

**ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 2017-1**

**In The Workers' Compensation Setting, May A Lawyer For The Employer
Present A Lump-Sum Settlement Offer, Inclusive Of Legal Fees?**

ISSUE PRESENTED

In Workers' Compensation proceedings, is it ethically permissible for an employer attorney to present a lump-sum settlement offer, inclusive of attorney fees?

CONCLUSION

Generally speaking, such offers are ethically permissible. It is also ethically permissible for employee counsel to advise the client of their intention to seek payment and address the possibility of lump-sum settlement offers within retainer agreements.

BACKGROUND

Under the Alaska Workers' Compensation Act (the "Act"), the employer is typically responsible for payment of employee attorney fees with disputes resolved by the Alaska Workers' Compensation Board.¹ The procedure for doing so is governed by the Alaska Administrative Code and may be separate from the resolution of other issues.²

Recovery of fees by employee attorneys under the Act is different from attorney fees awarded under Alaska Civil Rule 82. Unlike the traditional lawyer-client relationship, attorney fees for claims brought under the Act are typically paid directly by the employer, not the client, and the client may not review employee attorney fee billing; the Alaska Workers' Compensation Board reviews the attorney's affidavit concerning the work performed and determines the fee.³ Attorney fee awards under the statutory scheme are to be "fully compensatory" and reasonable in order to encourage competent counsel to represent injured workers.⁴

¹ AS 23.30.145 (attorney fees related to claim to Alaska Workers' Compensation Board); AS 23.30.008(d) (attorney fees related to appeals to Alaska Workers' Compensation Appeals Commission).

² 8 AAC 45.180.

³ 8 AAC 45.180(d)(2); AS 23.30.145(a) (noting that, for a controverted claim, "the board may direct that the fees for legal services be paid by the employer").

⁴ *Williams v. Abood*, 53 P.3d 134, 147 (Alaska 2002).

Due to the fee model described above, the Committee is informed that employees may be advised that attorney fees are paid by the employer, not the employee, and are in addition to other workers' compensation benefits. The Committee is unaware of any fee arbitrations between an employee attorney and client.

As with many disputes, claims under the Act are often resolved through settlement negotiations. Employer lawyers periodically make lump-sum settlement offers to employees, inclusive of liability for employee attorney fees. To the extent that the employee attorney is paid, the employee receives less. The Committee's guidance is requested on the permissibility of this practice.

ANALYSIS

The Committee agrees that settlement offers inclusive of employee attorney fees create a conflict of interest between the employee attorney and the employee by virtue of the personal interest of the lawyer.⁵ Similar issues arise in other claims arising under statutes providing for payment of attorney fees such as Unfair Trade Practices and Consumer Protection Act claims, Civil Rights Act claims, Voting Rights Act claims, and class actions. The ethical issue created by settlement offers inclusive of attorney fees for these claims is that there will be a trade-off between the amount of the fees the employer or defendant pays to the attorney and the amount paid for other benefits or relief owed to the employee, potentially creating a conflict between the attorney and client.

Historically, multiple courts and bar associations opined that it was ethically impermissible for lawyers defending claims under "fee shifting" statutes to make lump-sum settlement offers inclusive of attorney fees with some also opining that it was ethically impermissible even to simultaneously negotiate the underlying claim and associated fees because doing so created a conflict of interest between the opposing lawyer and his client.⁶ However, this view changed with the United States Supreme Court Opinion, *Evans v. Jeff D.*,

⁵ See Rule 1.7(a)(2) (noting that a concurrent conflict of interest exists if there is a significant risk that the representation of the client will be materially limited by the "personal interest of the lawyer"); see also Utah State Bar Ethics Advisory Opinion No. 98-05 (noting that a settlement offer may create a conflict of interest when it is predicated on counsel's loss of fee).

⁶ See, e.g., *Jeff D. v. Evans*, 743 F. 2d 648 (9th Cir. 1984); *Moore v. Nat'l Ass'n of Sec. Dealers Inc.*, 762 F. 2d 1093, 1114 (D.C. Cir. 1985); Thomas G. Hungar, *The Ethics of Fee Waivers: Negotiation of Statutory Attorney's Fees in Civil Rights Cases*, 5 Yale Law & Policy Review 157, 161 & n.24 (1986) (collecting authorities).

475 U.S. 717 (1986). In Evans, the United States Supreme Court held that, under the statutory language of the Fees Act (42 U.S.C. §1988), the right to recovery of attorney fees in a §1988 action belonged to the claimant – not the lawyer – such that the client had the authority to settle his claim, including the right to waive attorney fees in their entirety. Three members of the Court vigorously dissented.

Since Evans, the majority of courts and ethics authorities considering fee-shifting statutes conclude that settlement offers inclusive of attorney fees are, generally speaking, ethically permissible.⁷

The Committee agrees with the majority of opinions holding that settlement offers, inclusive of statutory attorney fee claims, are generally permissible. Like any settlement offer, the employee attorney has a duty to communicate the settlement offer to the client and to explain the alternatives and consequences of the offer.⁸ Unless otherwise provided by statute, regulation, or other law, the right to decide whether to settle a claim belongs to the client.⁹

The Committee acknowledges that, despite the general permissibility of these lump-sum settlement offers, each case is necessarily fact-specific and that additional facts relating to the settlement negotiations could demonstrate

