, the waiver tactic is effective not because plaintiffs calculate the likelihood of success and determine to accept relief without fees; it is effective solely because the defendants can exploit the ethical quandary that it creates. It is "a demand . . . that the plaintiff's lawyer cannot resist as a matter of ethics and in which the plaintiff has no interest and therefore will not resist." D.C. Bar Op. No. 147 at 5-6; N.Y.C. Bar Op. No. 80-94 at 7a. It results not in a fair and expeditious settlement, but rather in an undeserved windfall to the civil rights violator who avoids the statutory obligation to pay fees.

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20. This is, in part, a function of Congress's intention that fees be governed by "prevailing market rates," *Blum v. Stenson*, — U.S. —, 79 L.Ed.2d 891, 900 (1984); the market would not deny counsel a fee because success was achieved by agreement rather than litigation.

21. As long as it does not condition fees on merits relief, it can bargain over what is a reasonable fee. To do so, it is entitled to disclosure of the plaintiffs' fee request. N.Y.C. Op. No. 82-80.

22. There is no suggestion whatsoever that this case involved such circumstances. Rather, the acceptance by the defendants of detailed injunctive relief only on the eve of trial rebuts any possibility that the state had planned the changes prior to the lawsuit, begun two years earlier.

D. The Use of the Waiver Tactic by Government Counsel is Particularly Inappropriate

In the hands of government, the waiver tactic will be particularly effective in defeating the goal of providing legal representation contemplated by Canon 2 and the Act. And given their special responsibilities in our system, it is particularly inappropriate for the government and its counsel to coerce a settlement that evades the law and is unjust.

Because "governmental officials are frequently the defendants in cases brought under the statutes covered by" § 1988, H.R. Rep. No. 94-1558 at 7, they are best situated to discourage plaintiffs' counsel by repeated invocations of the coercive waiver tactic.

> Permitting conditional fee settlements favors public entites and other habitual abusers who are customarily defendants in civil rights cases. They can better fend off subsequent claims and continue unlawful practices by the use of intentional and concerted insistence on fee waivers. The reputation of specific defendants who utilize fee waiver tactics quickly spreads, and the civil rights bar is forced to switch resources to other "targets." Thus, the most flagrant offenders are rewarded.

Kraus, *supra* n.16, 29 Vill. L. Rev. at 644-45 (footnotes omitted). Yet, the Court has noted in a related context:

> How, 'uniquely amiss' it would be therefore, if the government itself — 'the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct' — were permitted to disavow liability for the injury it has begotton.

Owen v. City of Independence, 445 U.S. 622, 651 (1980) (quoting *Adickes v. Kress & Co.*, 398 U.S. 144, 190 (1970) (Brennan, J., concurring)).

Government counsel's duty of loyalty runs not to particular officials but to the entity.[23] Therefore, they cannot ignore the impact of their actions on plaintiffs, who are the entity's citizens.[24] And because they represent the government, they have a heightened duty to see that the law is complied with. Thus, the Code cautions that:

> A government lawyer in a civil action . . . has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

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23. *See* EC 5-18: "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity. . . ."

24. This irony was not lost upon the Congress that passed § 1988. It noted that: "such governmental entities and officials have substantial resources available to them through funds in the common treasury, including taxes paid by the plaintiffs themselves." H.R. Rep. No. 94-1558 at 7.

EC 7-14.[25] The coercive waiver tactic runs afoul of this ethical command because it exploits the government's better economic position to deprive opposing counsel of their statutory fee.

III. A Bifurcated Approach to Negotiations on the Merits and Fees in Civil Rights Cases is the Most Appropriate and Effective Remedial Device for Preventing the Ethical Abuse of the Coercive Waiver and its Variants

The ethical abuse occasioned by the coercive waiver tactic is not a rare or isolated occurrence. It has been estimated "that there are requests for fee waivers in more than half of the civil rights cases litigated." *Fee Waiver Requests Unethical: Bar Opinion*, 68 A.B.A.J. 23 (Jan. 1982). As noted above, the petitioners and their amici suggest they may be compelled to use the tactic by their ethical responsibility to their clients. A practice thus entrenched requires more than rhetorical censure; the courts must develop and enforce appropriate measures to prevent such ethical abuses.

