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ETHICAL AND LEGAL CONCERNS IN COMPPELLING 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

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I. INTRODUCTION

THE Civil Rights Attorney’s Fees Awards Act of 1976 ("Fees Act") deals solely with the awarding of attorney’s fees. The Fees Act was enacted to encourage private enforcement of the civil rights laws by filling the “anomalous gaps in our civil rights laws created by the United States Supreme Court’s decision in Alyeska.” The Supreme Court held in Alyeska Pipeline Service Co. v. Wilderness Society that absent specific legislative authorization, courts were to apply the traditional rule prohibiting the award of attorney’s fees to the prevailing party. The Fees Act is the legislative response which enables powerless minorities and the poor to purchase legal representation.

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   In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. Section 2000d et seq.], 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.


4. Id. at 269.

5. See H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4-5 (1976). The Fees Act applies in large part to racial discrimination cases brought under the Reconstruction-
in civil rights cases which often yield little monetary recovery, but which are of great personal and societal importance.7

The Fees Act and many other federal statutes8 authorize fee-shifting as a method of promoting private enforcement of publicly beneficial statutory policies.9 In so doing they contravene the standard American rule requiring each side in civil litigation to bear its own attorney’s fees.10 Although these statutes are numerous, their ef-

7. See Lipson, Beyond Alyeska—Judicial Response to the Civil Rights Attorneys’ Fees Act, 22 ST. LOUIS U.L.J., 243, 245-46 (1978). For a discussion of the laws covered by the Fees Act and the cases to which it could apply, see generally id; H.R. REP. No. 1558, supra.

8. H.R. REP. No. 1558, supra note 5, at 1. In defining the purpose of the Fees Act, the House Report stated: “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.” Id. See also S. REP. No. 1011, supra note 2, at 2, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5910.

9. See 122 CONG. REC. 33,314 (1976) (statement of Sen. Kennedy). Senator Kennedy remarked that there are often important principles to be gained in [civil rights] litigation, and rights to be conferred or enforced, but just as often no large promise of monetary recovery lies at the end of the tunnel. So civil rights cases—unlike tort or antitrust cases—do not provide the prevailing plaintiff with a large recovery from which he can pay his lawyer.

10. See Ruckelshaus v. Sierra Club, 103 S. Ct. 3274, 3276 (1983) (“[there are] more than 150 existing federal fee-shifting provisions”). The extent of success required for an award of fees varies greatly under these statutes, as does the amount of court discretion in specific cases. Standards include: “prevailing party,” “substantially prevailing party,” “successful party,” and “whenever [the court] determines that such an award is appropriate.” Id. at 3276-77 & nn.3-5. “Appropriate” in this last standard must now be read to require at least some success on the merits. Id.


The number of compilations of federal fee-shifting statutes is fast approaching the number of statutes. See, e.g., Alyeska Pipeline Serv. Co. Wilderness Soc’y, 421 U.S. 240, 260 n.33 (1975); SOURCE BOOK, supra note 2, at 303; E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY’S FEES 323-27 (1981); Berger, supra, at 303 n.104; Note, supra, at 90 n.80.


10. For a compact history of the American rule, see Alyeska Pipeline Serv. Co.
Conditional Fee Waivers

Effectiveness relies upon continual judicial appreciation of the ameliorative and utilitarian purposes intended by their creator.11

Ever growing inroads are being made into the initial successes of civil rights attorneys in gaining Fees Act awards.12 One of the most serious and significant of these is the increasing practice of defense counsel, especially those who represent public entities, of conditioning favorable offers to settle the merits of Fees Act cases on the acceptance of full or partial waivers of attorneys' fees by plaintiffs' lawyers.13 This waiver aggravates the inherent tension in a non-fee-generating civil rights case between the low income plaintiff, whose primary interest is in success on the merits, and his attorney, whose economic aim is to obtain an award of counsel fees. It accordingly provokes a potential conflict of interest between attorney and client, caused by

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11. See S. REP. NO. 1011, supra note 2, at 2, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5910. Referring to Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a, 2000e (1982), and the Voting Rights Act Amendment of 1975, 42 U.S.C. § 1973 (1982), the report notes that "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. For further discussion of the necessity of fee awards to the effective redress of civil rights violations, see notes 5-7 and accompanying text supra, and notes 35-39 and accompanying text infra.

12. It has been estimated that public interest attorneys were awarded more than one million dollars in fee awards within a few months after the Fees Act became effective. Derfner, One Giant Step: The Civil Rights Attorney's Fee Awards Act of 1976, 21 ST. LOUIS U.L.J. 441, 441 (1977).

Of course success has never come close to the predictions of opponents who characterized it as an "attorney relief" statute. 122 CONG. REC. 31,850 (1976) (remarks of Sen. Allen).

13. See Winter, Fee Waiver Requests Unethical: Bar Opinion, 68 A.B.A. J. 23 (1982). The author notes that E. Richard Larson, national staff counsel for the American Civil Liberties Union, has "estimated that there are requests for fee waivers in more than half of the civil rights cases litigated." Id.

The exact number of requests is difficult to determine. They occur at the settlement stage of civil rights cases, and therefore almost never appear in reported decisions. Also, along with other civil cases in the federal district courts, almost all civil rights cases are settled before trial. For instance, during the twelve month period before June 30, 1982, only 14.6% of the civil rights cases were terminated during or after trial. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 242-43 (1982). Finally, most civil rights cases are class actions and, while not statistically documented, it is a fact that class actions rarely go to trial. See Dam, Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest, 4 J. LEGAL STUD. 47, 59-60 (1975).
the attorney's duty of loyalty to the client and self-interest in gaining an award of fees; this invariably results in the attorney's capitulation in the fee waiver demand and recommendation of the beneficial settlement of the merits.\textsuperscript{14} However, in spite of the recognition of this inherent ethical dilemma by courts,\textsuperscript{15} commentators,\textsuperscript{16} and those conducting studies of attorney's fees,\textsuperscript{17} the problem has received only cursory discussion.\textsuperscript{18}

This article examines the practice of simultaneous negotiation of the merits and attorney's fees in the settlement of Fees Act cases and the ethical constraints which this practice places on attorney participants. It also analyzes the impact of this practice on enforcement of the civil rights laws, its conflict with the public policy of the Fees Act, and possible judicial remedies which could obviate the practice.

II. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976

A. Filling the Gap Left by Alyeska

The broad public policy of the Fees Act must be read through the remedial lens of a consistent and clear pattern of judicial and congressional support and encouragement of civil rights cases.\textsuperscript{19} Blurred for a time by \textit{Alyeska},\textsuperscript{20} the tripartite exception the federal courts had developed to the American rule barring fee-shifting was restored in the Fees Act by reuniting the private attorney general theory of fee-shifting with the two judicially created exceptions: the common fund doctrine and the bad faith rule.\textsuperscript{21}

Originally approved by the Supreme Court in 1881, the common

\textsuperscript{14} Largely to provide variety, I will use the terms, "conditional fee settlement," "conditional fee waiver," "fee waiver settlement," "lump-sum settlement," and "simultaneous settlement" interchangeably. They all connote the practice of negotiating and conditioning settlement of the merits of Fees Act cases on the full or partial waiver of attorney's fees by prevailing plaintiffs.

\textsuperscript{15} For a discussion of judicial recognition of this inherent dilemma, see notes 60-107 and accompanying text \textit{infra}.


\textsuperscript{17} \textit{A. Miller, Attorneys' Fees in Class Actions} 219-20 (1980).

\textsuperscript{18} For a discussion of the superficial treatment of this conflict of interest, see notes 108-11 and accompanying text \textit{infra}.

\textsuperscript{19} For a discussion of the judicial and congressional encouragement of civil rights litigation through fee awards, see \textit{Derfner, supra} note 12, at 441-45.

\textsuperscript{20} \textit{Alyeska Pipeline Serv. Co. v. Wilderness Soc'y}, 421 U.S. 240 (1975) (superceded by Fees Act).

\textsuperscript{21} For the history of exceptions to the American rule such as the common fund
fund concept enables courts to award fees to successful plaintiffs who recover or preserve a common fund for themselves or others\textsuperscript{22} or confer a common benefit upon a class.\textsuperscript{23} The value of the common fund exception is that it spreads the costs of litigation among the beneficiaries.\textsuperscript{24} In contrast, the bad faith exception\textsuperscript{25} focuses on the behavior of a party who conducts all or part of an action in bad faith,\textsuperscript{26} or in a vexatious, wanton or oppressive manner.\textsuperscript{27} Attorney's fees are

document, bad faith rule and private attorney general theory, see notes 22-32 and accompanying text infra. See also Nussbaum, supra note 10, at 314-17.

The Supreme Court's decision in \textit{Alyeska} had "foreclosed the shifting of attorney's fees under the private attorney general theory in federal litigation." Note, supra note 8, at 88. The Fees Act was a direct and immediate response by Congress to \textit{Alyeska}. See Derfler, supra note 12, at 446. The Act, by restoring the private attorney general theory of fee shifting, filled the "anomalous gaps" created by the court's decision. See S. REP. NO. 1011, supra note 2 at 4, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5911; Note, supra note 8, at 83-89.

22. See Trustees v. Greenough, 105 U.S. 527 (1881). The Supreme Court held that it would be unfair for a plaintiff bondholder, who succeeded in rescuing a trust fund for a group of bondholders, to shoulder the entire legal expense. The Court concluded that he should have his legal expenses reimbursed from the fund or from a proportional contribution from those bondholders who benefited from his legal success. \textit{Id.} at 532.

See also \textit{Sprague} v. Ticonic Nat'l Bank, 307 U.S. 161 (1939) (plaintiff's right to place lien on accounts of bank in receivership vindicates "beneficiaries similarly situated but not actually before the court, as well as the interest of the common creditors"). The Court in \textit{Sprague} also noted that the "formalities of the litigation" (i.e., whether or not the plaintiff sued as representative of a certified class) were irrelevant to the interest "of equity in doing justice." \textit{Id.} at 167. See generally \textit{Alyeska Pipeline Serv. Co. v. Wilderness Soc'y}, 421 U.S. 240, 258 (1975) (superseded by Fees Act) (citing Supreme Court decisions recognizing the common fund doctrine); Dawson, \textit{Lawyers and Involuntary Clients: Attorney Fees From Funds}, 87 HARV. L. REV. 1597 (1974) (tracing the development of the common fund doctrine).

23. This aspect of the exception applies the common fund concept to success in obtaining nonmonetary benefits. See, e.g., Hall v. Cole, 412 U.S. 1 (1973) (vindication of expelled union member's right of free speech "dispels the 'chill' casts upon rights" of other union members); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (stockholder's action concerning misleading proxy statement benefited "all shareholders by providing means of enforcement of the proxy statute").

24. See Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396-97 (1970) (fees award does not "saddle the unsuccessful party with the expenses but . . . impose[s] them on the class that has benefited from them and that would have had to pay them had it brought the suit").

25. See generally \textit{Alyeska Pipeline Serv. Co. v. Wilderness Soc'y}, 421 U.S. 240, 258-59 (1975) (superseded by Fees Act) (citing Supreme Court cases recognizing a bad faith exception).

26. See, e.g., Vaughn v. Atkinson, 369 U.S. 527, 530-31 (1962) (defendant "willfully and persistently"") refused to investigate libellant's claim though damages were "plainly owed him under laws that are centuries old"); Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963) (defendant's "discreditable" tactics included a long standing refusal to initiate desegregation and repeated creation of administrative obstacles to desegregation plans); Gazan v. Vadsco Sales Corp., 6 F. Supp. 568 (E.D.N.Y. 1934) (stockholder action filed without any legal or factual basis).

27. See, e.g., Kinnear-Weed Corp. v. Humble Oil & Refining Co., 441 F.2d 631, 637 (5th Cir.) (accusation made fraudulently and without any basis), cert. denied, 404...
awarded to punish the wrongdoer, as well as to provide restitution for the cost of defending against an action brought or prosecuted in bad faith.\textsuperscript{28}

\textit{Alyeska} brought a hiatus in the application of the judicially created private attorney general theory which had allowed federal courts to award attorney's fees to plaintiffs whose successful civil rights cases resulted in benefit to the public.\textsuperscript{29} Despite its holding that the American rule controlled absent a specific federal statutory exception allowing fee-shifting, the Supreme Court left the bad faith and common fund exceptions intact,\textsuperscript{30} and invited Congress to create a provision for attorney's fees in civil rights cases.\textsuperscript{31} Less than one and


28. The attorney's fees are assessed as part of the fine, in order to punish the defendant, or to reimburse the plaintiff for costs incurred because of the improper behavior. \textit{See}, e.g., Hall v. Cole, 412 U.S. 1, 5 (1973) ("the underlying rationale of 'fee shifting' [in cases involving bad faith] is, of course, punitive"); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923) (defendant liable for attorney's fees incurred by successful plaintiff in defendant's subsequent attempt to enjoin enforcement of earlier decree); Nemeroff v. Abelson, 704 F.2d 652 (2d Cir. 1983) (plaintiff's prosecution of suit without a colorable claim and in bad faith warrants fee award to defendants). For a discussion of the availability of attorney's fees awards under the Fees Act to prevailing defendants able to prove bad faith on part of plaintiffs, see note 45 and accompanying text infra.

29. The Supreme Court conveniently provided a list of the cases it was overruling. \textit{See} Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 270 n.46 (1975) (superseded by Fees Act).


30. \textit{See} Alyeska, 421 U.S. at 259. Referring to the common fund and bad faith doctrines, the Court acknowledged that "[t]hese exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress." \textit{Id. See}, e.g., Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) ("The common-fund doctrine . . . stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees.") (citing \textit{Alyeska}, 421 U.S. at 259-58).

31. \textit{See} Alyeska, 421 U.S. at 262-64. The Court recognized that "Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation" with many of the fee award statutes. \textit{Id.} at 263. However, it cautioned, the use of the private attorney general theory in statutes did not authorize judicial abandonment of the American rule in the absence of congressional authority. \textit{Id.} Finally, the Court concluded that "Congress . . . presumably has the power and judgment" to decide which statutes merited fees awards, but that "it would be difficult, indeed, for the courts, without legislative guidance, to consider some statutes important and others unimportant and to allow attorney's fees only in connection with the former." \textit{Id.} at 263-64.
one-half years later, Congress cordially and decisively accepted the invitation.  

B. Legislative History and Congressional Intent

The legislative history of the Fees Act clearly manifests Congress' recognition that civil rights laws are heavily dependent upon private enforcement; that suits by the general public are an essential and operative means of enforcement; that awards of attorney's fees provide necessary incentives to stimulate such private enforcement; and that awards of attorney's fees deter potential violators of the civil rights laws.

The Senate Committee on the Judiciary emphatically noted that the viability of the civil rights laws depends on private enforcement through litigation, stating that "[t]he purpose and effect of [the Fees Act] are simple—it 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. . . . All of these civil rights laws depend heavily upon private enforcement. . . ." The legislative history is replete with findings that, without attorney's fees awards, violations would go unredressed because most citizens lack the financial resources to bring civil rights claims. The Senate Committee on the

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32. *Alyeska* was decided on May 12, 1975. 421 U.S. 240. The Fees Act was passed by the Senate on September 29, 1976, 122 CONG. REC. 33,315; by the House of Representatives on October 1, 1976, 122 CONG. REC. 35,130; and signed by the President on October 19, 1976, 122 CONG. REC. 35,086-87.

33. S. REP. NO. 1011, *supra* note 2, at 1, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5908. Since the Supreme Court in *Alyeska* barred fee awards under the private attorney general theory absent specific statutory authorization, Congress was concerned that the lack of uniform provisions in the various civil rights acts would create inconsistent civil rights enforcement. See id. at 4-5, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5911-12; H.R. REP. NO. 1558, *supra* note 5, at 1.

