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ETHICS AND THE SETTLEMENT OF CIVIL RIGHTS CASES: CAN ATTORNEYS KEEP THEIR VIRTUE AND THEIR FEES?

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The Civil Rights Attorney's Fees Award Act of 1976 authorizes an award of fees to the prevailing party in a civil rights action. The United States Supreme Court, in *Evans v. Jeff D.*, has interpreted the Fees Act to authorize the parties in a civil rights action to negotiate settlement of fees and merits jointly. The Court did not determine whether joint fees-merits negotiation is ethical. The author of this article contends that joint negotiation is ethical. He further contends that it is ethical for plaintiff's attorney to reject an offer of settlement if the offer is coupled with a demand that he waive attorneys' fees.

I. INTRODUCTION

The Civil Rights Attorney's Fees Award Act of 1976 (Fees Act)[1] authorizes courts to award attorneys' fees to the prevailing party in civil rights litigation.[2] From the inception of the Fees Act, attorneys attempting

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1. 42 U.S.C. §1988 (1983). The Act states:

> 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, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Id.

2. Whether the prevailing party in a civil rights action had a right to obtain attorneys' fees from the opposing party was an open question for a time prior to the adoption of the Fees Act. Some courts had authorized awards of attorneys' fees to successful civil rights litigants under the judicially created private attorney general doctrine. *See, e.g.*, Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281 (6th Cir. 1974); Fowler v. Schwarzwalder, 498 F.2d 143 (8th Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971). These courts contended that federal civil rights laws expressed the policy of the federal government. Private attorneys who successfully represented parties seeking vindication of their rights under these federal laws were acting as private attorneys general enforcing federal policy. The cases frequently did not promise sufficient financial return to attract private attorneys. The courts awarded attorneys' fees to prevailing attorneys in civil rights cases to encourage them to assist federal authorities in enforcing these laws by bringing actions on behalf of injured parties. The U.S. Supreme Court rejected the private attorney general doctrine in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), holding that Congress, rather than the courts, should determine whether prevailing parties can obtain fee awards. Within a year of the *Alyeska* decision, Congress enacted the Fees Act to "remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), and to achieve consistency in our civil rights laws." S. REP. NO. 1011, 94th Cong., 2d Sess. 1, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5908.

to settle civil rights cases have confronted an ethical dilemma: are they free to negotiate settlement of the merits and attorneys' fees jointly? A number of commentators[3] and courts[4] have contended that joint fees-merits negotiation is unethical because the attorney's personal interest in a fee conflicts with his duty of loyalty to his client. Critics of joint fees-merits negotiation have suggested a number of procedural devices to reduce this conflict of interest. Generally, the proposals have called for a bifurcated procedure that would require delaying resolution of the attorneys' fees issue until some point after the parties agreed to settlement of the merits.[5] Other courts[6] and commentators[7] have rejected proposals requiring bifurcated settlement negotiations in all cases.

On April 21, 1986, the United States Supreme Court ruled in the case of *Evans v. Jeff D.*[8] that a trial court had discretion under the Fees Act to approve a settlement in a civil rights action that included a waiver of fees by plaintiff's counsel. That decision purported to interpret the Fees Act, not the ethical obligations of attorneys under state codes of legal ethics.[9] The decision in *Jeff D.* has important ramifications on the ethical issues discussed in this article.

3. Calhoun, *Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U.S.C., § 1988,* 55 U. COLO. L. REV. 341 (1984); Kraus, *Ethical and Legal Concerns in Compelling the Waiver of Attorney's Fees by Civil Rights Litigants in Exchange for Favorable Settlement of Cases Under the Civil Rights Attorney's Fees Award Act of 1976,* 29 VILL. L. REV. 597 (1984); Levin, *Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in Which Statutory Attorneys' Fees Are Authorized,* 14 CLEARINGHOUSE REV. 515 (1980).

4. Prandini v. Nat'l Tea Co. 557 F.2d 1015 (3d Cir. 1977); Gillespie v. Brewer, 602 F. Supp. 218 (N.D. W. Va. 1985); Chrapliwy v. Uniroyal, Inc., 509 F. Supp. 442 (N.D. Ind. 1981); Regalado v. Johnson, 79 F.R.D. 447 (N.D. Ill. 1978).