A. Coercive Fee Waiver Agreements Should Be Unenforceable

A "contract . . . in violation of public policy and professional ethics . . . calls for judicial condemnation." *Weil v. Neary*, 278 U.S. 160, 174 (1929). Faced with a fee waiver that is the result of this form of ethical abuse, a court should apply the traditional rule that contracts against public policy are unenforceable.[26] *See, e.g., Woodstock Iron, Co. v. Richmond and Danville Extension Co.*, 129 U.S. 644 (1889); Restatement of Contracts 2d § 178. This is particularly so when "the strength of that policy [i]s manifested by legislation." *Id.*, subsection (3)(a).

The unenforceability of the coercive fee waiver, however, should not in a case like this result in the invalidity of the balance of the settlement agreement. In refusing to enforce contractual terms that are void as against public policy, courts generally preserve the balance of the contract, and even of the term. Restatement of Contracts 2d §§ 178, 184. This is particularly true when, as here, the party seeking enforcement of the balance acted "in good faith and in accordance with reasonable standards of fair dealing." *Id.*, § 184(2). When the substance of the settlement on the merits is, on its own, a reasonable compromise, *cf. Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977), it should be enforced because the fee waiver cannot be said to have been

25. The nongovernmental lawyer also has a duty of fair dealing. EC 7-10 provides that: "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved with the legal process and to avoid the infliction of needless harm." Similarly, the Preamble to the Model Rules observes that: "As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others." The point is only that the responsibility of govenrment counsel is greater.

26. "[A] consent decree or order is to be construed for enforcement purposes basically as a contract. . . ." *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975).

"an essential part of the agreed exchange." Restatement § 184(1). That the defendant does not receive the full benefit of this bargain is of little consequence when that bargain was obtained unethically: "This [i]s not a bona fide compromise." *Lazar*, 757 F.2d at 437.

But unless the Court is clear on both the unenforceability and the severability of fee waivers, this form of judicial review will be ineffective. The defendants, as here, often counter such efforts with a request to undo the negotiated settlement on the ground that the fee waiver was *the* consideration for the grant of relief on the merits. This can be as effective in preventing plaintiffs' counsel from challenging the waiver as that tactic was coercive in the first place: "each step forward reintroduces precisely the same ethical dilemma that originally forced the acceptance of the fee waiver." Kraus, 29 Vill. L. Rev. at 620-22; *see* Vermont Bar Op. No. 85-3 (attorney may challenge coerced fee waiver as long as it does not jeopardize client's recovery).

B. A Bifurcated Approach to Settlement Is the Most Effective Remedy

We respectfully submit that, for four reasons, a flat ban on simultaneous or conditional negotiations of the merits and fees in this narrow class of cases is the best remedy.[27]

1. A flat ban on simultaneous negotiation deals directly with the waiver problem by removing the context that makes the tactic effective. It gives clear guidance to busy district courts, eliminating the uncertainties of a case-by-case approach.

2. A bifurcated approach to settlement better preserves scant judicial resources. Reliance on district court supervision would only be successful in direct proportion to the amount of time and effort expended by the district court. Actual supervision of negotiations could be very time consuming. After-the-fact review might require reconstruction of the course of negotiations in an effort to ascertain whether the defendants' negotiation tactics were in fact coercive. *See Moore*, 762 F.2d at 1114-15 (Wright, C.J., dissenting).[28] The bifurcated negotiation approach, on the other hand, is self-enforcing. It is successful because, by removing the context that makes the coercive waiver tactic and its variants effective, it ends their use. If the ban on simultaneous or conditional negotiation is breached, a simple application to the court can bring prompt sanctions.

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27. This would neither preclude defendants from obtaining reasonable information regarding prosepective fee requests, N.Y.C. Bar Op. No. 82-80, nor from negotiating separate fee settlements after agreeement has been reached on the merits.

28. Judge Wright's dissenting opinion catalogues the progress of the settlement negotiations in *Moore* and shows that the "waiver" offer came from the plaintiffs because, by a pattern of responses and nonresponses to prior settlement offers, "NASD's counsel had made absolutely clear that the *merits* proposal was perfectly acceptable, but that NASD would not agree to that merits proposal unless the question of fees and costs were resolved [a]nd . . . that only a waiver . . . would satisfy NASD and permit the merits settlement to go forward." *Id.* at 1115 (emphasis in original).