34. For a discussion of these propositions, see notes 35-39 and accompanying text infra.


In many cases arising under our civil rights laws, 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 . . . then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

Id. Both the Senate and House reports quoted approvingly from the Supreme Court's decision in Newman v. Pigie Park Enter., 390 U.S. 400 (1968): "If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved
Judiciary stated this succinctly: "If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases."37

The legislative history of the Fees Act also stressed that the close nexus between attorney's fees awards and enforcement of the civil rights laws, which existed on the level of individual remedy, was just as essential for the maintenance of our national civil rights effort.38 Moreover, it is evident that Congress saw the threat of Fees Act awards as a deterrent to noncompliance with the civil rights laws.39 Finally, Congress was convinced not only that its post-Alyeska resurrection of the private attorney general concept would stimulate effective, consistent enforcement of the civil rights laws, but also that it would have the additional benefit of "limiting the growth of the [civil rights] enforcement bureaucracy."40

C. Judicial Application of Congressional Intent

Provided with such an ample and extensive legislative record, the courts predictably responded to the Fees Act with liberal con-

38. See H.R. Rep. No. 1558, supra note 5, at 9. The House Judiciary Committee concluded: "The effect of [the Fees Act] will be to promote the enforcement of the Federal civil rights acts, as Congress intended, and to achieve uniformity in those statutes and justice for all citizens." Id. In short, by encouraging the use of the private attorney general theory, the Fees Act has an impact upon judicial enforcement of civil rights far beyond redressing the rights of the individual litigant who brings the action. For a discussion of the public benefits of the private attorney general theory, see notes 5-7, 29 & 35 and accompanying text supra.
39. See S. Rep. No. 1011, supra note 2, at 2, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5910. The Senate Judiciary Committee recognized that "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. "[F]ee awards are essential if the Federal statutes to which [the Fees Act] applies are to be fully enforced. We find 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." Id. at 5, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5913.
40. Id. at 4, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5911. By creating the economic incentive of fee awards for prevailing parties, the Fees Act has reduced the need for a civil rights enforcement bureaucracy by encouraging the growth of a private civil rights bar with "its own built-in financial viability." Derfner, supra note 12, at 451.
stricitions of its legislative history and expansive readings of its broad remedial purposes. Congress had made this easier by specifically anticipating many issues that quickly arose in Fees Act cases. For example, the Fees Act was ruled applicable to pending cases. Congress' dual "prevailing party" standard was also endorsed. Under this dual standard, prevailing plaintiffs are presumptively entitled to fees under the general standards announced in pre-Fees Act cases, many of which were expressly endorsed by Congress in the legislative history. On the other hand, fees can be awarded to prevailing defendants "only if the action [of the plaintiff] is vexatious and frivolous, or if the plaintiff has instituted it solely 'to harass or embarrass' the defendant." Additionally, Fees Act awards were made available

41. For a discussion of the legislative call for this liberal interpretation and the appropriate judicial response, see notes 51-52 and accompanying text infra.

42. See Hutto v. Finney, 437 U.S. 678, 694 n.23 (1978). The Supreme Court quoted the plain language of the House Judiciary Committee: "In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment. . ." Id. (quoting H.R. Rep. No. 1558, supra note 5, at 4 n.6 (citing Bradley v. School Bd., 416 U.S. 696 (1974) (absent contrary statutory direction on legislative history, "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice").)

43. See, e.g., Hughes v. Rowe, 449 U.S. 5, 14 (1980) (prevailing defendants may recover fees only where plaintiff's action is "groundless or without foundation"); Hughes v. Repko, 578 F.2d 483, 487 (3d Cir. 1978) (prevailing plaintiff may recover fees where he has "essentially succeeded" on his claim). For a further discussion of the dual prevailing party standard, see notes 44-45 and accompanying text infra.


45. H.R. Rep. No. 1558, supra note 5, at 7 (quoting United States Steel Corp. v. United States, 519 F.2d 359 (3d Cir. 1975)). Concerned that fee awards for prevailing defendants would discourage the enforcement of civil rights through private litigation, "the courts have developed a different standard for awarding fees to prevailing defendants because they do not appear before the court cloaked in a mantle of public interest." Id. at 6 (quoting United States Steel Corp. v. United States, 519 F.2d 359, 364 (3d Cir. 1975)). See Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (prevailing defendant entitled to fees award where "plaintiff's action was frivolous, unreasonable or without foundation" regardless of existence of bad faith); Gage v. Wexler, 82 F.R.D. 717 (N.D. Cal. 1979)(defendant was awarded portion of fees where tenant-plaintiff's action was groundless and litigated in bad faith); Kane v. City of New York, 468 F.Supp. 586 (S.D.N.Y. 1971)(defendant awarded portion of fees where plaintiff's 12th suit, despite three full hearings and
and to plaintiffs who succeed through out-of-court settlements\(^{47}\) or by consent decree.\(^{48}\)

But not surprisingly, even after extensive hearings, Congress failed to divine some problems which soon surfaced. Two of these are the question of whether \textit{pro se} litigants are eligible for Fees Act awards,\(^{49}\) and the availability of awards to plaintiffs who prevail in cases moot (usually by some intentional action of defend-

\(^{46}\) See S. REP. NO. 1011, supra note 2, at 5, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5912; H.R. REP. NO. 1558, supra note 5, at 8 (citing with approval Bradley v. School Bd., 416 U.S. 696, 725 (1974) ("to delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel, and discourage the institution of actions despite the clear congressional intent to the contrary . . . "). See, e.g., Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980)(authorizing Fees Act award for preliminary injunction though case mooted before full argument), cert. denied, 450 U.S. 1012 (1981); Kimbrough v. Arkansas Activities Ass'n, 574 F.2d 423 (8th Cir. 1978) (preliminary injunction granted as part of final appealable order merits Fees Act award).

\(^{47}\) See H.R. REP. NO. 1558, supra note 5, at 7. Recognizing that there is more than one way to win a law suit, the House emphasized that "[t]he phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. . . . A 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion." \textit{Id.} See, e.g., Young v. Kenley, 614 F.2d 373 (4th Cir. 1979).

\(^{48}\) See S. REP. NO. 1011, supra note 2, at 5, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5912; H.R. REP. NO. 1558, supra note 5, at 7 ("If the litigation terminates by consent decree, for example, it would be proper to award counsel fees"). See, e.g., Maher v. Gagne, 448 U.S. 122 (1980) (Fees Act award to plaintiff obtaining consent decree amending welfare regulations); Iranian Students Ass'n v. Edwards, 604 F.2d 352 (5th Cir. 1979) (Fees Act award to student group obtaining consent decree amending university demonstration rules).

ants) and dismissed before trial. A third is the subject of this article: the conflicts of interest and detrimental impact on the goals of the Fees Act caused by the simultaneous negotiation of the merits and Fees Act attorney's fees awards.

"In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws." At least four federal courts of appeal have already followed this admonition in concluding that the Fees Act must be liberally construed to achieve its sweeping remedial purposes. In filling a gap in congressional intent, the court should predict what Congress would have done if it had foreseen the specific problem by "starting from the areas where the legislative intent is readily discernible, and projecting to fair and reasonable corollaries of that intent for the specific issue in question."

There is a direct clash between the Fees Act's remedial purpose

50. See Note, Civil Rights Attorney's Fees Awards in Moot Cases, 49 U. CHI. L. REV. 809, 825 (1982) ("Although Congress did not mention moot cases, it explicitly authorized fees awards in many other situations falling short of a full trial on the merits."). The courts have sometimes considered the question of mootness under the prevailing party rubric of the Fees Act. See, e.g., Williams v. Alioto, 625 F.2d 845, 848 (9th Cir. 1980) ("[c]laims for attorneys' fees . . . may be heard even though the underlying case has become moot"). But see Cramer v. Virginia Commw. Univ., 486 F. Supp. 187, 192 n.7 (E.D. Va. 1980) ("plaintiff cannot be a prevailing party where his claim is dismissed as moot."). Courts often look to see whether the plaintiff is the catalyst behind the defendant's voluntary compliance. See, e.g., Dayan v. Board of Regents, 620 F.2d 107 (5th Cir. 1980) ("plaintiffs obtained substantial voluntary relief as a direct result of their lawsuit" and thus were entitled to a fees award) (emphasis supplied by the court)).


52. See Shadis v. Beal, 685 F.2d 824, 829 (3d Cir.) ("Congress has noted that the primary goal of the [Fees] Act is 'to promote the enforcement of the Federal Civil Rights Acts, as Congress intended, and to achieve uniformity in those statutes and justice for all citizens.' . . . [T]he [Fees] Act must be liberally construed to achieve these ends." (quoting H.R. REP. NO. 1558, supra note 5, at 19)), cert. denied, 103 S. Ct. 300 (1982); Dennis v. Chang, 611 F.2d 1302, 1306 (9th Cir. 1980) ("Congress' purpose in authorizing [Fees Act] awards was to encourage compliance with and enforcement of the civil rights laws. The Fees Awards Act must be liberally construed to achieve these ends."); Mid-Hudson Legal Servs., Inc. v. G & U Inc., 578 F.2d 34, 37 (2d Cir. 1978) ("In view of this clear congressional mandate we cannot accept that the statute must be construed narrowly as the district court held. Rather, [the Fees Act] must be applied broadly to achieve its remedial purpose."); Seals v. Quarterly County Court, 562 F.2d 390, 393 (6th Cir. 1977) (The Fees Act "should be liberally construed to achieve the public purposes involved in the congressional enactment.").

of encouraging compliance with our national civil rights laws through the process of private enforcement, motivated by the mechanism of attorney's fees awards, and the disincentive to private enforcement which results from the simultaneous negotiation of the merits and waivers of attorney's fees.\textsuperscript{54} On balance, the remedial policies underlying the Fees Act are certainly comprehensive enough to require that this gap in Fees Act legislative history be filled with a public policy barring conditional fee waivers.\textsuperscript{55}

Indeed, these same remedial policies were found substantial enough to render void certain provisions of a privately negotiated annual funding contract between the Commonwealth of Pennsylvania and Community Legal Services (CLS), by which the local legal services organization agreed to waive its right to seek attorney's fees in actions against the Commonwealth of Pennsylvania.\textsuperscript{56} In \textit{Shadis v. Beal},\textsuperscript{57} the Third Circuit, citing repeatedly to the Fees Act's legislative history, found a clear public policy of encouraging private enforcement of civil rights laws.\textsuperscript{58} Against this background, the court held that defendants, especially public officials, could not buy immunity from Fees Act awards through the means of a private agreement.

In this case, we conclude that the Commonwealth has attempted to vitiate, by contract, a significant portion of the power and duty which Congress has granted to the judiciary as an essential tool in the scheme of civil rights enforcement. It is axiomatic to our federal system that neither private parties nor the states can avoid the equitable powers of the federal courts. . . . Here, the existence of a contrary private agreement cannot successfully be asserted as a defense to the district court's statutorily mandated supervisory power over attorneys' fees.\textsuperscript{59}

\textsuperscript{54} For a discussion of the negative impact of fee waivers on the civil rights bar and civil rights practice, see notes 168-91 and accompanying text \textit{infra}.

\textsuperscript{55} For a discussion of the clear legislative intent supporting a broad remedial purpose for the Fees Act, see notes 33-40 and accompanying text \textit{supra}. For a discussion of the liberal construction which several courts have given the Act in order to effect that purpose, see note 52 and accompanying text \textit{supra}.

\textsuperscript{56} Shadis v. Beal, 685 F.2d 824, 831 (3d Cir.), \textit{cert. denied}, 103 S. Ct. 300 (1982). Although it was argued that the contract was voidable on grounds of economic duress, the Third Circuit specifically declined to decide the case on that basis. Instead it predicated its decision on the public policy of the Fees Act. \textit{Id.} at 828 n.6.

\textsuperscript{57} 685 F.2d 824 (3d Cir.), \textit{cert. denied}, 103 S. Ct. 300 (1982).


\textsuperscript{59} \textit{Id.} at 831 (citation omitted). The court continued: "Congress expressed unambiguously the significance it attached to the attorneys' fees provisions, and we
There is a striking parallel between the coercive nature of the bargain in Shadis and that in conditional fee waivers. Unlike a fee waiver agreement made during the settlement of a single lawsuit, the Shadis agreement involved a yearly funding contract; however, both capitalize on the conflict between attorney and client as their source of coercive power. In Shadis, CLS acceded to the waiver provisions, under protest, only because its obligations to poor clients were threatened by the severe fiscal crisis brought about by imminent defunding. Similarly, simultaneous settlement pits attorney against poor client in a setting in which the best interest of the client mandates acquiescence and waiver of the right to petition for a Fees Act award. Buying Fees Act immunity on a case-by-case basis is just as antagonistic to federal civil rights enforcement policies as purchasing it annually.

Mid-Hudson Legal Services, Inc. v. G & U, Inc. is another case which demonstrates the breadth of the public policy encompassed by the Fees Act. By successfully suing to gain a first amendment right of access for its attorneys to visit farm workers living in labor camps located on privately owned farms, Mid-Hudson Legal Services was held to be a prevailing plaintiff and eligible for a Fees Act award. Although farm workers were not party plaintiffs, the legal services program was entitled to attorney's fees because it had vindicated the public policy embodied in [the Fees Act] is a vital one.” Accordingly, the court ruled the contract between the commonwealth and CLS to be “void as contrary to public policy.” Id. at 833-34 (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 179 (1979)).

60. 685 F.2d at 831. The trial court had directly drawn the analogy: Like any private lawyer, CLS must remain within a budget, and only do the legal work that it can afford to do. . . . The obvious effect of this [contract], if the agreement is enforced, is to cause CLS not to bring actions against the Commonwealth. In end result, an important member of the plaintiffs' civil rights bar would be removed from the scene, and the vigorous enforcement of the laws would be materially quelled.


61. 685 F.2d at 828 & n.6.

62. For a discussion of the argument that the American Bar Association Code of Professional Responsibility requires acquiescence to a fee waiver in exchange for a favorable settlement on the merits (whereas CLS attorneys have no particular ethical duty to continue the program's operations), and thereby imposes a larger hurdle to fulfillment of Congressional intent, see notes 150-53 and accompanying text infra.

63. 578 F.2d 34 (2d Cir. 1978).

64. Id. at 36-38.

65. Mid-Hudson Legal Services asserted that its own first amendment rights were violated in that it was not free to speak to or associate with workers, even though it was statutorily mandated to provide such free services. Id. at 35 (citing Economic Opportunity Act of 1964, Pub. L. No. 90-222, § 105(e), 81 Stat. 672, 709 (repealed 1978)).
federal policy in favor of increasing farm worker access to legal services and therefore qualified under the Fees Act’s "clear congressional mandate" that those who act as private attorneys general are entitled to reasonable attorney’s fees.66

Mid-Hudson Legal Services has two important messages for conditional fee settlements. First, the public policy of the Fees Act must be read expansively to accomplish its goals.67 This requires that courts look beyond the immediate parties in civil rights cases to the benefit conferred upon those who are not actual participants in the lawsuit.68 Second, if this flow of benefit to third persons furthers the Fees Act policy of opening avenues to the legal system in civil rights cases, then it is a proper basis for an award of attorney’s fees.69

In conditional fee settlement cases, the absent third party is the class of persons the Fees Act was designed to protect. Unless attorney’s fees awards are made to the prevailing plaintiffs in settlements on the merits, future civil rights grievants will find their access to legal counsel stifled.

III. JUDICIAL RESPONSE TO THE PROBLEM OF SIMULTANEOUS SETTLEMENT

A. The Prandini Decision

A number of courts have considered the ethical issues surrounding the conflicts of interest inherent in simultaneous negotiation of the merits and attorney’s fees. Of the courts that have recognized the strain and tension it creates between attorney and client, only the

66. Id. at 37.

67. Id. For a discussion of other circuit court rulings which also call for a liberal construction of the Fees Act, see note 52 and accompanying text supra.

68. 578 F.2d at 37. The court reasoned that, although the farm workers were not parties to the litigation, “Mid-Hudson was not engaged in a simple academic exercise to vindicate the constitutional rights of its attorneys. The sole purpose of the litigation was to gain access to the workers at their place of abode in order to disseminate information and to provide legal assistance and counsel.” Id. at 36.

69. Id. at 37. The court drew the link between the interests of Mid-Hudson and those of the farmers based on the policy of the Fees Act:

In view of the intimate nexus between the action here commended by Mid-Hudson to establish its right to communicate with the farm workers employed by G & U, and the exercise by the workers of their rights, we cannot agree that appellants were not acting to vindicate a general federal policy which [the Fees Act] was designed to promote.