⁷ See, e.g., *Nilsen v. York County*, 400 F. Supp. 2d 266, 272 (D. Me. 2005) (“[I]t is well established that a defendant may settle, for a single lump sum, all outstanding claims in a fee-shifting case, including claims for attorney fees.”); *Wildearth Guardians v. U.S. Forest Serv.*, 778 F. Supp. 2d 1143, 1154 (D.N.M. 2011); *Pinto v. Spectrum Chem. & Lab. Prods.*, 985 A.2d 1239, 1248-50 (N.J. 2010); Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & POL’Y 1, 35 (2008) (“In fact, after *Evans*, the state bar ethics boards that had previously barred fee waivers or simultaneous negotiation of merits and fees immediately changed their opinions to permit such bargaining.”). Some ethics opinions go so far as to say that a settlement offer that waives a claim for attorney fees may be permissible. See Utah State Bar, Ethics Advisory Opinion No. 98-05; D.C. Bar Opinion No. 207 (1989); New York City Bar Association, Formal Opinion 1987-4 (noting that such an offer is not unethical per se, but deferring a definitive finding on the propriety of any such offer until responding to further inquiry in specific cases). This “waiver” issue is beyond the scope of this opinion, other than to note that those authorities allowing a settlement condition on a waiver of attorney fees support the notion that a lump-sum offer is permissible.

⁸ State Bar of California Formal Opinion Interim No. 98-0001.

⁹ *Compton v. Kittleson*, 171 P. 3d 172 (Alaska 2007); Rule 1.2(a) (“A lawyer shall abide by a client’s decision whether to offer or accept a settlement.”)

a breach of the Rules of Professional Conduct. It is neither practical nor useful to speculate on what types of settlement negotiation behavior could result in a violation of the Rules. Either the courts or the Committee will address any such scenarios as they arise.¹⁰

To be clear, this opinion does not preclude employee attorneys from asserting their right to be paid fairly for their work. Some courts and commentators recommend that attorneys address this potential conflict in the initial retainer agreement between the attorney and the Employee.¹¹ Despite the potential conflict of interest created by settlement offers inclusive of attorney fees, Rule 1.7(b) allows an employee attorney to continue representing the employee if he or she reasonably believes he or she is able to provide competent and diligent representation. In doing so, Rule 1.7(b)(4) requires that the affected client give written informed consent. The retainer agreement may provide this written informed consent.

Examples of these provisions in a retainer agreement include, but are not limited to, agreements asking the client to agree not to waive any statutory right to legal fees, agreements asking the client to assign any statutory right to legal fees, or agreements otherwise providing that the Alaska Workers'

¹⁰ See, e.g., Maine Prof'l Ethics Comm'n Opinion 95 (1989) ("[T]he Commission would prefer to leave the question of the reasonableness of the settlement behavior of either party in a case involving statutory attorney's fees claims to the courts, for resolution on a case-by-case basis."); New York City Bar Association, Formal Opinion 1987-4 (concluding that it is not unethical per se for defense counsel to propose settlements condition on the waiver of attorney fees in statutory fee-shifting cases, but "emphasiz[ing] that no inference should be drawn from the Committee's action that conduct previously deemed unethical by the Committee is now necessarily being sanctioned. Rather, in the future these questions will be dealt with on a case-by-case basis.").

¹¹ See, e.g., *Pinto*, 985 A.2d at 1249 ("To the extent that lump-sum settlement offers present challenges to public-interest clients and their counsel on how to divide a limited pot between a client's damages and attorneys' fees, we believe that candid lawyer-client discussions about the value of the case from the outset will resolve many problems."); see also *Zeisler v. Neese*, 24 F. 3d 1000 (7th Cir. 1994) (assignment of statutory right to fees under Truth in Lending Act with potential claims against client and defendant in the event of breach of agreement); California Formal Ethics Op. No. 1994-136; New York City Bar Association, Formal Opinion 1987-4; Utah State Bar, Ethics Advisory Opinion No. 98-05; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 38 cmt. f (2000).

Compensation Board or some other entity will have the ultimate right to determine the fees in the event of a settlement offer inclusive of attorney fees.¹²

The Committee believes the initial retainer agreement is the best place to address this issue, clearly explaining to the client that such a settlement proposal may be made and explaining the consequences, along the lines of a provision similar to the following:

Employee recognizes that Attorney will be seeking payment of attorney fees from the Employer pursuant to the Alaska Workers' Compensation Act. Attorney fees under the Act are paid by the Employer, and not by the Employee. Sometimes, Employers offer to settle these matters through lump-sum settlements that include attorney fees. Whether or not to accept a lump-sum settlement is the Employee's decision. In a lump-sum settlement, Attorney's fees are paid from the settlement funds. The Employee receives the balance remaining after Attorney's fees are paid and not the full settlement amount. Employee agrees that if he or she accepts a lump-sum settlement, Attorney's fees and expenses will be deducted from the settlement amount and paid to Attorney. In the event such a settlement offer is made, Attorney will advise Employee of the amount of fees and costs to be deducted and the expected balance to be paid to Employee after those deductions, so that Employee may make an informed decision on whether or not to accept the offer.

Otherwise, employee counsel must comply with Professional Conduct Rule 1.7(b)(4).

Approved by the Alaska Bar Association Ethics Committee on April 6, 2017.

Adopted by the Board of Governors on May 9, 2017.

G:\Ds\COMM\ETHICS\DRAFTS\2017\Settlement Offers in the Context of Fee Shifting Statutes-04-03-17.doc

¹² *Cisek v. National Surface Cleaning, Inc.*, 954 F. Supp. 110 (S.D.N.Y. 1997) (better practice is to refrain from discussing attorneys' fees at all until an agreement is reached on the relief sought by client or to negotiate lump sum and the allow court to allocate the fund between counsel and client); *compare Compton v. Kittleson*, 171 P.3d 172, 177 (Alaska 2007) (if the client's actions unfairly deprive attorney of a reasonable expectation of compensation, attorney's proper remedy is to seek recovery of the reasonable value of services rendered under a theory of quantum meruit).