

## **Settlement Offers Inclusive of Legal Fees in Workers' Compensation Cases**

Issue Presented: Pursuant to AS 23. 30.145 of the Alaska Workers' Compensation Act, attorney fees for the Employee claimant are paid by the Employer. Lawyers representing both Employees and Employers have asked about the propriety of settlement offers which, in addition to resolving the Employee's claim for other benefits, also seek to reduce or waive the Employer's liability for attorney fees.

Conclusion: The Committee has been asked whether this creates a conflict of interest between the Employee and the Employee's lawyer, and if so, whether this is ethically permissible. Based on a review of Alaska workers compensation law as well as nationwide cases and standards considering this same issue in other contexts, the Committee concludes that such offers, generally speaking, are not permissible.

### **BACKGROUND**

Under the Alaska Workers' Compensation Act, the injured Employee's legal fees are decided by the Alaska Workers' Compensation Board ("AWCB") with the responsibility for payment statutorily shifted to the Employer.<sup>1</sup> An Employees' attorney has the right to seek fees even if discharged. The Alaska Administrative Code sets forth the procedure for lawyers to seek fees and approval of fee contracts.<sup>2</sup> Failure to comply with the Alaska Workers' Compensation Act subjects an Employee's attorney to criminal liability.<sup>3</sup>

Recovery of fees by attorneys representing Employee claimants are very different than attorneys fees awarded in other contexts.

Fees can be awarded under a number of scenarios, including instances where the injured worker prevails on a small number of issues.<sup>4</sup> The Alaska Supreme Court has repeatedly held that fee awards should be fully compensatory and reasonable in order to "encourage" competent counsel to represent injured workers."<sup>5</sup>

Fee agreements between Employee claimants and counsel in workers compensation cases emphasize that fees are paid by the Employer, not the Employee, such that attorneys' fees will not reduce Employee benefits. As with many legal issues, the issue of fees is often resolved through compromise and settlement.

---

<sup>1</sup> AS 23.30.145(Attorney fees related to claim to Alaska Workers' Compensation Board); AS 23.30.008(Attorney fees re appeal to Alaska Workers Compensation Appeals Commission)

<sup>2</sup> 8 AAC 45.180.

<sup>3</sup> AS 23.30.260.

<sup>4</sup> Id.

<sup>5</sup> Williams v. Abood, 53 P.3d 134, 147 (Alaska 2002).

In Workers' Compensation claims, the Employer pays 100% of attorney fees on an hourly basis at an enhanced fee rate. Unlike most litigation, fees are paid directly to the attorney, not the client. Per statute, the Employee's lawyer's ability to modify this fee arrangement is extremely limited, if non-existent. To the extent that the amount of the fees is disputed, that dispute is between the Employee counsel and the Employer with resolution in a separate hearing before the AWCB and not between the Employee counsel and the client Employee. It should be noted that Employee counsel has a claim for fees even if Employee counsel has been terminated and even if the Employee is only partially successful on the claim. Put another way, the Employee never receives the attorneys' fees, and never pays the attorney. Because of the statutory scheme with the Employer paying Employee counsel, there has never been a fee arbitration or dispute between an Employee client and his lawyer concerning attorneys' fees under the Alaska Workers' Compensation Act.

This is different from fees pursuant to an hourly contract in which a client reviews bills and potentially exercises his right of review to decide whether fees are excessive or otherwise improper. This is also different from Rule 82 fees which, by the language of Rule 82, are "partial awards" of fees to a "party" and used to offset (and possibly exceed) the client's contractual liability for fees with the lawyer rights limited to asserting an attorney lien. Between the fee agreement, the right to assert a lien, and the common goal of maximizing those fees, Rule 82 fee awards do not create conflicts between the lawyer and client. In the context of a contingency fee, the conclusion remains the same because both the lawyer and client have the common goal of maximizing the recovery to which the applicable percentage can be applied. Finally, in these fee arrangements, both the client and attorney have the goal of maximizing the amount of settlement with no relationship to the fee. In contrast, workers' compensation settlement offers, inclusive of fees, force either a client or the lawyer to compromise their position.

To the extent that attorneys are not paid, one would expect the number of attorneys willing to represent Employee claimants to decrease thereby defeating the purpose of the statutory scheme seeking the opposite result.

This inquiry asks whether Employer settlement offers to Employee claimants, inclusive of attorneys' fees owed to Employees' counsel are ethically permissible. If so, Employees' attorneys seek guidance on actions that can ethically be taken to protect the attorneys' interest in payment consistent with the Rules of Professional Conduct.

## **DISCUSSION**

Rules 1.7 and 1.8 of the Alaska Rules of Professional Conduct Settlement address conflicts of interest between a lawyer and his client. The Committee agrees that where liability for attorneys' fees is statutorily shifted to the Employer, settlement offers inclusive of Employer liability for attorneys' fees create a conflict of interest between the Employee and his lawyer.<sup>6</sup> While this particular question has arisen here in the context of a workers compensation question, we note that this conflict occurs in all cases in which statutes shift responsibility for attorneys' fees such as Unfair Trade Practice claims, Civil Rights claims, Voting Rights Act claims, and class actions. The ever present risk is that there will be a trade-off between the amount of the fees the Employer or defendant owes to the lawyer and other benefits or relief owed to the Employee or claimant.