. . . . . Thus, an award of legal fees in the discretion of the district court was within both the letter and spirit of [the Fees Act].

Id.
Third Circuit Court of Appeals has emphatically acted to remedy this practice.

In the leading case directly addressing this issue, Prandini v. National Tea Co.,\textsuperscript{70} the Third Circuit concluded that negotiations of statutorily authorized attorney’s fees should commence only after settlement of the merits has been completed.\textsuperscript{71} Defending a sex discrimination in employment class action, National Tea proposed a settlement which contained a fund for class relief and a separate fund of up to $50,000 to pay court-approved attorneys’ fees.\textsuperscript{72} Sharing the district court’s concern about a possible “conflict of interest,” the Third Circuit held that this contemporaneous settlement procedure results in the “potential for impropriety [which] gives rise to possible misunderstanding by the public.”\textsuperscript{73} The genesis of this potential misperception is the division of a settlement offer in a class action between the attorneys and the class, which can take one of two forms. First, the defendant may offer a lump sum award, leaving it to the counsel and class to make the division. In this setting, the conflict of interest between the two is clear.\textsuperscript{74} Second, the defendant may agree to a fund for the class and a separate fund for counsel. While the potential for conflict appears minimal in this situation, there remains the specter of a “generous” defendant buying off the representative or actual class member(s) and counsel at the expense of the passive class members.\textsuperscript{75}

\textsuperscript{70} 557 F.2d 1015 (3d Cir. 1977).

\textsuperscript{71} Id. at 1021.

\textsuperscript{72} Id. at 1017. The action was brought by a class of female employees pursuant to the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1982). The attorney’s fees award was authorized by 42 U.S.C. § 2000e-5(k) (1982).

\textsuperscript{73} 557 F.2d at 1017. Seeing this potential perception of impropriety, the court felt obliged to act in order to fulfill what is perceived to be its “duty to see to it that the administration of justice has the appearance of propriety as well as being so in fact.” Id. at 1021.

\textsuperscript{74} Id. at 1020. Under this “common fund” approach, the fees award will reflect a direct reduction in the client’s recovery. Id. Professor Miller has found that there is rarely any opposition to the attorney’s fee petition in these cases, a result he found “disturbing” because “most of the procedures for determining fees are based on an adversary model. . . .” A. Miller, supra note 17, at 212. Such an “ex parte” proceeding creates “a risk that the class interest is slighted. . . .” Id.

\textsuperscript{75} Prandini, 557 F.2d at 1020-21 (citing Prandini v. National Tea Co., 16 Fair Empl. Prac. Cas. (BNA) 956 (W.D. Pa. 1976)). The district court noted that “[t]he defendant deals with the representative party or parties and counsel who also represents the class. The impulse to treat opposing counsel and the representative party generously is an element that cannot be ignored.” 16 Fair Empl. Prac. Cas. (BNA) at 957.

Professor Miller recognized that this potential conflict is even greater where there are no active class members:

a class attorney may be tempted to accept a smaller class recovery in return for agreement on a handsome attorney’s fee. . . . When a large attorneys'
The Prandini scenario fit within the latter category, and by protecting the interests of the passive class members, the court found itself essentially deciding an ex parte appeal. Moreover, the court was not unmindful of the need to encourage out of court dispute settlements. Concerned with the potential attorney-client conflict of interest on the one hand, and the havoc which would be wrought by prohibiting settlements where statutory fee awards were involved on the other, the court mandated a bifurcated procedure in which the merits of the case (including damages) were settled before any attorney’s fees negotiations were begun. Such an alternative, the court concluded, "would eliminate the situation found in this case of having, in practical effect, one fund divided between the attorney and client."

fee means a smaller class recovery, a substantial conflict of interest between the class and the attorney is created. Even if the plaintiff’s attorney does not consciously bargain for a higher fee at the expense of the class, it is difficult to estimate the effect this situation has on the negotiations and in any event a damaging appearance of conflict of interest exists.

A. Miller, supra note 17, at 219-20.

76. Prandini, 557 F.2d at 1021. The Third Circuit explained the difficult position it was in by quoting approvingly the analogy drawn by the district judge:

[A]s devil’s advocate, we must look at an agreement by defendants to pay counsel for the class a fee up to a certain maximum, as determined by the court, as having the potentiality of what is known in the labor field as a “sweetheart contract.” This puts the judge who must determine its reasonableness and fairness in the posture of a “bad guy.” None of the class members [complain]; counsel for the defendant does not complain; why should he interject himself into the arrangement?


77. 557 F.2d at 1021 (“we recognize that with the increasingly heavy burden upon the courts, settlements of disputes must be encouraged”).

78. Id.

79. Id. A recent survey shows that over 51% of the judges and 65% of the attorneys responding “agreed” or “strongly agreed” with this resolution of the potential conflict of interest. A. Miller, supra note 17 at 224. For a further discussion of this study, see notes 221-23 and accompanying text infra.

Critics argue that this two step process is not the panacea it may seem to be. First, it may be difficult to enforce the mandated separation, for attorneys may enter “informal agreements on fees, or formalize agreements but withhold them until the merits are settled. A. Miller, supra note 17, at 222 & n.39. Second, by “eliminating the very certainty that makes settlement attractive to the defendant,” the Prandini approach may discourage settlements. Id. at 222-23. Professor Miller suggests allowing attorneys to estimate the likely fee request, so as to allow defendants to anticipate their own costs. Id. at 223. While this may appear very similar to an informal agreement, Professor Miller concludes that “at some point reliance must be put on the integrity of the attorneys.” Id. For a further discussion of potential difficulties that might arise in applying the Prandini two-part process, and responses to those concerns, see notes 192-224 and accompanying text infra.
B. Other Cases Recognizing the Ethical Conflict

The Prandini solution has not gone unnoticed by other courts. In Mendoza v. United States,\textsuperscript{80} a school desegregation class action, the Ninth Circuit refused to set aside a settlement reached through the concurrent negotiation of the merits and $500,000 in attorneys' fees for class counsel.\textsuperscript{81} The court acknowledged that joint negotiation necessarily creates an ethical conflict\textsuperscript{82} and, citing Prandini, went on to "strongly discourage the simultaneous negotiation of attorneys' fees and substantive issues in class action settlement negotiations."\textsuperscript{83} Still, in upholding the $500,000 attorneys' fees settlement, the court continued, "we do not believe rejection of a resulting settlement in every case is appropriate."\textsuperscript{84}

The ambivalent approach of the Ninth Circuit in Mendoza was echoed by the Seventh Circuit in McDonald v. Chicago Milwaukee Corp.,\textsuperscript{85} a class action suit by railroad bond and debenture holders which was settled, in part, by an agreement to pay $250,000 in damages to a subclass.\textsuperscript{86} This settlement was attacked as a sham, created to provide a fund for payment of attorney's fees, and as a means for defendants to buy their way out of the lawsuit.\textsuperscript{87} The Seventh Circuit showed the uncertainty characteristic of most courts considering contemporaneous negotiation. The court noted that it was not uncom-

\textsuperscript{80} 623 F.2d 1338 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981).
\textsuperscript{81} Id. at 1352.
\textsuperscript{82} Id. at 1352. The Ninth Circuit recognized that, even though plaintiff's allegations of conflict of interest were "no more than suggestive of mere potential conflicts,"

[we cannot indiscriminately assume, without more, that the amount of fees have no influence on the ultimate settlement obtained for the class when, along with the substantive remedy issues, it is an active element of negotiation. Nor do we believe that this potential conflict disappears simply because there is no fund or money damages being negotiated. Financial consequences of injunctive relief are a significant consideration to the institution negotiating a remedy, and the potential conflict between class counsel and the members of the class remains.

\textsuperscript{83} Id. at 1352-53 (citing Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977)) (footnotes omitted).
\textsuperscript{84} Id. at 1353.
\textsuperscript{85} Id. Quoting Prandini, the Ninth Circuit noted that although there was no evidence of impropriety in the case, it is the appearance of impropriety against which the court must guard. Id. & n.20. Commenting that the active participation of the United States Department of Justice was "a significant factor in quieting the potential for unfair treatment of minority interests," the court concluded that the appearance of impropriety was neutralized. Id. at 1353. For a further discussion of the Mendoza approach, see notes 116-19 and accompanying text infra.
\textsuperscript{86} 555 F.2d 416 (7th Cir. 1977).
\textsuperscript{87} Id. at 423.
\textsuperscript{88} Id. The court acknowledged "that there [was] no dispute but that [counsel] will seek $125,000 out of the $250,000 fund." Id. at 424.
It is also expressly deferred passing judgment on the Prandini analysis because, unlike Prandini, the factual setting of the case insured an adversary posture during the fee award proceedings. Instead, the Seventh Circuit left to the district judge, in resolving the pending fee claims which remained in the action, the “opportunity to consider the applicability of the Prandini guidelines.”

Undoubtedly, the most notable appreciation of the ethical dilemma raised by simultaneous negotiation in a Fees Act setting has occurred in Regalado v. Johnson. In Regalado, the Eastern District of Illinois first applied contract law principles to decide that a consent order in favor of the class was silent on the matter of attorney’s fees. It then agreed to consider a Fees Act motion made on behalf of the

88. Id. at 423. On this point, the court referred extensively to the Manual for Complex Litigation. See id. (citing MANUAL FOR COMPLEX LITIGATION § 1.46 (rev. ed. 1982)). The Manual is explicit in its disapproval of a settlement proposal which does not include attorney’s fees: “Such an arrangement should not be permitted. All amounts to be paid by the defendant(s) are properly part of the settlement fund and should be known and disclosed at the time the fairness of the settlement is considered.” MANUAL FOR COMPLEX LITIGATION § 1.46, at 65 (rev. ed. 1982) (emphasis added) (footnote omitted).

The reasoning behind such inclusion is that it avoids “the making of collateral private, undisclosed agreements for payment of attorneys as a feature of a class action settlement.” Id. However, when there is this simultaneous negotiation of fees and the award, the same authority recognizes that “there is an inherent conflict of interest.” Id. at 66.

89. 565 F.2d at 426 (citing Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977)).

90. Id. at 425. The court recognized that the Prandini fee proceeding was essentially an “ex parte application[ ]” Id. (citing Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977)). In the case before it, on the other hand, the Seventh Circuit had the benefit of the district court’s “interesting solution” of giving one of the defendants a reversionary interest in any part of the settlement award left unclaimed. Id. Consequently, adversariness was insured because the defendant “retain[ed] an economic incentive to contest [counsel]’s fee request, by virtue of the opportunity to regain a portion of the account on deposit.” Id.

91. Id. at 426. In referring the pending fee claims to the district court, the Seventh Circuit noted that the judge “may confront . . . problems relating to ex parte applications” because the remaining fee requests pertained to cases in which the “interesting solution” of the reversionary interest was not invoked. Id. at 425. Declining to accept the Prandini procedure until the district court had considered the circumstances, the court concluded that “the district judge will have an initial opportunity to consider the applicability of the Prandini guidelines.” Id. at 426 (citing Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977)).

92. 79 F.R.D. 447 (E.D. Ill. 1978) (class action by unemployment insurance recipients, seeking injunctive relief to prohibit unreasonable delays in replacement of benefit checks which were mailed but never received).

93. Id. at 450-51. After recognizing that “[o]ne of the indispensable characteristics of a contract is mutual assent, manifested by one party to the other,” the court ruled that a “consent order, being like a contract, cannot be so interpreted that a party to it is deprived of a right . . . to which there has been no agreement.” (citations omitted). Since there was no agreement “that plaintiffs could not at least move
plaintiffs' legal services attorneys. The court's rationale in agreeing to consider the fees request reflected two interrelated concerns. First, recognizing that any plaintiff's motion for a fees award in cases involving indigent plaintiffs is a matter of concern only to the attorney, the court stressed the ethical questions of discussing the fees in the settlement stage. Second, the court reaffirmed the strong public policy in favor of Fees Act awards in order to effectively enforce the nation's civil rights laws.

Other courts have not been as willing to intervene to resolve the ethical conflicts of interests emanating from combined settlements. The trend in these courts has been to acknowledge the ethical conflict, but to cherish the ability of adversaries to resolve it in the settlement process. For example, in White v. New Hampshire Department of Employment Security, the Supreme Court accepted the district court's finding that a consent decree's silence on the matter of attorney's fees did not constitute an implied waiver of the claim for fees, especially since the facts demonstrated that prejudgment attempts to negotiate a waiver of costs and attorneys' fees had failed. The Court reversed a unanimous First Circuit and held that a Fees Act motion for attorney's fees was timely. Although it was made approximately four and one-half months after approval of a consent decree and entry of judgment, because it dealt with a collateral matter and consequently was not a "motion to alter or amend the judgment." The Court held that

this court for an award of attorney's fees and costs[,]" the court denied defendants motion to strike the motion for fees. Id. at 451-52.

94. Id. at 452. Legal services organizations, although publicly funded, have consistently been held eligible for Fees Act awards. Id. at 451. For a discussion of the rationale supporting fees awards to salaried legal services attorneys, see notes 179-87 and accompanying text infra.

95. 79 F.R.D. at 451. After recounting the nature of plaintiff's proceedings, the court stated: "Everyone familiar with civil rights litigation knows that a plaintiff in such suits rarely pays attorney's fees or the costs of litigation. For these reasons, a motion for fees and costs in such a case, although made in the name of the plaintiff, is really one by the attorney." Id. Accordingly, the court concluded, counsel's economic interest "makes it improper for the lawyer in a civil rights suit to inject the question of attorney's fees into the balance of settlement discussions." Id. (citing Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977)).

96. The court realized that the purpose of the Fees Act was to compensate counsel for prevailing parties in civil rights litigation. Moreover, the court continued, "courts have been admonished not to lose sight of the fact that the overriding purpose of [the Fees] Act is encouragement of the private enforcement of civil rights laws in order to fully vindicate the federal constitutional guarantees involved." Id. (citation omitted).


98. Id. at 448 & n.4. The Court did not review this finding because it was not appealed; the precise issue was not the availability of a fee award, but the timeliness of counsel's petition. See id. at 448-50.
the motion was not subject to the ten day limit of Rule 59(e) of the Federal Rules of Civil Procedure. The Fees Act award of attorneys' fees was ruled to be collateral to the main cause of action because fees could not be determined until a "prevailing party" existed, and this determination required "an inquiry separate from [and necessarily subsequent to] the decision on the merits." 100

In a footnote to his majority opinion, Justice Powell specifically declined to rely on the ethical conflict of interest argument that had proven attractive to the Eighth Circuit when it had considered the same issue under review in White. 101 The Eighth Circuit had cited Prandini and Mendoza in ruling that the Rule 59(a) limit should not apply because its short ten-day duration would compel abbreviated simultaneous negotiations of the merits and attorneys' fees, and thereby necessarily exacerbate the inherent ethical conflict of interest between attorney and client. 102 In contrast to the Eighth Circuit, Justice Powell explicitly recognized the existence of the conflict of in-

99. Id. at 451-52 (citing Fed. R. Civ. P. 59(e) ("A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment"). The First Circuit had held that, although the Fees Act labels fees awards as "costs," they were not "costs" within the meaning of Rules 54(d) or 58. Id. at 448-49 (citing Fees Act, 42 U.S.C. § 1988 (1982); Fed. R. Civ. P. 54(d), 58). The First Circuit based its holding on its conclusion that the costs assessable under those rules were all "capable of routine computation," while a fees award request required a more in-depth and adversary proceeding. Id. at 449 (quoting White v. New Hampshire Dep't of Empl. Sec., 629 F.2d 697, 702 (1st Cir. 1980)).

100. 455 U.S. at 451-52. The Court also reasoned that the relief sought in a fees award motion was "not compensation for the injury giving rise to an action" and, consequently, was "uniquely separable from the cause of action to be proved at trial." Id. at 452 (citation omitted).

The Court was not oblivious to the potential unfairness of fee award motions led long after disputes had been settled. It noted that such problems could be ameliorated by invoking the district court's discretion to deny or award fees, or by establishing local rules governing fee award petitions. Id. at 454 & n.16 (citing Obin v. District No. 9 of the Int'l Ass'n of Machinists and Aerospace Workers, 651 F.2d 574 (8th Cir. 1981)).