5. Prandini, 557 F.2d at 1021; Calhoun, *supra* note 3, at 370; Levin, *supra* note 3, at 515; Kraus, *supra* note 3, at 648. A bifurcated procedure occurs in two stages. The first stage includes discussion and possible settlement of the merits of the dispute and no discussion about attorneys' fees. After the parties have resolved all issues pertaining to the merits, they may proceed to the second stage and resolve fees.

6. Moore v. Nat'l Ass'n of Sec. Dealers, Inc., 762 F.2d 1093 (D.C. Cir. 1985) (plaintiff's counsel may propose waiving attorneys' fees as part of a settlement); Lazar v. Pierce, 757 F.2d 435, 439 (1st Cir. 1985) (court refused to promulgate absolute rules about when parties may jointly negotiate fees and merits); El Club Del Barrio v. United Community Corp., 735 F.2d 98, 101 (3d Cir. 1984) (dictum criticizing Prandini); Parker v. Anderson, 667 F.2d 1204 (5th Cir. 1982) (Parties can negotiate lump sum settlement in class action where court retains authority to approve the amount of the settlement that will be paid for attorneys' fees); White v. New Hampshire Dep't of Employment Sec., 629 F.2d 697 (1st Cir. 1980), *rev'd on other grounds,* 455 U.S. 445 (1982).

7. Third Circuit Task Force, Court Awarded Attorney Fees (1985), *reprinted in* 771 F.2d No. 2 advance sheet at 1 (Oct. 14, 1985); Comment, *Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations,* 131 U. PA. L. REV. 793 (1983) (parties should be able to negotiate merits and fees with plaintiff's counsel retaining authority to halt negotiation of fees at any time); 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 Company,* 51 TEMPLE L.Q. 799 (1978).

8. 106 S. Ct. 1531 (1986).

9. *Id.* at 1537.

Jeff D. was a civil rights class action filed on behalf of children with emotional and mental handicaps against various state officials in Idaho.[10] The plaintiffs filed suit in the United States District Court for the District of Idaho seeking improved educational and health care services for children in state custody.[11] The parties negotiated a settlement on terms favorable to the class with a proviso that plaintiff's attorney waive any fees that he would have been entitled to under the Fees Act. The agreement specified that the fee waiver provision was subject to approval of the trial judge.[12]

Jeff D.'s attorney requested the trial judge to reject the settlement provision waiving attorneys' fees. The attorney argued that the fee waiver demand placed him in a conflict of interest with his clients. He was forced to negotiate his client's interests in the merits along with his own interest in the fees. He was duty bound to accept an offer on terms favorable to the clients at the expense of his own interest.[13] The trial court rejected this argument and approved the settlement. The judge determined that an attorney may ethically give up his fees in order to obtain improved terms of settlement for his clients.[14]

The Court of Appeals for the Ninth Circuit reversed the lower court.[15] The appellate court disapproved joint negotiation of fees and merits because of the conflict class counsel has between his own interest in fees and the class members' interest in the merits.[16] The court of appeals invalidated the settlement provision waiving fees, but left in force the settlement terms on the merits.[17]

In a 6-3 decision, the United States Supreme Court reversed the court of appeals and reinstated the decision of the district court. Justice Stevens, speaking for the majority identified the question before the Court as whether the district court had a duty to reject the proposed settlement because it included a waiver of fees authorized by the Fees Act.[18] Justice

10. *Id.* at 1534.
11. *Id.*
12. *Id.* at 1535.
13. *Id.*
14. *Id.*
15. Jeff D. v. Evans, 743 F.2d 648 (9th Cir. 1984).
16. *Id.* at 651-52.
17. *Id.* at 650. The appellate court stated:

> The principle that generally binds lawyers and litigants to stipulations has limited applicability in the present situation, however. The question here is whether the court, in reviewing a class action settlement in a civil rights action, properly approved the waiver of attorney's fees simply because it was part of the settlement to which the parties had agreed. We answer the question in the negative, because the court has a duty to review the reasonableness of all the terms of class action settlement agreements, particularly those related to attorney's fees.