### The Permissibility of the Employers' Attorney Making Settlement Offers Inclusive of Statutory Fees

In the context of attorney fee-shifting statutes, multiple courts and bar associations have historically opined both that it was ethically improper for opposing lawyers to make settlement offers conditioned on the waiver of legal fees and that it was ethically improper to simultaneously negotiate the underlying claim and associated fees because of the obvious conflict of interest.<sup>7</sup> This view changed with the United States Supreme Court Opinion in Evans v. Jeff D.<sup>8</sup> In Evans, the United States Supreme Court reached the opposite conclusion, holding that, under the statutory language of the Fees Act (42 U.S.C. §1988), the right to legal fees under 1988 belonged to the claimant, not the lawyer, such that the claimant had the right to settlement while waiving fees in their entirety. Three members of the Court vigorously dissented.

Since Evans, many jurisdictions conclude that settlement offers in the context of fee-shifting statutes that seek to waive or reduce attorneys' fees are, generally speaking, ethically permissible while also acknowledging the potential for such settlement offers to be made in an ethically impermissible way.<sup>9</sup> For example, such a tactic cannot be used for an improper purpose to engage in conduct prejudicial to the administration of justice, such as conditioning settlement on a fee waiver where there is no defense so as force the

---

<sup>6</sup> E.g., Utah State Bar Ethics Advisory Opinion No. 98-05. See generally, Evans v. Jeff D., 106 S. Ct. 1531 (1986); Pinto v. Spectrum Chemicals & Lab. Products, 200 N.J. 580, 584, 985 A.2d 1239, 1241 (2010) (squarely rejecting Jeff D and adopting the rationale in Justice Brennan's dissent instead).

<sup>7</sup> E.g., Jeff D. V. Evans, 743 F. 2d 648 (9<sup>th</sup> Cir. 1984); Moore v. Nat'l Ass'n of Sec. Dealers Inc., 762 F. 2d 1093, 1114 (DC Cir. 1985); Hunger, The Ethics of Fee Waivers: Negotiation of Statutory Attorney's Fees in Civil Rights Cases, 5 Yale Law & Policy Review 157 (1986).

<sup>8</sup> 106 S. Ct. 1531 (1986)

<sup>9</sup> Cf. D.C. Bar Opinion. No. 207 (1989); New York City Bar Association, Formal Opinion 1987-4 (withholding deliberation on the issue until responding to further inquiry in specific cases).

a party to waive rights to legal fees, to demanding that opposing counsel not represent similarly situated client, insisting on fee waivers as a matter of policy (instead of as a bargained for proposition in a specific case) or any other improper purpose. Some courts have held that settlements that contain fee waivers are only permissible if done voluntarily, but may not be demanded by the opposing party.<sup>10</sup>

A significant number of authorities disagree with Evans. Most often, this has been by state courts interpreting their own statutes. For example, in Coleman v. Fiore Bros., Inc.,<sup>11</sup> and later in Pinto v. Spectrum Chemicals and Laboratory Products,<sup>12</sup> the New Jersey Supreme Court held the practice to be improper, adopting the reasoning of the Evans dissent that such offers are both unwarranted intrusions into the attorney-client relationship and “thinly disguised ploys to put a client at war with his lawyer.” Basing its decision on different grounds, the California Supreme Court in Flannery v. Prentice,<sup>13</sup> also came to the same conclusion, reasoning that the purpose of fee-shifting statutes is to provide parties with legal representation as well as encourage litigation of such claims such that the right to fees belongs to the attorney, not the client.<sup>14</sup>

While the Alaska Supreme Court has not specifically addressed whether the right to fees in a workers’ compensation proceeding belongs to the injured Employee or the lawyer, the regulation governing attorneys’ fees, 8 AAC 45.180 makes fee awards directly to attorneys. Alaska Supreme Court opinions, in language similar to the California Supreme Court, also state that the purpose of attorney fees awards is to make certain that competent counsel will represent this category of plaintiffs.<sup>15</sup> Because the process for seeking payment of fees is separate from the process of determining workers’ compensation benefits, the underlying public policy of ensuring the availability of counsel through full payment of fees, and the inherent conflict such offers create, the Committee believes the practice of settlement offers, inclusive of fees, to be, generally speaking, ethically impermissible.

---

<sup>10</sup> See Moore v. Nat’l; Ass’n of Sec. Dealers Inc., 762 F. 2d 1093, 1110 (DC Cir. 1985).

<sup>11</sup> 552 A. 2d 141 (NJ 1989).

<sup>12</sup> 985 A. 2d 1239 (NJ 2010)

<sup>13</sup> 28 P. 3d 860 (Cal. 2001); But see State Bar of California Formal Opinion Interim No. 98-0001.

<sup>14</sup> See also LA County Bar Ass’n, Formal Op. No. 445(1987)

<sup>15</sup> E.g., Bouse v. Fireman's Fund Ins. Co., 932 P.2d 222 (Alaska 1997); but see AS 23.30.045(legal fees are a benefit to the Employee under the Alaska Workers’ Compensation Act).