101. 455 U.S. at 453 n.15. See Obin v. District No. 9 of the Int'l Ass'n of Machinists and Aerospace Workers, 651 F.2d 574, 582-83 ("counsel would be placed in the position of negotiating a fee ultimately destined for his pocket at the same time that all thoughts ought to be singlemindedly focused on the client's interests") (citing Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981); Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977); Regalado v. Johnson, 79 F.R.D. 447 (E. D. Ill. 1978)).

102. Obin v. District No. 9 of the Int'l Ass'n of Machinists and Aerospace Workers, 651 F.2d 574, 582-83, (8th Cir. 1981) (citing Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980); Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977); Regalado v. Johnson, 79 F.R.D. 447 (E.D. Ill. 1978)). The Eight Circuit reasoned that the ethical conflict would necessarily arise because "application of the ten-day rule set forth in Rule 59(a) would require counsel during settlement negotiations to discuss simultaneously the substantive issues in the action and the amount of the fee award." Id. at 582 (emphasis added).
terest, but pointed out that the Court chose instead to rely on the integrity of the bar: "Although such situations may raise difficult ethical issues for a plaintiff's attorney, we are reluctant to hold that no resolution is ever available to ethical counsel." While the Supreme Court may have raised the ethical issues in White only because the First Circuit had considered them in its ruling, the California Supreme Court has since wasted little time in elevating the Supreme Court's dictum to the "view of the White court."

103. 455 U.S. at 453 n.15. Speaking for the Court, Justice Powell wrote: "Although sensitive to the concern [of conflict of interest] that petitioner raises, we decline to rely on this proffered basis. In 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." Id.

It remains to be seen whether this footnote will pass into oblivion with thousands of other Supreme Court footnotes, or whether Justice Powell will appear prescient. To illustrate the difficulty of prediction, see the discussion of the (in)famous footnote 11 to Brown v. Board of Educ., 347 U.S. 483 (1954) in R. KLUGER, SIMPLE JUSTICE 705-06 (1976). This footnote noted that sociological research had disproven the view that the sense of inferiority ascribed to blacks arising from segregation was self-imposed, a view first expressed in Plessy v. Ferguson, 163 U.S. 537 (1896). It was "destined to become one of the most debated [footnotes] in the annals of the Court." Id. at 705.

Yet Chief Justice Warren included the footnote only to support the decision, not as the substance: he was later quoted as saying: "[I]t was only a note, after all." Id. at 706.

Given Justice Powell's demonstrated antagonism towards the expansion of fee awards, footnote 15 in White is likely to reappear. See, e.g., Hensley v. Eckerhart, 103 S. Ct. 1955, 1963 (1983) ("where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained"); Maine v. Thiboutot, 448 U.S. 1, 25 (1979) (expanding scope of 42 U.S.C. § 1983 (1982) to include any statutory right) (Powell, J., dissenting) ("No one can predict the extent to which litigation arising from today's decision will harass state and local officials; nor can one foresee the number of new filings in our already overburdened courts. But no one can doubt that these consequences will be substantial.") modified, Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 28 (1981) (§ 1983 does not apply where statute violated contains exclusive remedy).

104. 455 U.S. at 454 n.15.

105. See White v. New Hampshire Dep't of Empl. Sec., 629 F.2d 697, 705 (1st Cir. 1980). The First Circuit did not "see anything wrong with requiring the parties to face up to the issue of fees in their settlement negotiations." Id. (comparing Regalado v. Johnson, 79 F.R.D. 447 (E.D. Ill. 1978)). After noting that "[f]ailure to confront the fees issue merely muddies the waters," the court equivocated:

We of course do not suggest that an attorney in the course of settlement negotiations need, or in every case properly may, hold out, against his client's best interests, for a specific fees award to be included in the consent decree. If agreement as to fees is not easily accomplished, the parties may provide for submission of the entire question of fees to the court; further, they may, of course, decide to waive fees altogether.

Id.

106. Folsom v. Butte County Ass'n of Gov'ts, 32 Cal. 3d 668, 681, 652 P.2d 437, 446, 186 Cal. Rptr. 589, 598 (1982) ("While the preferred procedure is to reserve fee issues for judicial consideration and determination . . ., we decline to rule, as plaintiffs urge, that fee matters may never be injected into negotiations on the merits without placing counsel in a position of inherent conflict. We thus join th[e] view of the
C. Impact of the Court Decisions

Many of the courts confronting this ethical issue have continued to exhibit a cavalier attitude towards the analysis set out in Prandini. Thus, the courts’ recognition of the inherent ethical conflict of interest107 is often followed by perfunctory approval,108 adoption,109 recommendation,110 or rejection111 of the Prandini requirement that settlement of the merits occur before any consideration of attorney’s fees. Rather than providing firm guidance, these decisions have left a legacy of ambiguity to lower courts.112

White Court. . . .” (citing White v. New Hampshire Dep’t of Empl. Sec., 455 U.S. 445 (1982)).


108. See, e.g., Monell v. Department of Social Servs., 24 Fair Empl. Prac. Cas. (BNA) 701, 706 (S.D.N.Y. 1980). In approving the settlement of a civil rights class action, the court praised the separate negotiation of a settlement on the merits and the agreement on attorneys’ fees, recognizing that in this manner the parties avoided potential conflict between plaintiffs and their counsel and also avoided the “delay and turmoil” inherent in litigating the attorneys’ fee issue more fully before the court. See also Williams v. Ryan, 78 F.R.D. 364 (S.D. Ga. 1978). In evaluating a consent decree in a racial discrimination class action, the court noted, approvingly, that attorney’s fees played no part in the settlement since they were not provided for in the settlement of the merits and were reserved for future court determination. Id. at 369.

109. See, e.g., Regalado v. Johnson, 79 F.R.D. 447, 451 (E.D. Ill. 1978) (It is “improper for the lawyer in a civil rights suit to inject the question of attorney’s fees into the balance of settlement discussions.”). For a further discussion of Regalado, see notes 92-96 and accompanying text supra.

110. See, e.g., Obin v. District No. 9 of the Int’l. Ass’n of Machinists and Aerospace Workers, 651 F.2d 574, 582 n.10 (8th Cir. 1981) (“it is unrealistic to expect the parties ‘to waive fees altogether,’ and it is preferable to avoid any appearance of impropriety even if an agreement on fees may be ‘easily accomplished’”); Mendoza v. United States, 623 F.2d 1338, 1353 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981) (“while we strongly discourage the simultaneous negotiation of attorneys’ fees and substantive issues in class action settlement negotiations, . . . we do not believe rejection of a resulting settlement in every case is appropriate”).

111. See, e.g., Aho v. Clark, 608 F.2d 365, 367 (9th Cir. 1979); Folsom v. Butte County Ass’n of Gov’ts, 32 Cal. 3d 668, 681, 652 P.2d 437, 446, 186 Cal. Rptr. 589, 598 (1982).

112. Some decisions do recommend use of separate settlements. See note 101 supra. However, other decisions are premised on narrow readings of settlement agreements, which makes it difficult to determine the effect of their silence on the matter of
For example, in *Aho v. Clark*, a suit for declaratory and injunctive relief to require implementation of state-wide school breakfast program, the Ninth Circuit approved a consent decree that was silent on the question of attorneys’ fees because it found that the parties had intended it to be an “amicable settlement.” The court concluded that it would be “manifestly unfair” to the State of Hawaii to approve a subsequent Fees Act request that would alter the parties’ original compromise. Yet, shortly thereafter, the Ninth Circuit implicitly reversed itself in *Mendoza*. Without even mentioning *Aho*, the court “strongly discourage[d]” the use of the same contemporaneous settlement process it had previously endorsed in *Aho*. In support of this new stance, the *Mendoza* court cited *Prandini*. However, *Mendoza*’s qualified endorsement of *Prandini* does not provide attorneys’ fees. See notes 85-91 supra. Such “recommendations” provide little guidance to lower courts.

113. 608 F.2d 365 (9th Cir. 1979).
114. *Id.* at 367.
115. *Id.* In determining whether the plaintiffs were entitled to attorneys’ fees, the court applied the rule that “civil rights plaintiffs ‘should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.’” *Id.* (citations omitted). The court then considered the circumstances surrounding the execution of the parties’ original settlement agreement, which did not contain a provision for counsel fees, to determine whether they should be granted. *Id.* The court first noted that the Fees Act became effective only slightly more than two months before the settlement was reached and inferred, therefore, that much of the negotiation did not concern this issue. *Id.* Second, the court found that the parties may have thought the law inapplicable. Third, the court accepted the defendants’ argument that they would not have agreed to the settlement had they known the plaintiffs would seek attorneys’ fees. *Id.* The court emphasized this third point stating, “It is evident that [plaintiffs], in order to realize the most important aims of the suit without incurring the expense and risk of further litigation, agreed to forego some of the benefits which they had originally sought.” *Id.* The court then found that the statutory purpose of the Act did not mandate an award. *Id.* at 367-68. In light of these factors, the court finally concluded that “special circumstances” did exist and affirmed the district court’s refusal to disturb the parties’ original compromise settlement. *Id.*

116. See *Mendoza*, 623 F.2d at 1352-53. For further discussion of *Mendoza*, see note 110 supra and notes 117-19 and accompanying text infra.
117. *Mendoza*, 623 F.2d at 1353. Ironically, the Ninth Circuit disapproved of *Mendoza*’s ample $500,000 negotiated attorney’s fees settlement which was under attack by a subclass member, rather than the *Aho* fee waiver which had been challenged by the attorneys who were caught in the ethical dilemma. In addition, it is surprising that *Mendoza* did not even mention *Aho*, since Judge Joseph Sneed sat on both Ninth Circuit panels. After *Mendoza*, undoubtedly *Aho* must be limited to its factual circumstances, since the case was filed four months before the Fees Act became effective, and the consent decree was approved two months after it became effective. The *Aho* court ruled that the defendants may have relied upon an understanding that the law did not authorize attorneys’ fees in such cases. See *Aho*, 608 F.2d at 367.
either courts or counsel with any clear guidance.\textsuperscript{119} District courts, with their discretion only slightly narrowed, are free to continue their case-by-case supervision of simultaneous settlements; defense counsel, tempted to gamble with demands for fee waivers, are merely faced with lower odds for success.

D. \textit{Barriers to Appellate Review}

Part of the reason that the courts have been reluctant to embrace the \textit{Prandini} method, and have instead adopted the tactic of giving notice to lower courts and members of the bar to be cautious in simultaneous settlement situations, is that the most blatant examples of conditional Fees Act waivers almost never reach appellate courts. This is largely due to the tremendous leverage available to defendants in fee waiver settlements. Indeed, this leverage not only survives a negotiated settlement in the trial court, but gains strength after the initial settlement and assures retaliation by defendants at every subsequent step in the review process.\textsuperscript{120}

Once the conditional pact is offered and accepted, there is little plaintiffs' counsel have been able to do to test the validity of fee waivers. Motions in district courts to sever attorneys' fees from negotiations on the merits, made while settlement negotiations were underway, have been disregarded\textsuperscript{121} and denied as burdensome to the settlement process.\textsuperscript{122} After the parties have reached a settlement

\textsuperscript{119} See id. at 1353. The Ninth Circuit's conclusion in \textit{Mendoza} reads as follows:

Whether the existence of this potential conflict requires a trial court to reject a settlement proposal depends upon the circumstances of each case. The presence of simultaneously negotiated attorneys' fees should cause the court to examine with special scrutiny the benefits negotiated for the class. It would rarely be an abuse of discretion for a trial court to reject a settlement proposal where such combined negotiation took place. But rejection of a settlement is not automatically required in such cases—there may be circumstances present which appear to neutralize the potential for impropriety.

\textit{Id.}

\textsuperscript{120} Once a settlement has been agreed to, and the plaintiff has prevailed, an attorney can no longer even fall back on the pre-settlement delusion that proceeding to trial would best serve the client's interests—and, not coincidentally, his own.

\textsuperscript{121} Chattanooga Branch of the NAACP v. Chattanooga, Nos. 82-5016/5031 (6th Cir. App. Dismissed Apr. 29, 1982), is an unreported case in which the plaintiffs' motion to prohibit counsel from discussing attorneys' fees as part of the settlement negotiations of the dispute between the parties was filed in the district court to prevent defense counsel from seeking an express waiver of fees during negotiations of the claims. This was met by the defendants' refusal to continue settlement negotiations; by directions from the court to resume negotiations in the best interests of the plaintiffs; and by the court's reluctance to formally rule on the substance of the motion. \textit{See} Brief of Plaintiffs-Appellants at 4-7, Chattanooga Branch of the NAACP v. Chattanooga, Nos. 82-5016/5031 (6th Cir. App. Dismissed Apr. 29, 1982).

\textsuperscript{122} See Levin, supra note 16, at 519. In his article, Mr. Levin discussed \textit{Vega v.}
which expressly waives or is silent on the matter of fees, plaintiffs' motions for trial courts to grant attorneys' fees and, if necessary, to set aside the fee waiver provisions of newly or soon to be approved consent decrees have invariably been denied. Moreover, they have been met with defendants' cross-motions to set aside the consent decree or, in the alternative, to deny the plaintiffs' motions for attorneys' fees. Appeals from district court denials of these motions for attorneys' fees are countered by the defendants' cross-appeals to va-

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Bloomsburg, 427 F. Supp. 593 (D. Mass. 1977), in which the Massachusetts District Court refused to rule improper the defendants' insistence on a fee waiver, although the parties had already agreed to a settlement which did not mention counsel fees. See Levin, supra note 16, at 519. Plaintiffs' counsel, faced with the ethical dilemma of having to waive their fees or contest the issue, acquiesced in the court's decision. Id. Thus, as Mr. Levin suggests, this early portion of Vega clearly illustrates the Massachusetts court's refusal to follow the Prandini reasoning during the presettlement phase negotiations. Id.

123. See, e.g., Aho, 608 F.2d at 366; Chattanooga Branch of the NAACP v. Chattanooga, Nos. 81-5016/5031 (6th Cir. App. Dismissed Apr. 29, 1982), Brief of Plaintiffs-Appellants at 9-10. For further discussion of Aho, see notes 104-05 and accompanying text supra.

However, challenges to consent decrees by defendants are equally unproductive. Since consent orders are usually construed as private contracts, when either party attempts to set aside part of an order, the remainder of the other party's performance is excused at least until the validity of the questioned terms is decided. See United States v. ITT Continental Baking Co., 420 U.S. 223, 236-38 (1975). In ITT Continental, the Court observed that, "since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts. . . ." Id. See also Regalado v. Johnson, 79 F.R.D. 447, 450-51 (E.D. Ill. 1978).

124. See, e.g., White v. New Hampshire Dept. of Empl. Sec., 455 U.S. 445 (1982). In White, the petitioner brought a class action against the New Hampshire Department of Employment Security (NHDES) claiming that the respondent failed to make timely determinations of certain entitlements to unemployment compensation. Id. at 447. Petitioner's complaint sought declaratory and injunctive relief, but did not specifically request attorney's fees. Id. The district court found for the petitioner but, pending an appeal by NHDES, the parties signed a settlement agreement. Id. More than four months after the settlement was approved, the petitioner filed a motion for attorney's fees under the Fees Act. Id. at 448. The district judge granted the motion on the grounds that the settlement agreement did not constitute a waiver of petitioner's right to seek counsel fees. Id. Immediately thereafter, respondent moved to vacate the consent decree arguing that it had intended the agreement to fix its total liability, and that it would not have agreed to the settlement had it thought it could be subjected to further liability. Id. The district court denied respondent's motion, but the Court of Appeals for the First Circuit reversed on other procedural grounds. Id. The United States Supreme Court reversed and remanded the case on the procedural grounds. Id. at 455. Thus, the issues which sparked the controversy in the district court remain unresolved today.