The argument that bifurcation would require two settlement hearings is misplaced. Counsel may separately negotiate the merits and fees, without conditioning one on the other, and present both agreements to the court at one hearing. Moreover, the conflicts of interest and the resulting opportunities for abuse that occur in civil rights cases are not limited to class actions. Thus, even if the bifurcated negotiation approach might occasionally yield more settlement hearings in class action cases, the alternatives—intensive after-the-fact scrutiny or supervision of negotiation—would require greater district court resources in every case.

The bifurcated approach encourages the parties to bargain in good faith on a principled basis to reach a reasonable compromise on the merits of each aspect of the case: first, on the question of relief and, separately, on an appropriate and reasonable fee. That form of "principled negotiation produces wise agreements amicably and efficiently." R. Fisher and W. Ury, GETTING TO YES 86 (1981). In the long term, it will conserve judicial resources.

3. The bifurcated approach will in fact encourage settlements, despite the superficially appealing assertions to the contrary. The current availability of "sacrifice" tactics disserves the settlement process. In many of these cases, the ultimate liability for the plantiffs' attorneys' fees may be the single largest incentive for compliance. This is obviously true, for example, when the monetary or injunctive relief at stake is minor. But it will also be true in cases in which the injunctive relief is very costly. In those cases, the lower transaction costs of in-house litigation are offset by the larger savings that accrue from delaying implementation. Thus, the availability of "sacrifice" tactics as a method of avoiding or reducing liability for fees removes the largest economic incentive to voluntary compliance without litigation. *See* Kraus, 29 Vill. L. Rev. at 643-44.

Once litigation has begun, the ability to avoid or reduce fee liability by later use of "sacrifice" tactics is an incentive to delay settlement to the last moment, as occurred in this case. In contrast, the bifurcated negotiation process makes clear that defendants will not be able to avoid the payment of accrued fees. Thus, there is a strong incentive either to comply voluntarily or to settle at an early stage before the accrued fees become very large.

The availability of "sacrifice" tactics disserves the settlement process in another way. Plaintiffs' counsel know that they face the possibility of being manipulated to compromise their fee if they engage in simultaneous negotiations. Therefore, many counsel will simply refuse to negotiate if the defendants insist on simultaneous negotiations.

When negotiations have already begun, the interjection of "sacrifice" tactics is likely to derail the process. As the petitioners point out, the community of interests shared by the parties is often the most effective basis of settlement. Brief for Petitioners at 27-28. The invocation of the coercive waiver tactic or its variants destroys the plaintiffs' faith in the other side's bona fides. It thus not only destroys the community of interests that might lead to settlement, but

also decreases the value of any settlement that might be achieved. "A wise plaintiff knows that ultimate success 'depends to a degree on making the other side sufficiently content with an agreement to want to live up to it.' " Brief for Petitioners at 28 (quoting Fisher & Ury, *supra*, at 75). But by the same token, a wise plaintiff knows that the agreement he or she gets is only as valuable as the good faith of the other side in implementation; the invocation of the waiver tactic destroys any hope the plaintiff might have that a settlement is worth achieving.

4. The bifurcated approach better controls other forms of ethical abuse. It is more effective in dealing with the partial sacrifice and partial sweetheart situations—which develop from the trade-off of merits relief for fees relief or vice versa—that will be hard to uncover in an after-the-fact review of the result. Moreover, even when simultaneous negotiations result in a perfectly fair and ethical settlement, it creates an appearance of impropriety. What the public sees is a bund of lawyers setting their own fees amongst themselves at the possible expense of the client, not the context of the overall result.