18. Evans, 106 S. Ct. at 1537.

Stevens first noted that the requirement of judicial approval of class action settlements is set forth in Rule 23(e) of the Federal Rules of Civil Procedure. That rule, according to the majority opinion, authorizes trial judges to accept or reject proposed settlements, but does not authorize courts to enforce part of a settlement and reject other parts. The Supreme Court determined that the Ninth Circuit Court of Appeals had acted in excess of its authority when it sought to enforce the merits of the settlement while rejecting the fees provision. If the court of appeals was correct in rejecting the fee waiver provision, it should have rejected the entire settlement and remanded the case to the district court.[19]

The majority opinion in *Jeff D.* then addressed whether the court of appeals properly refused to approve a fee waiver as part of a settlement. The decision stated that the trial judge's duty, when faced with a settlement that includes a fee waiver, "derives ultimately from the Fees Act rather than from the strictures of professional ethics."[20] While recognizing that an attorney representing a class has conflicting interests between seeking relief for the class or fees for counsel, the decision denied that the conflict created an ethical dilemma. Class counsel had no ethical obligation to seek fees and his waiver of fees violated no ethical norm.[21] Having determined that class counsel had behaved ethically, the Court proceeded to determine whether the trial court had discretion to accept the settlement that included a waiver of fees. The Court concluded that an attorney fee award is one item among the "arsenal of remedies" available to victims of civil rights violations.[22] Just as a party may waive a damages claim to secure enhanced injunctive relief, so may she give up attorneys' fees in order to secure better relief in another area.[23]

The Supreme Court decision in *Jeff D.* did not address the ethical issue that was raised by plaintiff's attorney. He contended not that he was permitted to waive attorneys' fees, but that he was required to waive them under the prevailing code of ethics when defendant included a fee waiver demand in an offer of settlement that was beneficial to his clients.[24] His obligation of loyalty to his client conflicted with his own interest in an award of fees. The Supreme Court did not address whether the attorney for the plaintiffs was correct in asserting that he was required to waive fees in return for a favorable merits settlement. The decision did note that the Fees Act granted the right to attorneys' fees to a prevailing party and that the party may assign the right to fees to her attorney.[25] It did

19. *Id.*
20. *Id.*
21. *Id.* at 1537-38.
22. *Id.* at 1539-40.
23. *Id.* at 1539.
24. *Id.* at 1535.
25. *Id.* at 1539.

not discuss whether counsel could reject a settlement offer because the offer included a fee waiver provision.

Justice Brennan wrote a dissenting opinion in *Jeff D.* He also decided the propriety of joint fees-merits negotiations under the Fees Act.[26] As did the majority, Justice Brennan rejected the proposition that joint fees-merits negotiation must be prohibited because it puts plaintiff's attorney in a conflict of interest with his client.[27] Justice Brennan analyzed the problem in *Jeff D.* as one that raised two distinct questions. First, can the parties negotiate settlement of fees and merits jointly? Second, can the fees provided by the Fees Act be waived?[28]

The dissenting justices argued that the parties to a civil rights suit should be permitted to negotiate a reasonable attorney's fee along with the merits subject to approval of the trial judge. The purpose of the Fees Act is to assure that counsel will be available to represent clients who have been injured in violation of the nation's civil rights statutes. The legislative history of the Fees Act expressed the need for fees if victims of civil rights violations are to have equal access to the courts. The Fees Act promotes representation of citizens who claim civil rights violations by providing reasonable fees to prevailing parties.[29] The dissenting justices saw no inconsistency with the Fees Act under a scheme in which the parties negotiate a reasonable fee when settling the merits, subject to approval by the trial judge.[30]