See also Aho, 608 F.2d at 368 (defendants "moved to set aside the entire consent agreement on the grounds that [plaintiffs] had acted in bad faith by concealing their intention to seek attorneys' fees and had materially breached the terms of the agreement"); Regalado v. Johnson, 79 F.R.D. 447, 448 (E.D. Ill. 1978)("Defendants responded [to plaintiffs' motion for attorneys' fees] with a motion of their own asking this court to strike and deny plaintiffs' request . . . , or in the alternative that the consent order be vacated.").
cate the consent decree. At each step to obtain review, the prevailing plaintiff’s beneficial relief, although nearly attained after the favorable settlement has been reached, is postponed and permanently threatened by counsel’s efforts to secure attorney’s fees. Moreover, each step forward reintroduces precisely the same ethical dilemma that originally forced acceptance of the fee waiver. In the quest for attorney’s fees, plaintiff’s counsel continues to place the client’s recovery in jeopardy. Any collateral attack on a Fees Act attorney’s fee waiver replays this ethical dilemma and very often risks the loss of arduously won, urgently needed, non-monetary relief.

E. Conflicts of Interest

The barriers to appellate review in Fees Act waiver cases have contributed to the courts’ failure to appreciate and carefully distinguish between the diverse conflicts of interest presented by different pre-trial simultaneous settlements. There are as many different potential conflicts of interest involved as there are combinations of participants. For instance, a conflict of interest occurs when an attorney simultaneously negotiates attorney’s fees and a settlement of the claims of uncertified and unnamed class members. A second conflict of interest arises between counsel and a certified class when a defendant offers excessive fees in return for a “sweetheart” settlement on the merits. Third, there is serious potential for a conflict of in-

125. See Aho, 608 F.2d at 366, 368. See also Chattanooga Branch of the NAACP v. Chattanooga, Nos. 82-5016/5031 (6th Cir. App. Dismiss Apr. 29, 1982. According to counsel for plaintiffs-appellants, the cross-appeal of defendants, accompanied by refusal to institute the relief approved in the consent decree, resulted in a decision to withdraw the appeal.

126. Fees Act cases very often involve injunctive and declaratory relief. See note 7 supra.

127. For discussion of the sources of the ethical constraints on plaintiffs’ and defendants’ attorneys in Fees Act attorneys’ fees waivers, see notes 137-67 and accompanying text infra.

128. See, e.g., Shelton v. Pargo, Inc., 582 F.2d 1298, 1315 (4th Cir. 1978) (addressing the potential conflict of interest, in a pre-certification settlement context, between the compromise of a named plaintiff’s individual claim, a claim for attorney’s fees for plaintiff’s counsel, and the claims of absent class members); Munoz v. Arizona State Univ., 80 F.R.D. 670, 671-72 (D. Ariz. 1978) (dismissal of class action allegations and refusal to accept an attorney’s fees settlement in an employment discrimination case because attorney’s fees were negotiated simultaneously with an overall settlement, creating a “clear conflict of interest”); Lyon v. Arizona, 80 F.R.D. 665, 669 (D. Ariz. 1978) (a different judge from that in Munoz granted a motion to dismiss allegations and refused to accept an attorney’s fees settlement because plaintiffs’ counsel had shown a direct conflict of interest in attempting to negotiate attorney’s fees simultaneously with negotiation for settlement of the claims of uncertified and unnamed class members).

129. See, e.g., Mendoza, 623 F.2d at 1352 (plaintiff argued that simultaneous negotiations can result in tradeoffs between additional benefits to the class and attor-
Interest between attorney and client when the attorney is confronted with a request to waive a Fees Act attorney's fee award. All three conflict of interest problems can be, and have been, resolved through the use of the Prandini dual negotiation method. Yet, courts have been reluctant to employ this method. Notably, this failure to apply the Prandini method is much more harmful in Fees Act waiver cases than in excessive fee situations. The difference becomes evident when the four general aims of awarding statutory attorney's fees are examined.

Statutory attorney's fees have four broad goals. First, they stimulate legal representation through the availability of fee awards. Second, they facilitate the enforcement of rights through improved access to legal representation. Third, they deter non-compliance by defendants and by potential violators. Fourth, they demonstrate a national commitment to protect the class of persons who benefit through direct enforcement of the rights involved, and to protecting the public in general, which benefits through voluntary compliance.

When an overly generous fee offer is made by a defendant, the courts' prime concern is to shield the individual named plaintiffs and the remainder of the class from their attorney's self-interest in profiting from the terms of the settlement, through the receipt of a disproportionate share of the settlement as attorney's fees. In addition, the courts are concerned that the attorney's self-interest will motivate him to settle the lawsuit at a premature stage and/or to settle it on terms detrimental to the named plaintiffs and/or the class.

Implicit in the courts' recognition of this need to protect plaintiffs and the interested class is the assumption that a single monetary pot exists to be split between client and attorney. No doubt this is a valid assumption in most commercial cases where monetary relief is fundamental. However, this premise is of less value in many Fees Act cases. In civil rights cases, monetary recovery often plays a

\[\text{ney's fees where plaintiff's attorneys had negotiated fees of $500,000}; \text{Prandini, 557 F.2d at 1021 ("we must look at an agreement by defendants to pay counsel for the class a fee up to a certain maximum, as determined by the court, as having the potentiality of what is known in the labor field as a 'sweetheart contract'"); (citing Prandini v. National Tea Co., 16 Fair Empl. Prac. Cas. (BNA) 956, 957 (1976)).} \]

130. For a discussion of the use of the dual negotiation method to resolve conflict of interest problems, see notes 103-04 supra.

131. See Northcross v. Board of Educ., 412 U.S. 427, 428 (1973). See also Newman v. Figgie Park Enters., 390 U.S. 400 (1968). In Newman, the Court observed that "Congress . . . enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief. . . ." Id. at 402. See generally Derfner, supra note 12. For a general discussion of the goals of statutory attorney's fees, see notes 21-40 and accompanying text supra.
subordinate role to injunctive and declaratory relief, and it is much more difficult to convert these nonmonetary settlement offers into precise dollar equivalents. Therefore, in any monetary “sweetheart” settlement, the primary concern of the court, quite properly, is that a client’s recovery not be sacrificed to attorney’s greed.

When excessive fee settlements are weighed against the purposes of providing statutory fee awards, they seriously threaten only the goal of assuring an adequate and fair recovery to injured parties. At worst, they have only a minimal negative impact on the other policy aims of statutory fee-shifting, and at best, they actually serve these purposes. Excessive fees stimulate and draw practitioners, who anxiously await clients. Indeed, the extra incentive of pocketing disproportionate shares of settlements may even draw aggressive, skilled counsel, capable of maximizing overall settlements. Consequently, the use of excessive fee settlements does not significantly reduce the deterrent effect of the Fees Act on defendants and potential violators, since it is the overall monetary level of a settlement which deters, not its apportionment between attorney and client.

Excessive fee settlements are largely problems of misallocation between attorney and client. As such, they can usually be controlled by two time-consuming alternatives to the bifurcated settlement. The first is a case-by-case monitoring of the reasonableness of attorney’s fees settlements. The second is a search for an adversarial interest in each case so that settlement does not take place in an ex parte

132. See, e.g., Dam, supra note 13, at 58-59 (noting that court awards of attorney’s fees in commercial class action cases have been substantial and have been criticized as a source of abuse). See generally Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1604-23 (1976) (“Critics of class actions have suggested that a pattern of ‘miniscule recoveries’ and ‘a golden harvest of fees’ is characteristic at least of damages class actions.”).

133. See Mowrey, Attorney Fees in Securities Class Action and Derivative Suits, 1978 J. Corp. L. 267, 331 n.458 (“Obviously, handsome awards encourage attorneys to take class actions and meager awards discourage the bringing of such actions.”).

134. See notes 208-11 infra.

135. See Fed. R. Civ. P. 23(e) (requiring judicial approval of all class action settlements). See also Parker v. Anderson, 667 F.2d 1204 (5th Cir.), cert. denied, 459 U.S. 828 (1982) (the court extensively reviewed and approved a simultaneous settlement in an employment discrimination class action); Jamison v. Butcher & Sherrerd, 68 F.R.D. 479, 484 (E.D. Pa. 1975). In Jamison, the court set aside a proposed settlement in a class action brought under the Securities and Exchange Act of 1934, partially because of a settlement provision for direct payment of attorney’s fees to counsel for the class. The court ruled that the issue of settlement of attorneys’ fees was “more properly reserved for judicial consideration after the settlement of the gross amount to the class . . . [because] the present arrangement leaves the unfortunate impression that defendants are buying themselves out of a lawsuit by direct compensation to plaintiffs’ counsel.” Id. For further discussion of Parker, see note 218 infra. For additional examples of cases where the court monitored attorneys’ fees, see notes 200, 204-05 & 216 and accompanying text infra.
When full or partial Fees Act waiver settlements are compared with the purposes of statutory fee awards, they present very different problems from those which result in excessive fee situations. In Fees Act waiver settlements, the courts know that settlement terms lack reasonable compensation for attorneys. Non-allocation, not misallocation, is the issue. The danger to named plaintiffs and to the class comes from an attorney who might be tempted, by self-interest in fees, to continue a lawsuit beyond the optimal settlement point on the merits. Thus, only the unscrupulous attorney who presses forward, sacrificing the client’s interest, poses a realistic threat to a civil rights plaintiff. Client interest, ethical constraints, defendant pressure, and court supervision make this rare.

Therefore the injury in fee waivers is almost never to the named plaintiffs and/or the class who receive an adequate recovery (or an excessive one if the common fund analogy is valid). The damage is to the truly unrepresented class, who are unable to obtain legal representation to bring civil rights claims in the future. The harm is to the general public as well, which suffers not only from lax enforcement of the civil rights laws, but also from the diminishing of the deterrent impact of attorney’s fees by the perception that the cost of noncompliance has been freed from the burden of Fees Act Awards. A Fees Act attorney’s fee waiver shortchanges the public as much as it harms the attorney who foregoes the award.

As a result, a number of courts have recognized the importance of separate settlements of the merits and attorney’s fees where potential conflicts of interest arise in “sweetheart” settlements. A close analysis of the potential conflicts of interest in full and partial fee waiver settlements, and the resultant harm to the congressional policies embodied in the Fees Act, dictate that separate settlements are even more necessary in these circumstances.

136. See Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) (defendant Boeing contended, but the Supreme Court did not decide, that the unclaimed portion of a class fund from which the attorney’s fees were to be drawn should revert back to the defendant); Shlensky v. Dorsey, 574 F.2d 131, 150 (3d Cir. 1978) (a shareholders derivative suit where the adversarial interest needed to assure that a conflict between attorney and class did not arise was supplied by the presence of the corporation as a real party in interest, which, as the recipient of the fund created by the settlement, would benefit to the extent that the settlement fund was not reduced by an award of excessive attorney’s fees). See also notes 216-17 and accompanying text infra.
III. SOURCES OF ETHICAL CONFLICTS OF INTEREST: THE ABA CODE OF PROFESSIONAL RESPONSIBILITY

The source of attorneys' ethical constraints in simultaneous Fees Act negotiations and settlements is the fountainhead of legal ethics—the American Bar Association (ABA) Model Code of Professional Responsibility (the Code). Although the Code was posed merely as a source of ethical guidelines, through the impact of disciplinary proceedings, the threat of disqualification for conflicts of interest, and the potential of malpractice actions for breach of its limita-


On August 2, 1983, the American Bar Association adopted a comprehensive new Model Code of Professional Conduct. Although it should eventually replace the Code of Professional Responsibility on the state level, the disagreement and heavy opposition which have carried over from the dispute over ABA approval make the likelihood of rapid adoption by the states highly unlikely. See N.Y. Times, Aug. 3, 1983, at A1, col. 1. There is clearly widespread opposition. See also N.Y.L.J., Aug. 9, 1983 at 1, col. 2. ("No dramatic changes in the rules for disciplining lawyers in New York loom on the immediate horizon as a result of the American Bar Association's vote last week to adopt a comprehensive new model code of ethics."); N.Y. Times, Aug. 3, 1983, at B9, col. 2 ("Representatives of the two largest state bar associations, those in New York and California, said here today that they would oppose adoption of the model rules in their states, as did representatives of some other large state bar associations, including those of Florida and Illinois."); L.A. Daily J., Aug. 3, 1983, at 15, col. 4 ("[T]here was wide agreement that getting the model code adopted in its current form presents another mammoth task."); Chi. Daily L. Bull., Aug. 2, 1983, at 16, col. 5 ("The Illinois Supreme Court adopted its current ethics rules in 1980 and Connelly said he doesn't expect the court to be in a hurry to adopt the new ABA version.").


138. For a discussion of the use of the ABA's Standing Committee on Ethics and Professional Responsibility opinions as sources of law in state disciplinary proceedings, see Finman & Schnayer, The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee of Ethics and Professional Responsibility, 29 UCLA L. Rev. 67, 85 (1981). See also S. Tisher, L. Bernabei & M. Green, Bringing the Bar to Justice 97 (1977) (cumulatively, only 0.6% of complaints of attorney ethical violations led to public sanctions in Pennsylvania and 1.7% led to court imposed discipline in New York State); Ad Hoc Committee on Grievance Procedures of the Association of the Bar of the City of New York, Report on the Grievance System 47 (1976). See generally Developments—Conflicts of Interest, supra note 137, at 1496-503 (the legal profession has come under continual, sometimes withering, attack for failing to discipline its members).
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tions, it has become a set of authoritative legal restrictions on the behavior of members of the profession. In support of this development, the ABA promulgates the Code's Disciplinary Rules (DR's) and Ethical Considerations (EC's). The Standing Committee on Ethics and Professional Responsibility, in turn, interprets these in response to specific inquiries by attorneys uncertain as to how to conform their conduct to Code dictates. Additionally, committees of state, local and specialty bar associations issue numerous ethics opinions, usually in response to specific inquiries. Some of these have been collected and are widely available.

Even without sanctions, it is to be expected that all practitioners would conduct themselves ethically and avoid conflicts of interest under the Code, its interpretive guidelines, and state and local rules. In addition, experience has shown that these standards have the greatest impact upon the behavior of civil rights and legal service attorneys who must be even more circumspect in their actions than

139. See Finman & Schneyer, supra note 138, at 85 n.71; Developments—Conflicts of Interest, supra note 137, at 1471-86.

140. The Code does not specifically undertake to impose standards for civil liability. This is left to general legal principles. However, once the standards are adopted by the states, they become the basis for liability on the grounds of misconduct or malpractice. See Finman & Schneyer, supra note 138, at 86 n.72. See also Developments—Conflicts of Interest, supra note 137, at 1487, where the author notes: "Although conflicts of interest account for only a small percentage of malpractice claims, the private civil action is well established at least for the most serious violations, and the use of such actions may be expected to grow as malpractice actions become more popular."

141. The Code's Disciplinary Rules are mandatory in character and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preamble and Preliminary Statement (1980).

142. The Code's Ethical Considerations are not intended as a basis for discipline, but are "aspirational in character," and are designed as general guides to ethical behavior and as aids in interpreting the Disciplinary Rules. Id.

143. The ABA Standing Committee on Ethics and Professional Responsibility receives approximately fifty requests for new opinions annually. See Finman & Schneyer, supra note 138, at 75. Despite these interpretations, the rules have been criticized for their lack of specificity. See, e.g., Comment, ABA Code of Professional Responsibility: Void for Vagueness?, 57 N.C.L. REV. 671 (1979) (discussing application of the Supreme Court's "void-for-vagueness" standard to the Code of Professional Responsibility).

144. See DIGEST OF BAR ASSOCIATION ETHICS OPINIONS (O. Maru & R. Clough eds. 1970); DIGEST OF BAR ASSOCIATION ETHICS OPINIONS (O. Maru ed. Supp. 1970 & 1975). See also ABA DIRECTORY OF BAR ACTIVITIES 14 (1980) (a recent survey found that 80% of all statewide and 23% of all local bar associations issue opinions).