C. The Ordinary Judicial Tools Have So Far Proven Insufficient

Judicial scrutiny of settlement agreements may be effective in the "sweetheart" context—when overly generous attorneys' fees are exchanged for a compromise of the interests of the client class, *see Prandini v. National Tea Co.*, 557 F.2d 1015, 1020-21 (3rd Cir. 1977)—because the ethical abuse is more readily apparent from the terms of the settlement. But "sacrifice" agreements—like coercive waiver and its variants—resist effective scrutiny. When defendants require plaintiffs' counsel to accept a lower fee in exchange for relief on the merits, the result may be indistinguishable in hindsight from a tough but good faith bargain. Similarly, coercive fee waivers come wrapped in the rhetoric of knowing and voluntary waiver, *see, e.g., Moore*, 762 F.2d at 1107, and are often mistaken for a voluntary barter of the fee for relief on the merits (the "bargaining chip" theory). *Id.* at 1105. That is how the district court erred in this case, R.T. 7, even though plantiffs' attorneys negotiated a provision requiring court approval that should have alerted the court to the fact that the waiver was not voluntary.

Simply to remit this issue to the lower federal courts would be to require busy judges to assess complex negotiations without necessary guidance. Thus, when counsel have sought district court intervention during negotiations the results have often been unsatisfactory.[29] Indeed, a majority of the rulings in

29. In one case, the parties negotiated a settlement without discussing fees. Prior to its presentation to the court for approval, however, the defendants insisted that the settlement was conditional on a full waiver of fees. Relying on *Prandini*, planitiffs' counsel raised the matter with the district court. The court declined to rule; plaintiffs' counsel were forced to acquiesce to the waiver in light of the client's interest in relief on the merits. S. Levin, *Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in which Statutory Attorney's Fees Are Authorized*, 14 Clearinghouse Rev. 515, 519 (Oct. 1980).

In another case, counsel's motion to the court to prohibit the defendants from insisting on

these cases are unreported, reflecting that these problems are not always considered with depth.[30] The problem is compounded because the absence of reported decisions, together with the disincentives to appeal, have effectively shielded the practice from adequate scrutiny; "the most blatant examples of conditional Fees Act waivers almost never reach appellate courts." Kraus, 29 Vill. L. Rev. at 620.

Thus, federal district court intervention is unlikely to serve as an effective remedy to this practice. The lower courts would require an affirmative directive sensitively to police such abuses.[31] Because of the limitations of retrospective review, active supervision of the conduct of negotiations that concern both the merits and fees would be required.

D. The Criticisms of the Bifurcated Approach Are Inaccurate

Contrary to the assertions of petitioners and their amici, the bifurcated approach does not impinge on the ethical responsibilities of defense counsel. Defendants have a legitimate interest in knowing the extent of their liability. But that does not mean that overzealous counsel may coerce a waiver or partial waiver of fees. Other avenues are open to ethical defense counsel to further their clients' interest in limiting liability. For example, defendants can request reasonable information concerning hours and rates. *See* N.Y.C. Bar Op. No. 82-80. Then, applying the standards enunciated in *Blum v. Stenson*, 79 L.Ed.2d at 901-03, they can figure their outside liability with reasonable accuracy. Or they can limit their liability for fees by settling meritorious suits promptly. They can aggressively bargain over a reasonable fee, seeking to exclude compensation for unnecessary effort. Or they can argue that the suit was in fact meritless and, although nominally settled, should not result in a substantial fee. All of these options preserve vigorous advocacy for both sides, unlike the coercive waiver tactic which preempts the process.

That defense counsel cannot achieve the most advantageous result for

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a fee waiver instead prompted the court to direct the plaintiffs' counsel to continue to negotiate and to act in the client's best interest. The agreement that resulted included a fee waiver. Counsel's effort to set aside the waiver provision was met with a motion by the defendants to set aside the entire agreement; the court approved the agreement and the fee waiver. When the plaintiffs appealed, defendants cross-appealed, again placing the relief on the merits at risk. Because of this, the appeals were voluntarily dismissed. Comment, *Settlement Offers Conditioned upon Waiver of Attorney's Fees: Policy, Legal, and Ethical Considerations*, 131 U. Pa. L. Rev. 793, 802 (1983).

30. For example, some courts have tended wrongly to assume (*See* Pt. I *supra*) that fees in this context are no different than any other. No doubt courts have also been affected by the important role that settlements play in judicial administration. Understandably, courts not fully familiar with the dynamics of the settlement process may be reluctant to tinker with any aspect of the "mix" that now produces settlements.