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other sectors of the legal profession.\textsuperscript{146} A cursory review of recent history reveals that civil rights, legal services and public interest attorneys have been closely scrutinized, often by their hostile brethren, and that deliberate attempts to thwart their activities have taken the guise of disciplinary and ethical proceedings.\textsuperscript{147}

The majority of civil rights plaintiffs have either no resources to pay attorney’s fees, or are not obligated to do so because they are represented by a public interest organization that does not accept fees as a matter of policy, or by a legal services office that is prohibited from charging for services.\textsuperscript{148} Consequently, the specific civil rights claimant’s primary concern is in obtaining a favorable resolution of the case. Assuring that his or her legal representative receives compensation is only a secondary concern and, realistically, encouraging legal representation for others to litigate civil rights claims may not even be a concern of the individual claimant. Therefore, it is axiomatic that the interest in attorney’s fees is that of counsel, not client.\textsuperscript{149} Certainly this is true in the case where the plaintiff is indigent and has acquired legal representation with the expectation that sus-

\textsuperscript{146} For a discussion of the ethical difficulties confronting the legal services program, see In re Community Action for Legal Servs., Inc., 26 A.D.2d 354, 274 N.Y.S.2d 779 (1966) (rejecting a petition for approval of a legal services program because of ethical concerns over solicitation, group representation and lobbying); Hiestand, The Politics of Poverty Law, in With Justice for Some 160 (B. Wasserstein & M. Green eds. 1970); Robb, Controversial Cases and the Legal Services Program, 56 A.B.A. J. 329 (1970).

\textsuperscript{147} See, e.g., NAACP v. Button, 371 U.S. 415, 423 (1963) (challenge to a Virginia statute prohibiting the “solicitation” of legal business by any person or organization not a party to a judicial proceeding and having no pecuniary right or liability in it, which the Virginia courts construed to prevent the NAACP from prosecuting racial discrimination suits); Murphy, The South Counterattacks: The Anti-NAACP Laws, 12 W. Pol. Q. 371 (1959) (discussing the impact of the “anti-NAACP laws” on the organization’s ability to offer free legal services to persons bringing racial discrimination suits). For a brief discussion of the attacks on the National Lawyers Committee by the New Deal legal establishment, see G. Wolfskill, Revolt of the Conservatives (1962). For a compelling historical critique of the ABA’s general institutional bias against the lower strata of the legal profession and its lack of evenhandedness in the creation and application of the Code, see generally J. Auerbach, Unequal Justice (1976).

\textsuperscript{148} See note 5 supra and note 170 infra and accompanying text.

\textsuperscript{149} See Opinion No. 80-94 of the Committee on Professional and Judicial Ethics of the New York City Bar Association, 36 Record of N.Y.C.B.A. 507, 508 (1981) (“Defense counsel thus are in a uniquely favorable position when they condition settlement on the waiver of the statutory fee: they make a demand for a benefit which the plaintiff’s lawyer cannot resist as a matter of ethics and which the plaintiff will not resist due to lack of interest.”).

The general practice of the federal courts is to order that statutorily authorized fees be paid directly to attorneys, rather than to clients. See, e.g., Maher v. Gagne, 448 U.S. 122, 126 (1980) (awarded to “respondent’s counsel”); Hutto v. Finney, 437 U.S. 678, 693 (1978) (paid “counsel for the prevailing parties”); Miller v. Amusement Enters., 426 F.2d 534, 539 (5th Cir. 1970) (“the fees allowed are to reimburse and
cess will be accompanied by a satisfactory Fees Act award. Yet, these circumstances enhance the ethical conflict for civil rights counsel, since there is very often no alternate source of compensation other than the anticipated Fees Act award.

The attorney’s relationship to the client is that of a fiduciary who must act in the best interest of the client. The Code cautions the attorney against sacrificing the undivided loyalty owed clients to “financial, business, property, or personal interests.” The attorney continues to occupy the fiduciary position from the time he accepts the case until the case is resolved. If a settlement is involved, the attorney is required to negotiate, evaluate and communicate a proposal free from any taint of self-interest in gaining a fee. Thus, in civil rights cases, once relief is offered, the attorney is ethically and legally obligated to advise his client of the substance and sufficiency of that relief, of the burden, expense and risk of nonacceptance, and of the likelihood of attaining an even more favorable outcome by continuing the lawsuit.

Just as the Code plainly enumerates the bases for loyalty owed compensate for legal services rendered and will not go to the litigants, named or class.


151. Model Code of Professional Responsibility DR 5-101(A) (1980) (“a lawyer shall not accept employment’ if his own interests will interfere with his professional judgment).

152. Id. Canon 5. Although the thrust of Canon 5 goes to economic, political and social pressure from third parties which might influence attorney independence, EC 5-1 provides as follows: “The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.” (footnote omitted). Id. EC 5-1. See also id. EC 7-7 (“It is for the client to decide whether he will accept a settlement offer . . . ”).

153. Of course, civil rights attorneys often face other conflicts with clients besides those posed by simultaneous settlements. A common area of conflict concerns the attorney’s priority in establishing a law reform precedent or gaining broad remedial relief which may run counter to the client’s interest in accepting a substantial monetary settlement, offered, perhaps, at the precise point when the case appears certain of success. For an argument that the fiduciary model of attorney loyalty should be altered in this context to take account of the broader interests of the public in final judicial resolution of the issue, see Developments—Conflicts of Interest, supra note 137, at 1461-64. See also Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470 (1976) (discussing attorney-client conflict in school desegregation cases in which attorneys argued for complete integration and clients stressed better education).
plaintiffs (and thereby dictates the only ethical choice of counsel when confronted with Fees Act conditional settlements), it also clearly delineates sources of ethical constraints on defense counsel, who proffer conditioned settlement offers. For example, all lawyers are required to assist in improving the legal system and to appreciate that the "fair administration of justice requires the availability of competent lawyers."

The actions of counsel in pressing coercive fee waivers ultimately will create a vacuum in the availability of legal representation in civil rights cases. The legal profession has continually recognized the need for legal representation of the indigent and the duty of all attorneys to support such efforts. The Code calls on members of the profession "to assist in making legal services fully available." Moreover, the public's need for legal services is satisfied only if its members "are able to obtain the services of acceptable legal counsel."

In thwarting the purpose of the Fees Act and thereby limiting indigent civil rights litigants' access to competent counsel, defense attorneys subvert the Code's objective of providing necessary legal services to those unable to purchase them and frustrate the Code's

154. Model Code of Professional Responsibility EC 8-3 (1980). See also id. DR 1-102(A)(5) ("A lawyer shall not . . . . [e]ngage in conduct that is prejudicial to the administration of justice."); id. EC 1-1 ("A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence.").

155. Lawyers have been fond of proposing idealistic standards for the profession. Paragraph eight of a suggested oath for attorneys reads in part: "I will do all that I can to assure that the client with the unpopular cause is properly represented, and that the lawyer representing such a client receives credit from and support of the bar for handling such a matter." Thode, The Ethical Standard for the Advocate, 39 Tex. L. Rev. 575, 592 (1961). In addition, the ABA has consistently lauded the goal of service to those financially unable to obtain legal representation, especially to enforce equal rights. The ABA's Joint Conference on Professional Responsibility, chaired by Lon L. Fuller and John D. Randall, states:

If there is any fundamental proposition of government on which all would agree, it is that one of the highest goals of society must be to achieve and maintain equality before the law. Yet this ideal remains an empty form of words unless the legal profession is ready to provide adequate representation for those unable to pay the usual fees.


157. Id.

158. See id. EC 2-16. The Code provides as follows:

The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

Id. (footnotes omitted).
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directive that counsel support efforts to meet the need for legal services. In response, the New York City Bar Committee on Professional and Judicial Ethics recently concluded that it is unethical for defense counsel to demand conditional fee waivers in civil rights cases.

[T]he 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, contrary to the obligations and aspirations of the Code of Professional Responsibility. We find this conclusion particularly compelling in light of the special obligations of government counsel, who in the usual civil rights case are counsel for defendant, to deal fairly and not take undue advantage of his [sic] position to bring about unjust settlements or results.

While the ethical dilemma confronted by plaintiffs' attorneys in civil rights simultaneous negotiation cases is clear under the Code, defense counsel can argue that the Code embodies some countervailing values which mitigate the impact of these ethical constraints upon defense attorneys' use of the coercive fee waiver. The duties of loyalty to clients and of representing clients zealously within the bounds of the law both sanction a broad range of litigation strategy. However, the Code also contains compelling admonitions

159. See id. EC 2-25. "The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer. . . . Every lawyer should support all proper efforts to meet this need for legal services." Id. (footnotes omitted).

160. Opinion No. 80-94, supra note 149, at 510. The opinion relied strongly on DR 1-102(A)(5) and EC 2-25. For the relevant text of DR 1-102(A)(5) and EC 2-25, see notes 154 & 159 supra. See also Model Code of Professional Responsibility EC 7-14 (1980) ("A government lawyer in a civil action or administrative proceeding 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.").

161. See Model Code of Professional Responsibility EC 7-19 (1980) ("The duty of lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law."); Thode, supra note 155, at 584 ("The advocate does not decide what is just in this case—he would be usurping the function of the judge and jury—he acts for and seeks for his client that which he is entitled to under the law. He can do no less and properly represent the client.") (emphasis in original). See also notes 138-40 and accompanying text supra.

162. See Model Code of Professional Responsibility EC 7-4 (1980) ("The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction
which temper, and render secondary, its support of full and unbridled representation of clients. The Code places a number of constraints on defense counsel who insist on retaining every weapon in negotiating civil rights case settlements. First, the Code’s initial objective is to curb actions which are prejudicial to the administration of justice.  

Certainly defendants, especially governmental entities, share with their attorneys the interest in providing equal access to the courts and in the fair administration of justice. Second, portions of the Code raise fairness, and the appearance of fairness, above the interests of lawyers and clients in vehement representation. Third, although it would speed settlement, the Code bars defense counsel from restricting access to legal representation by conditioning settlements on an agreement by the plaintiff’s attorneys not to represent future claimants against the same defendant. Just as it is to a defendant’s financial advantage to compel a fee waiver, it would also be to a defendant’s financial benefit to restrict opposing counsel — already versed in the intricacies of a lawsuit, and about to extract a favorable settlement — from pursuing similar cases. However, it is not enough that both exchanges are financially advantageous, effectuate settlement of a lawsuit, and are the result of vigorous representation by counsel. Both are unethical because they violate the same public policy of assuring that the supply of competent legal representatives, with specialized knowledge and skills, is not curtailed through the settlement process. Fourth, the Code does not hesitate to declare unethical other practices which, if left unimpaired, would provide defendants with additional ammunition to speed the settlement process. Fifth, any reading of the Code’s endorsement of aggressive

will ultimately prevail.”) (footnote omitted). For a discussion of the defense attorney’s duty of loyalty owed to his client, see M. Freedman, Lawyers’ Ethics in an Adversary System 35 (1975) (emphasizing extreme loyalty); Frankel, The Search for Truth: An Unrealized View, 123 U. Pa. L. Rev. 1031 (1975) (stressing the goal of truth over pure advocacy).  


164. See Model Code of Professional Responsibility EC 7-10 (1980) (“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 in the legal process and to avoid the infliction of needless harm.”). See also notes 192-95 and accompanying text infra.  

165. Id. DR 2-108(B) (“In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.”).  

166. See id. DR 7-102(A)(1)-(8). For example, the Code prohibits an attorney from “conceal[ing] or knowingly fail[ing] to disclose that which he is required by law to reveal.” Id. DR 7-102(A)(3). See also id. DR 7-105 (forbidding the lawyer from “presen[ting], participat[ing] in presenting or threaten[ing] to present criminal charges solely to obtain an advantage in a civil matter”); DR 7-106(C)(7) (prohibiting a lawyer from “intentionally or habitually violat[ing] any established rule of pro-
representation that permits conditional fee waivers directly contra-
dicts the express congressional policy of providing counsel and access
to the judicial system in Fees Act cases.\textsuperscript{167} Litigation maneuvers by
defense attorneys which coerce Fees Act waivers by capitalizing on
the conflicts of interest they raise for opponents subvert this public
policy and are therefore unethical.

IV. IMPACT OF CONDITIONAL FEE SETTLEMENTS ON THE CIVIL
RIGHTS BAR AND ON CIVIL RIGHTS PRACTICE

A. The Civil Rights Bar

The negative impact of conditional fee settlements on the civil
rights bar and on the availability of competent civil rights attorneys
requires only brief discussion. The entire federal policy of the Fees
Act is premised on the direct, positive correlation between the award-
ing of attorney's fees and the number of civil rights counsel. This
nexus was recognized throughout the Fees Act's legislative history\textsuperscript{168}
and has been acknowledged numerous times in subsequent court
decisions.\textsuperscript{169}

While the inverse relationship between fee waivers and the
number of civil rights counsel is evident, the fragile nature of the civil
rights bar is less apparent. Besides the few well-known subsidized le-
gal organizations such as the American Civil Liberties Union, the
NAACP Legal Defense and Education Fund, the federal legal serv-
ces program, and public interest firms specializing in environmental
law, there are very few practitioners of civil rights law.\textsuperscript{170}

\textsuperscript{167} For a discussion of the Congressional intent behind the Fees Act, see notes
33-62 and accompanying text \textit{supra}.

\textsuperscript{168} For a discussion of the legislative history of the Fees Act see notes 33-40 and
accompanying text \textit{supra}.

300 (1982). For a discussion of the courts' recognition of the correlation between Fees
Act awards and the number of civil rights counsel, see note 190 and accompanying
text \textit{supra}.

\textsuperscript{170} See Handler, Ginsberg & Snow, \textit{The Public Interest Law Industry, in PUBLIC
INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS} 42, 55-67 (B. Weis-
brod ed. 1978) [hereinafter cited as Handler]. The authors' studies estimate that less
than 1% of the work of lawyers in private practice is involved in public interest law
activity. \textit{Id. at 67}. For a study of the distinctive style of practice of the ACLU and
Various studies have supported the conclusion that private civil rights practitioners are few in number. One study estimated that only 600 lawyers, about .0015% of all lawyers in America, were engaged in public interest practice.171 A 1979 study, which included personal interviews with 777 Chicago lawyers, selected at random to provide a cross section of the bar, concluded that only forty-three practiced civil rights law and that only one percent of the total legal efforts of those interviewed were devoted to civil rights law.172 Additionally, the authors of the 1979 study emphasized that lawyers have an extremely high degree of specialization and exclusive practice in the areas of their expertise which is molded to a large extent by the type of clients they serve.173 Generalizing from these conclusions, it appears that private civil rights practitioners are few in number, that civil rights cases form only part of their work load, and that there is unlikely to be much cross-pollination between lawyers in different specialities.

An evaluation of the connection between attorney’s fees and the health of the civil rights bar must also take into account the beleaguered, federally funded legal services program. Fees Act awards are extremely important to this program, which is already winching under President Reagan’s concerted campaign174 to reduce funding to local offices, to eliminate their attendant back-up centers which provide supportive services in civil rights cases, and to impose specific limitations on the range of cases they can initiate.175

the Legal Division and Education Fund, see Rabin, Lawyers for Social Change: Perspectives on Public Interest Law, 28 STAN. L. REV. 207 (1976). It is noteworthy that the public interest law reform cloak has also been taken up by conservative firms; at least one of which—the Washington Legal Foundation—refuses, as a matter of policy, to request attorney’s fees awards. See Flaherty, Right-Wing Firms Pick Up Steam, Nat’l L. J. May 23, 1983, at 1, col. 1.

For a general discussion of legal services practice, see Wexler, Practicing Law for Poor People, 79 YALE L.J. 1049 (1970); Note, Neighborhood Law Offices: The New Wave in Legal Services for the Poor, 80 HARV. L. REV. 805 (1967).

171. Trubek, Book Review, at 5 (reviewing COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALE OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA (1976)) (unpublished manuscript). One authoritative work of public interest practice, although somewhat dated since its results are from 1975, found that the 72 public interest law firms it identified had positions for only 478 attorneys. See Handler, supra note 170, at 51.


173. Id. at 243.

174. For President Reagan this appears to be round two. Round one was Governor Reagan’s battles with California Rural Legal Assistance, Inc. (CRLA). See Nussbaum, supra note 10, at 307 n.18. For a discussion of the entire incident see Bennett & Reynoso, California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice, 1 CHICANO L. REV. 1 (1972).

175. See Poverty Law Today, Sum. 1981, at 1, col. 1. This list also includes:
B. Economic Impact

Even though the exact contours of the civil rights bar are unclear, its precarious financial plight is readily apparent. Even when attorney's fees are awarded in civil rights cases, they do not approach the large sums often granted in commercial antitrust and corporate securities actions.176 Moreover, the existence of a "public interest discount" has been well documented.177 This results in disparate and inequitable determinations of reasonable attorney's fees in commercial and civil rights cases.178 This occurs despite the specific require-

(1) a ban on class action lawsuits against government entities; (2) a ban on litigation designed to promote, defend or protect homosexuality; (3) a ban on advice in desegregation matters; (4) a requirement of negotiation before litigation; and (5) a requirement that attorney's fees be returned to the National Legal Services Corporation. Id.

"[T]here is only $241 million per year available to provide civil legal services—$80 million less than in 1980-81 and $241 million more than President Reagan wanted." Pollack, Lawyers for the Poor, N.Y. Times, June 17, 1983, at A27, col. 1.

It is unlikely that the organized bar will fill this gap in legal services. Unfortunately, history and available studies indicate that the organized bar's pretensions to pro bono work must be taken with a grain of salt. See, e.g., Rabin, supra note 170, at 228 (the "sporadic involvement [in pro bono work of the traditional private practitioner] constitutes at most a de minimis contribution to law reform activity."); Handler, supra note 170, at 67 ("Little of the pro bono work done is of the Public Interest Law type. Lawyers responding . . . were asked to indicate the types of clients for whom they did pro bono work . . . . On average, 88 percent of all responses included either individuals or traditional community organizations, such as churches, clubs, universities, and unions, as clients during their billable hours devoted to pro bono work."). Pleas by former ABA President Chesterfield Smith and others for insertion of a mandatory pro bono requirement in the ABA's Model Rules of Professional Conduct have been soundly defeated. See, e.g., Aronson, Attorney-Client Fee Arrangements: Regulation and Review, 68 A.B.A. J. 284, 287 (1982); Smith, A Mandatory Pro Bono Service Standard—Its Time Has Come, 35 U. MIAMI L. REV. 727, 728 (1981).

176. For a discussion of civil rights fee awards compared to commercial actions, see Berger, supra note 8, at 310-15.

177. See id. "Public interest discount" represents the idea that fee awards in civil rights, environmental, consumer, and information access cases should be lower because attorneys have a professional responsibility to represent such clients and the public. Id. at 311.

178. See id. at 311. "A general review of the reported decisions inescapably confirms the conclusion that statutory fee awards under civil rights, environmental, consumer, and government information access statutes have been substantially lower than awards under antitrust, securities, and other fee statutes involving commercial rights." Id. at 310-11. "While the mean hourly rate awarded by courts under the fee provisions of the private antitrust statutes was $181 in the cases surveyed, the mean hourly rate awarded in the Title VII (employment discrimination) cases surveyed was $40." Id. at 310 (citing Helfman, A Statistical Survey of One Hundred and Forty Recent District Court Cases Involving Attorneys' Fees (1975) (project submitted to the faculty of Antioch School of Law)). This discrepancy was mentioned in Palmigiano v. Garrahy, 466 F. Supp. 732, 738 (D.R.I. 1979), aff'd, 616 F.2d 598 (1st Cir.), cert. denied, 449 U.S. 839 (1980). The court stated, "Unfortunately, there does exist a wide discrepancy between fee awards in private antitrust cases (rates averaging $180 an hour) as against those in the area of civil rights (rates averaging $40 an hour)." Id.
ment in the Fees Act's legislative history that reasonable attorney's fees in civil rights cases be set by the same standards that apply in other cases. Compliance and enforcement of civil rights laws require not only the availability of attorney's fees but also the maintenance of ample fees.

The policy of promoting compliance and enforcement of civil rights legislation through the award of attorney's fees has caused the courts to consistently hold that legal services attorneys are eligible for Fees Act awards on the same basis as their counterparts in private practice. It has been argued, however, that legal services attorneys are already "instinctively" motivated by their interest in civil rights enforcement to bring civil rights cases, and do not need the additional incentive supplied by potential fees awards. If a fee award is made, some argue, the amount should be keyed to their minimal legal services salary, rather than the high rates charged by private attorneys. Public officials have argued that since the government provides funding for legal services, a fees award against public officials would require the government to pay twice for the same services. To their credit, the courts have rejected these arguments, and have also refused to inquire into the source of attorneys' motivation to represent civil rights clients. To do so would be anomalous, for to inquire as

179. See S. Rep. No. 1011, supra note 2, at 6, reprinted in 1976 U.S. Code Cong. & Ad. News at 5913 ("It is intended that the amount of fees awarded under [the Fees Act] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature.").


181. See, e.g., Dennis v. Chang, 611 F.2d 1302, 1305 (9th Cir. 1980). In Dennis, Hawaii's Department of Social Services and Housing challenged attorneys' fees awards arguing, inter alia, that the legal services agency that was involved in the suit had "already voluntarily done what an award of attorneys' fees . . . was intended to encourage, [so that] a further award under the Act would be unnecessary and would not serve the purposes of the Act." Id.


183. See, e.g., Shadis v. Beal, 685 F.2d 824, 832 (3d Cir.), cert. denied, 103 S. Ct. 300 (1982); Dennis v. Chang, 611 F.2d 1302, 1305-07 (9th Cir. 1980).

184. See, e.g., Hensley v. Eckerhart, 103 S. Ct. 1933, 1947 (1983) ("market standards should prevail"); Dennis v. Chang, 611 F.2d 1302, 1309 (9th Cir. 1980) (fees should not be less than those customarily paid private counsel in a civil rights case); Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977) (reasonable fee awards should not be reduced because of low salaries), cert. denied, 436 U.S. 913 (1978); Becker v. Blum, 487 F. Supp. 873, 875 (S.D.N.Y. 1980) (rejecting any reduction in the fees award to reflect state and federal contributions to legal services and to reflect the law hourly pay rates). But see EEOC v. Enterprise Ass'n Steamfitters Local 638 of Va., 542 F.2d
to specific motivation would only result in penalizing attorneys in inverse proportion to their commitment to civil rights. Lower fee awards would be made to the most highly motivated, often members of those few firms dedicated to civil rights litigation on a full-time basis.

A number of recent articles have offered theoretical analyses and economic models to describe and explain individual attorney motivation and resource allocation in response to monetary incentives. Not surprisingly, lawyers dance to the beat of the marketplace. One proffered model, even when discounted for factors high on the priority list of civil rights attorneys such as professional satisfaction, societal contribution and ethical considerations, concludes that "fee for service lawyers" will withdraw resources from a given case when total expected costs exceed total expected benefits. No matter how sophisticated the analysis of attorney responses becomes, the conclusion remains that the more we decrease the reasonable expectation of Fees Act awards, the less likely it is that Fees Act cases will be initiated.

While the impairment to the availability of attorney's fees in civil rights cases caused by conditional fee settlements does not approach their almost total abrogation by the decision in Alyeska, that experience provides an indication of the immediate hardship suffered by civil rights claimants whenever there is a reduction in attorney's fees awards. Personal horror stories of attorneys who lost face because of Alyeska abound, and Congress "received evidence that private lawyers were refusing to take certain types of civil rights cases."

579 (2d Cir. 1976) (fees reduced to reflect funding to a legal services backup center), cert. denied, 430 U.S. 911 (1977).


186. See Johnson, supra note 185, at 575.

187. In a highly theoretical analysis which posits lawful methods of allocating legal costs and attorney's fees, the author found that in a system favoring the plaintiff (where the plaintiff receives a fee award if successful but need pay defense costs if unsuccessful), the plaintiff "will bring suit if and only if his expected judgment at trial would be at least as large as his expected legal costs—his own legal costs discounted by the probability of losing." Shavell, supra note 185, at 60.

188. See, e.g., Hermann & Hoffman, Financing Public Interest Litigation in State Court: A Proposal for Legislative Action, 63 CORNELL L. REV. 173, 184-85 (1978). A survey conducted by the Council for Public Interest Law found that Alyeska affected pending claims held by 34 out of 44 responding private firms with a substantial public interest practice. Id. at 184 n.54 (citing the COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 315 (1976)).

189. H.R. REP. NO. 1558, supra note 5, at 3.
Once attorney's fees are threatened, alternative sources of legal representation for poor civil rights litigants, in both complicated and mundane cases, become extremely limited. In the more mundane civil rights cases, which often yield "modest cash awards," the Third Circuit has recognized that "'[l]egal aid organizations are often the sole representatives of the economically, socially and culturally deprived in their disputes with landlords, government welfare agencies, employers and creditors.'"\(^{190}\)

In addition, legal services offices are compelled to make choices between equally worthy cases based upon the likelihood of fees awards. Although legal services attorneys are salaried and can theoretically make unlimited investments in particular cases, the current level of federal legal services program funding allows them to meet only approximately 20-25% of the need for such assistance.\(^ {191}\) Consequently, there is pressure to supplement budgets with attorney's fees awards, especially if this enables an office to expand the number of civil rights cases it can accept. If attorney's fees awards are threatened by the settlement tactics of particular defendants, a legal services program may divert energy from cases against these defendants which involve important public issues, and expend disproportionate amounts of time on cases where Fees Act awards are more likely. Therefore, not only does conditional fee waiver practice reduce the supply of private civil rights attorneys, but it also distorts the priorities of legal services lawyers and constricts the channels of legal representation for the poor.

**V. Tactical Litigation Considerations and Judicial Efficiency**

**A. Adversarial Combat**

A number of considerations are often advocated in favor of permitting simultaneous settlement. The most straightforward of these stems from faith in the adversary system. It expounds a preference for unfettered negotiation; a conviction that settlement is more likely to occur at a preliminary stage in a lawsuit if all aspects of a case remain negotiable and if each side has the maximum number of bargaining chips to sacrifice.\(^ {192}\)

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191. See Johnson, supra note 185, at 592-93 ("After a 25 percent cutback in funding for the Legal Services Corporation, there is now only one Legal Services lawyer available to help every 9,585 poor people eligible for assistance."). See also Pollack, supra note 175.

192. See, e.g., White v. New Hampshire Dep't of Empl. Sec., 455 U.S. 445, 454...
The major difficulty with this view, besides its unnecessary glorification of the sporting theory of the law, is its implicit acceptance of the traditional bipolar model of a lawsuit in the very setting that is its antithesis. Civil rights cases often seek comprehensive injunctive relief and widespread reform. The private attorney general concept has been statutorily recast in the Fees Act precisely because the outcomes of civil rights cases impart benefit beyond the immediate parties. An appeal to the adversarial process at the pre-trial stage to justify a tactic which creates ethical conflicts between an attorney and his or her client disregards the remedial process.

Furthermore, the truth-finding advantages rightfully ascribed to the adversarial process during trial are not attained through unbridled negotiation at the pre-trial stage. Truth and accuracy are better served by delaying vigorous representation in the setting of attorney’s fees until after settlement of the merits has been reached. At that point, adversaries can focus entirely on the question of reasonable attorney’s fees, freed from the potential ethical quandaries presented by conditional fee waivers whether it be in the negotiation of an attorney’s fees settlement or in the court’s review of applications for reasonable fees.

B. Facilitating Settlement and Judicial Economy

A related argument which has been offered in opposition to the negotiation of attorney’s fees only upon settlement of the merits is that it is advantageous for defendants to know their full exposure to financial loss as soon as possible in the settlement process. It is ar-
gued that it is desirable to eliminate the unknown monetary variable of a post-settlement attorney's fees award because it is more equitable to defendants, and because it leads to more informed, and earlier, decisions to settle. This, in turn, facilitates and effectuates the public policy in favor of pre-trial settlement of civil rights claims,197 and thereby avoids the inefficient use of judicial resources to shepherd cases further along the path to trial and to conduct repetitive hearings on settlements of the merits and attorney's fees.

These contentions are subject to criticism on a number of grounds. As previously discussed, the ABA Code of Professional Responsibility198 and court decisions199 make it clear that defense attorneys may not use unethical tactics to promote settlements that rely on conflicts of interest between opposing counsel and client. Courts closely examine the ethical conduct of attorneys when reviewing the reasonableness of agreements involving attorney's fees to see if they comport with public policy.200 Even the appearance of impropriety is liability before agreeing to settle. In a class action context, this can mean (1) an agreed fee, Foster v. Boise-Cascade, Inc., 420 F. Supp. 674 (S.D. Tex. 1976), af'd, 577 F.2d 335 (5th Cir. 1978); (2) a separate fund for fees, Prandini, 557 F.2d 1015; Women's Comm. for Equal Empl. Opportunity v. N.B.C., 76 F.R.D. 173 (S.D.N.Y. 1977); (3) a ceiling on the allowable fee, Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir.), cert. denied, 423 U.S. 864 (1975); McNary v. American Sav. and Loan Ass'n, 76 F.R.D. 644 (N.D. Tex. 1977); or (4) a total settlement fund from which the trial court sets a fee, Parker v. Anderson, 667 F.2d 1204 (5th Cir.), cert. denied, 103 S. Ct. 63 (1982); Merola v. Atlantic Richfield Co., 515 F.2d 165 (3d Cir. 1975). For a general discussion supporting this rationale, see Note, Promoting the Vindication of Civil Rights, supra note 16, at 362 ("fees are commonly settled as part of negotiations in connection with other types of litigation without conflict-of-interest problems"); 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, 812-13 (1978) ("defendants are deprived of vital information they need to agree upon a settlement in that they would not know during the initial class damage proceedings their total liability").

197. Public policies in favor of pretrial settlement include the expedient of claims, lessening of court backlog, mitigation of legal expenses, and voluntary cooperation between the parties. Courts have repeatedly noted the importance of the pretrial settlement process. See, e.g., Prandini, 557 F.2d at 1021 ("we recognize that with the increasingly heavy burden upon the courts, settlements of disputes must be encouraged"); Parker v. Anderson, 667 F.2d 1204, 1209 (5th Cir.) ("our limited review rule is a product of the strong judicial policy favoring the resolution of disputes through settlement"), cert. denied, 103 S. Ct. 63 (1982). For a discussion of federal court judges abusing their power by forcing settlements, see Resnik, Managerial Judges, 96 HARV. L. REV. 374 (1982).

198. For a discussion of the pertinent sections of the ABA Code of Professional Responsibility, see notes 154-57 and accompanying text supra.

199. For a discussion of recent court decisions pertaining to the ethical dilemma of simultaneous fee settlements, see notes 70-106 and accompanying text supra.

200. See, e.g., Shadis v. Beal, 685 F.2d 824 (3d Cir.) (contract between Commonwealth and legal services program which prohibited program from seeking attorneys' fees from the Commonwealth was not enforceable because it was against public pol-
a sufficient ethical ground to disqualify an attorney from representing a client on the basis of conflict of interest. A process which is justified in terms of promoting settlement, but operates to deny reasonable compensation to attorneys and fosters ethical conflicts of interest, is contrary to public policy and invites careful judicial scrutiny.

Arguments couched in terms of judicial efficiency overestimate the number of cases in which settlement would be discouraged if a simultaneous settlement were impermissible. Only the closest cases might be pushed beyond the settlement stage because the exact amount of attorney's fees could not be ascertained before completion of settlement of the merits. Any disincentive to early negotiation caused by uncertainty over fees would still be greatly outweighed by the unknown and substantial monetary risk of neglecting settlement.

For instance, in any case where the plaintiff is likely to prevail, postponing settlement not only risks increased litigation expenses, additional legal fees, and a more injurious outcome on the merits than was available through settlement, but it also risks a sharp escalation of the Fees Act award. Indeed, a prevailing plaintiff is eligible for a Fees Act award to cover legal work necessary to prepare for and to conduct the trial, to appeal the decision on the merits, and to draft petitions for and fully litigate all questions surrounding the availability and amount of attorney's fees awards.