31. The petitioners' assertion that district courts already have adequate tools to police such misconduct, Brief for Petitioners at 34-35, misses the mark because it fails to acknowledge the conditions noted above that render these tools ineffective in fact. Indeed, the petitioners would make district court intervention even less likely and less effective by erecting additional barriers: They would create a new presumption of ethical conduct by defense counsel that the already victimized plaintiffs' counsel would have to overcome. *Id.* at 35-36.

their clients neither means that "sacrifice" tactics are ethical, nor that a ban on simultaneous negotiations conflicts with ethical obligations. Many other ethical rules restrict zealous representation. Obtaining from opposing counsel a covenant not to sue the defendant in another action as a condition of settlement both serves the defendant's best interest and induces the defendant to settle. It is nevertheless unethical. DR 2-108(b); Model Rule 5.6(b).[32]

The defendant's ability to fix with certainty the amount of total liability all at once will only prevent settlement in the rarest case. The same considerations that now prompt parties to settle will continue to favor settlement over litigation in most cases. In suits for monetary relief, the defendant will still settle because settlement costs less than the full contingent liability. In injunctive cases, the defendant will settle because a negotiated settlement gives it the maximum control over the terms of the eventual decree. In either case, settlement saves the defendant both its further costs litigation *and* the larger liability for attorneys' fees that would otherwise accrue.

Bifurcated negotiations might deter settlement in cases in which the defendant could avoid all liability for fees if the case proceeded to trial. In that case, the prospect of conferring prevailing party status on the plaintiff by settling without a concurrent waiver of fees would seem to deter settlement. One such circumstance is the "noncatalytic" suit described above. But in that case, the defendant can simply settle and oppose the fee award by demonstrating that compliance predated filing.

The truly meritless suit is another such circumstance. But in that case, the defendant has numerous alternatives. It can settle early when the fee award will be small. Even when the lack of merit does not appear until late, it can seek to limit the fee recovery on the grounds of the meager results obtained. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983). And, when the case is frivolous, it can sue for its own attorneys' fees.

True, there may be some meritless cases in which the defendant, unwilling to run the risk of fee liability, will not settle. But that may well be a benefit. It is often assumed that some plaintiffs' lawyers file meritless suits for their "nuisance value," hoping that defendants will settle just to avoid the cost of litigation.[33] To the extent that bifurcated negotiations make meritless suits less likely to settle, they reduce the incentive to file such "nuisance suits." That furthers both the sound administration of justice and the long term interests of defendants.

The advantages of the bifurcated approach to settlement pioneered by the Third Circuit in *Prandini* are substantial. It is not surprising, therefore, that the *Prandini* approach has broad support. In his report to the Federal Judicial

32. Another example is the rule requiring counsel to disclose adverse authority directly on point. EC 7-23; Model Rule 3.3(a)(3.). It directly disserves the client's interest but is required by the lawyer's obligations both to the tribunal before which he or she is practicing and to the law.

33. Such suits are plainly unethical because not premised on a good faith interpretation of the law. *See* DR 7-102(A)(1) & (2).

Center on fees in class action cases, Professor Miller reported the results of a questionnaire on the subject: 51.9% of the judges responded that they agreed with the *Prandini* approach; 65.6% of the attorneys agreed. A breakdown for the attorneys' response shows bipartisan support for the rule: 65% of plantiffs attorneys and 59.4% of defendants attorneys support the rule. A. Miller, *Attorney's Fees in Class Actions* 224 (1980).[34] The Association's opinions, supporting the *Prandini* approach in the civil rights area where the considerations are stronger, were the result of extensive deliberation by members of the bar with a variety of perspectives. A rule with such a high degree of support from those in practice cannot be as unworkable as petitioners and their amici contend.

In sum, the bifurcated approach is the most effective remedy for a practice that impugns the integrity of the legal system and subverts the intent of Congress. It both removes the opportunity for impropriety and prevents the appearance of impropriety in the settlement process in civil rights cases. It is workable; it will encourage fair and expeditious settlements more than it will deter them. It should be affirmed by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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34. Professor Miller also reported that the problems with the *Prandini* approach are mitigated by providing the defendant with information regarding the fee request, *id.* at 223, a practice that the Association has approved of. Op. No. 82-80.