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201. See, e.g., Kramer v. Scientific Control Corp., 534 F.2d 1085, 1093 (3d Cir.) ("no member of the bar either maintaining an employment relationship, including a partnership or professional corporation, or sharing office or suite space with an attorney class representative during the preparation or pendency of a Rule 23(b)(3) class action may serve as counsel to the class if the action might result in the creation of a fund from which an attorney's fee award would be appropriate"), cert. denied, 429 U.S. 830 (1976); Schloetter v. Railoc of Ind., Inc., 546 F.2d 706, 711 (7th Cir. 1976) (firm disqualified since one attorney who formally represented plaintiff in related matter was still a member of firm representing defendant, irrespective of whether any confidential information was exchanged); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1385-86 (3d Cir. 1972) ("a court may disqualify an attorney for not only acting improperly but also for failing to avoid the appearance of impropriety") (footnote omitted), cert. denied, 411 U.S. 906 (1973).

202. There will be a trial if and only if the plaintiff's estimate of the expected judgment exceeds the defendant's estimate by the sum of their legal costs. See Shavell, supra note 185, at 67. For a discussion of the economics of bringing suit, see notes 6-7 and accompanying text supra.

203. See, e.g., Prandini v. National Tea Co., 585 F.2d 47, 54 (3d Cir. 1978) (on a second appeal, solely to examine the proper standard to apply in setting the fee, the
At the other end of the spectrum, where a defendant is confident of success, settlement terms will most likely be dictated by the defendant: even if the plaintiff is subsequently found to have prevailed on some issues, the amount of attorney’s fees will be circumscribed by the Supreme Court’s recent decision in *Hensley v. Eckerhart*, which held that prevailing plaintiffs are entitled to Fees Acts awards only to the degree that they succeed in obtaining the relief sought.

In only a few close cases will a defendant’s cost-benefit settlement analysis result in a decision not to settle the merits because of ignorance of a total settlement figure. To justify a general practice of concurrent settlement by seizing on these few cases is to rely on the very settlements that have the greatest potential for conflict and harm, since in cases where the chance of failure is highest for both sides, there is the strongest temptation to enter into a pact which excludes plaintiff’s civil rights attorney. Thus, while knowledge of the total size of liability will no doubt make settlement more attractive to defendants in this narrow range of cases, these situations are insufficient to provide the needed rationale for a general policy of conditional fee settlement.

Moreover, it is unrealistic to assume that a defendant is completely in the dark as to the amount of attorney’s fees for which a plaintiff will ultimately settle or be awarded in a bifurcated system. The same attorney who feels capable and confident when assessing and recommending terms for a merit settlement is certainly also able, except, perhaps, where a truly novel legal theory is being presented, to forecast with relative precision the amount of opposing counsel’s time expenditure and likely fee award. In most cases there are enough signals to enable any defense counsel who wishes to avoid a harsh surprise to make an accurate projection of a Fees Act award.

court awarded costs incurred preparing and prosecuting fee applications); Hastings v. Maine-Endwell Cent. School Dist., 676 F.2d 893, 896 (2d Cir. 1982) (fee awarded for time spent pursuing interim appeals); Gresham Park Community Org. v. Howell, 652 F.2d 1227, 1248 (5th Cir. 1981) (fees awarded for work done on appeals of the merits).

204. 103 S. Ct. 1933 (1983).

205. *Id.* The result achieved is the crucial factor in adjusting fees on a performance scale that has gradations of “exceptional,” “excellent,” “partial,” and “limited” success. *Id.* at 1940-41. Therefore, prevailing on only some issues will net a plaintiff a very small award.

206. In close cases both sides will be eager to eliminate the large risk present in going beyond the settlement stage. Still, there is no justification for providing a windfall to plaintiffs at the expense of counsel. Even if we assume that particular plaintiffs would receive smaller recoveries if conditional fee waivers are prohibited, this is the price of enforcing the civil rights laws. The cost should be shared by successful plaintiffs, who receive legal representation, so that others, who are also unable to afford counsel, will be able to secure representation.
Helpful factors include the effort expended by the defense, which has some equivalence to that of an opponent; past experience in similar cases; and knowledge of the law and of its application by specific judges in a particular jurisdiction. Moreover, once the Prandini dual settlement procedure is established and uniformly applied, uncertainty as to the amount of attorney's fees would cause little difficulty in forestalling negotiation of settlements of the merits. As long as civil rights attorneys consistently refused to permit the injection of fees into preliminary settlement discussions, it would soon become the norm for defense counsel to make estimates of fee awards and to use these predictions in assessing merit settlements.

Furthermore, the deterrent factor which is negated by fee waivers will be furthered by separate settlements. A Fees Act award above and beyond relief on the merits, which is often nonpecuniary in civil rights cases, acts as a necessary penalty for violation of the law. If there is any doubt as to the effectiveness of Fees Act awards

207. This forecast is more difficult in cases which are especially complex or present novel legal theories. To determine the amount of fees in Fees Act cases, courts usually apply the twelve factors listed in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). These factors are applied to increase or decrease the basic fee (the "loadstar" amount). Since the reactions of courts to contingency factors, such as the quality of attorneys' work and the novelty and difficulty of questions presented, are not easily predicted, it is difficult to estimate opposing counsel's fees in cases involving these factors. For a discussion of the computation of attorney's fees, see Larson, supra note 8, at 114-237. For an argument calling for more widespread use of the contingency factor, see Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 Yale L.J. 473 (1981).

208. A provision for fee awards serves to deter the violation giving rise to the cause of action by increasing the defendant's exposure to liability. See Comment, Attorney's Fees in Damage Actions Under the Civil Rights Attorney's Fee Awards Act of 1976, 47 U. Chi. L. Rev. 332, 347 (1980). The Supreme Court recognized and approved the deterrent impact in Carey v. Piphus, 435 U.S. 247 (1978), when it noted that "the potential liability of § 1983 defendants for attorney's fees . . . provides additional assurance that agents of the State will not deliberately ignore due process rights." Id. at 257 n.11.

209. This is a continuation of the longstanding policy, existing before the Fees Act, of punishing defendants who have acted fraudulently or in a knowingly illegal manner through the imposition of attorney's fees awards. See, e.g., Callahan v. Wallace, 466 F.2d 59, 62 (5th Cir. 1972) (a welfare case where attorney's fees were awarded because some public officials disregarded court decisions and federal regulations); Bell v. School Bd., 321 F.2d 494, 500 (4th Cir. 1963) (en banc) (it is an abuse of equitable discretion not to award fees where there has been a continued pattern of evasion and obstruction).

In discussing these policy considerations one commentator has suggested:

In other public benefit situations, such as injunctions with widespread effect or the general deterrent effect on prospective defendants of encouraging plaintiffs with certain types of claims through reimbursement for their fees if they win, the reasons for sparing losing defendants from fee shifting are not so strong. True, much of the public benefit may come from effects on complete strangers to the litigation; but it can be important to effective deterrence to show by example that violators will bear the victims' enforce-
in deterring forbidden conduct by public officials, it is dispelled by a brief look at the dire warnings in literature written for government administrators. For example, a recent journal article warns about Fees Act cases: “Consistent with the intent of Congress, the federal appellate courts have in effect declared ‘open season’ on the governmental pocketbook in such litigation when it comes to the awarding of attorneys’ fees.” The author goes on to suggest that “there is an obvious advantage to settle personnel grievances before a case is filed.” Plainly, Fees Act awards foster general compliance, reduce civil rights infractions, and decrease the number of court cases filed.

An argument in favor of simultaneous settlement grounded in court efficiency is misplaced because it overlooks the impact of the element of deterrence. When the deterrence factor is accounted for, simultaneous settlements may actually increase, not diminish, the overall burden on courts. While combined settlements help satisfy one aspect of the Fees Act policy by compensating those harmed by violations of civil rights laws, they eviscerate a second by failing to penalize violators, and thereby lower the general level of deterrence, especially of public agencies. Consequently, conditional fee settlements encourage civil rights abuses, at least to the extent that they lessen deterrence; this may lead to an increase in the number of claims brought to rectify violations. On the other hand, this effect may be offset by the effect of fee waivers on the civil rights bar and the curtailment of legal representation.

Regardless of which scenario is more accurate, both will be accompanied by de facto selective enforcement of the civil rights laws. Permitting conditional fee settlements favors public entities and

Rowe, supra note 10, at 673.
211. Id. (emphasis in original).

212. “With respect to the awarding of fees to prevailing defendants, it should further be noted that government officials are frequently the defendants in cases brought under the statutes covered by [the Fees Act].” H.R. REP. NO. 1558, supra note 5, at 7. Since many legal aid societies are publicly supported, the government has great leverage in requiring conditional fee settlements and, thereby, reducing the deterrent effect of an award of attorney’s fees.

213. In addition to large financial resources, public entities also have an advantage ascribed to the few public interest attorneys whose practice is subsidized: since the cost of resistance for public officials and their counsel is totally subsidized, they can make litigation decisions, especially long range ones, not available to more cost-conscious private defendants.
other habitual abusers\textsuperscript{214} who are customary defendants in civil rights cases. They can better fend off subsequent claims and continue unlawful practices by the use of an 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."\textsuperscript{215} Thus, the most flagrant offenders are rewarded.

Furthermore, courts are presently required to approve settlements in class actions.\textsuperscript{216} The additional effort necessary to review settlements in two steps is minimal. In fact, a persuasive case can be made that overall judicial efficiency is enhanced by the use of bifurcated negotiation and review. The Prandini method of separate negotiation preserves aggressive adversary representation so that both settlements are free from ex parte taint, and are therefore likely to fashion a result which more closely approximates the court’s final determination after review.\textsuperscript{217} There is less need for expensive and time-consuming discovery, evidentiary hearings, oral and written arguments, and lengthy, independent court review when separately negotiated fee settlements are presented for court approval.\textsuperscript{218}

\textsuperscript{214} See, e.g., Galanter, Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change, 9 LAW & SOC. REV. 95 (1974). The author discusses the strengths of those who often litigate ("repeat players"), as compared to those who rarely have contact with the courts ("one-shooters"). He notes the advantages of the former in being able to develop long-term strategies and to make decisions in immediate cases which have ramifications for their long range goals. \textit{Id.}

\textsuperscript{215} This, of course, cuts both ways: a lawyer who accedes to such a demand soon becomes a target for additional requests.

\textsuperscript{216} Rule 23(e) of the Federal Rules of Civil Procedure provides: "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." \textit{Fed. R. Civ. P. 23(e)}.

\textsuperscript{217} \textit{See Prandini}, 557 F.2d at 1021. "This procedure may not be particularly appealing to the parties, but it preserves the benefits of the adversary system since the defendant continues to have an economic interest." \textit{Id}. The danger of collusion between opposing counsel through informal preliminary discussions of, and, perhaps, agreements to settle the fee and the withholding of this information from courts until after merit settlements has been alluded to in \textit{Diam}, \textit{supra} note 13, at 57 n.19. While this could make enforcement of separate negotiations more difficult in excessive fee situations, it is no hindrance in fee waiver situations where plaintiff attorneys have every reason to bring overtures to waive fees to the attention of the courts.

\textsuperscript{218} For an example of the extensive court review that is encouraged by simultaneous settlement, see Parker v. Anderson, 667 F.2d 1204 (5th Cir.), \textit{cert. denied}, 103 S. Ct. 63 (1982). \textit{Parker} involved the settlement of an employment discrimination class action with a proposed lump-sum settlement of class claims and an agreement that reasonable attorneys' fees would be paid from the total settlement fund. \textit{Id.} at 1208. The amount of fees was left to the district court's determination. \textit{Id}. A two-day hearing on the terms of the merit settlement and a third day receiving evidence on the issue of fees for class attorneys were necessary before the court approved the settlement. \textit{Id}. On review, the Fifth Circuit recognized the potential for abuse and
Additionally, if conditional fee waivers were forbidden, the conflict of interest questions they raise would be rendered dormant and courts would no longer expend time wrestling with this issue. The frustration and outrage now felt by civil rights attorneys who are confronted with fee waiver demands, and the natural tendency of such requests to raise the general level of acrimony and to hinder settlement negotiations, would be abated. Hence, a bifurcated system might allow attorneys to operate more openly and reduce the need for constant court supervision during settlement.

Also, as the Supreme Court noted in a related context in White v. New Hampshire Department of Employment Security, the pressure caused by permitting concurrent settlements may actually generate increased litigation of fee questions because civil rights counsel, anticipating an ultimate fee waiver settlement, may rush to enter fee requests at every favorable interim ruling in advance of settlement.

Finally, a recent study has demonstrated that federal district court judges and attorneys who litigate class actions favor separate determination of the merits and attorney’s fees, and do not consider the Prandini method burdensome. Sixty-two percent of the seventy-

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<th>Attorneys</th>
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<tr>
<td>strongly agree</td>
<td>15 (19.0%)</td>
<td>39 (40.6%)</td>
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<td>agree</td>
<td>26 (32.9%)</td>
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<td>8 (10.1%)</td>
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<td>29 (30.4%)</td>
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<td>strongly disagree</td>
<td>6 (7.6%)</td>
<td>15 (12.5%)</td>
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Id.
nine judges who responded to a questionnaire agreed or answered "no opinion" when asked if they favored the Prandini requirement that fees not be discussed until after settlement of the merits in class actions. Seventy-two percent of the ninety-six attorneys who responded also agreed or answered "no opinion."

In summary, simultaneous settlement finds insufficient support in arguments which focus on defendants' need to know the exact extent of liability in proposed settlements, on its use as a means of fostering negotiation, and on its effect in improving court efficiency. The simple fact remains that the consistent prospect of having to pay Fees Act attorney's fees may serve as an inducement to settle a case early, and therefore reduce the burden on the courts. The risk and uncertainty of not knowing the precise amount of liability is as likely to promote early settlement as it is to make a defendant hesitant to settle.

VI. Conclusion

The Fees Act relies on a direct, rather uncomplicated process to assure that one of our most important national priorities is accomplished. Our basic civil rights are enforced by requiring those who have abused the fundamental rights of others to furnish their victims with the means to gain access to our judicial system and to acquire the tools needed to obtain redress. In conjunction with compensation for the injury, the wrongdoer provides the necessary inducement to vindicate the wrong; in so doing, he discourages others from committing similar transgressions. The Fees Act attempts to neutralize the factor of wealth in the fair administration of justice and to preserve freedom of choice in securing expert legal representation to assist in the enforcement of the civil rights laws.

Any interference with the availability of Fees Act awards—even one that is merely perceived as a hindrance—must be closely examined by the courts. Demands for full or partial waiver of Fees Act awards in return for favorable settlements of the merits seriously obstruct this essential safeguard.

After careful analysis, the alleged benefits of simultaneous settlements prove to be greatly exaggerated. Any advantages are clearly outweighed by the havoc the practice brings to the settlement process.

222. Id.
223. Id.
224. For a discussion of the deterrent effect of attorney's fees awards, see notes 208-11 and accompanying text supra.
Defense counsel act unethically in offering such settlements and plaintiffs' attorneys are tempted to act unethically in resisting them. They breed discontent and foster conflict between attorney and client. They heighten bitterness between opposing counsel. They involve courts in the review of unjust and unethical settlement agreements. This divide-and-conquer path to settlement has no place in a scheme that was created to encourage the enforcement of civil rights. It contravenes the purpose and objectives of the Fees Act and immerses the legal profession in an unethical practice imbued with the appearance of impropriety.

The best remedy for this harmful settlement procedure is that required by Prandini. Negotiation of attorney's fees in Fees Act cases must begin after the settlement of the merits has been determined. This remedy has the advantages of being straightforward, effective, and workable; eliminating the unethical conduct and potential conflicts of interest; preserving adversarial input during both phases of the settlement process, thereby rendering compromises which provide fair relief to plaintiffs and reasonable levels of attorneys' fees; and being self-policing by parties confronted with fee waiver requests. Finally, it is preferable both to time consuming, case-by-case court dissections of simultaneous settlements and to other alternatives.

It is insufficient for courts to simply identify the potential conflicts of interest in simultaneous settlements. The tactic should be prohibited and remedied by bifurcated settlement. The congressional policy reflected in the Fees Act and the distinct ethical duties of the legal profession, combined with the general supervisory power of the courts, provide ample and explicit legal authority to restrict this intrusion on the administration of justice and to mandate a specific remedy.

225. For a discussion of Prandini, see notes 70-79 and accompanying text supra.