The dissent arrived at a different conclusion on the issue of fee waiver. Permitting the defendant to demand a fee waiver as part of a settlement offer would be inconsistent with the purposes of the Act. An attorney's expectation of a fee in successful civil rights cases is reduced when he can be pressured to waive fees in return for settlement of the merits. By lowering the likelihood that he can receive a reasonable fee for successfully representing a client in a civil rights action, the majority decision lowers the likelihood that the attorney will take on civil rights cases. Fee waiver demands discourage representation of civil rights victims in conflict with the purpose of the Fees Act, to encourage representation.[31]

The majority and dissenting opinions both addressed the issues in *Jeff D.* as a problem of statutory interpretation. Both opinions approved joint negotiation. The majority and dissenting opinions disagreed about the propriety of fee waiver demands in settlement negotiations. Justice Brennan suggested two possible methods to avoid fee waiver demands in civil rights cases. First, he approved bar association ethics rules restricting fee

26. *Id.* at 1546. (Brennan, J., dissenting).
27. *Id.* at 1551.
28. *Id.*
29. *Id.* at 1548-50.
30. *Id.* at 1551, 1557.
31. *Id.* at 1551-54.

waivers.[32] Second, he suggested that civil rights attorneys may be able to obtain agreements from their clients that will permit them to reject fee waiver demands.[33] Justice Brennan noted that ethical matters are governed by local law rather than federal law.[34]

This article addresses the ethical question that the Court did not decide in *Jeff D.* and that Justice Brennan referred to in dissent. The author contends that an attorney who negotiates settlement of fees and merits jointly in a civil rights case does not inevitably have a conflict of interest with his client. The ethical posture of an attorney representing a client in a civil rights action covered by the Fees Act is not significantly different from that of an attorney representing a litigant under other commonly used payment schemes.[35] The conflict of interest concerns embodied in the ethical precepts governing the practice of law do not encompass cases involving joint fees-merits negotiation. The conflict of interest rules set forth in bar association ethical codes apply to situations that are significantly different from joint fees-merits negotiation.[36] Consequently, the conflict of interest rules do not provide useful guidance in establishing rules of conduct for attorneys facing joint fees-merits negotiation. The ethical rules addressing fees for legal services, however, are relevant and helpful in establishing appropriate guidelines for attorneys representing clients in cases covered by the Fees Act.[37]

Under the appropriate guidelines, parties should be permitted to jointly negotiate fees and merits. The ethical rules on fees should further be read to require that the attorney representing a party in a civil rights action prepare a written fee agreement that sets forth the rate or basis for establishing counsel fees. The fee agreement should also state whether the attorney will seek fees from the client if he cannot obtain them from the opposing party. Counsel may negotiate settlement of fees and merits jointly, if the fee negotiation is in conformity with the fee agreement. Counsel may reject a settlement that does not provide for attorneys' fees as set forth in the fee agreement. Counsel's right to reject a fee proposal that does not conform to the fee agreement should be subject to review by the trial judge. In an individual action, the judge need review the fee

32. *Id.* at 1557.

33. *Id.*

34. *Id.* at 1557 n.20.

35. Attorneys obtain fees under a variety of arrangements. The contingent fee agreement authorizes plaintiff's attorney to retain a percentage of any recovery received from the opposing party. Under a lump sum payment agreement, the attorney performs a specific task for a fixed fee. An hourly fee for service arrangement provides for payment of an hourly rate to the attorney for the amount of time he spends on behalf of his client. In the absence of a fee agreement between the attorney and client, the attorney may bill the client for the reasonable value of his services. For a discussion of the relationship between the Fees Act and other payment schemes see section IV B *infra*.

36. See section IV A, *infra*.

37. See section IV C, *infra*.

agreement and fee proposal only upon request of a party. In a class action, the judge should review the fee agreement and fee proposal as a matter of course. The judge's role in reviewing the fee agreement should be to determine whether the agreement is consistent with the Fees Act requirement that reasonable attorneys' fees may be awarded to a prevailing party. If the fee agreement is reasonable, the judge should approve any settlement offer that is consistent with the agreement. If the agreement is not reasonable, then the judge should review the opposing party's fee proposal and determine whether it is reasonable.

II. THE AMERICAN RULE AND EXCEPTIONS

American courts traditionally have required plaintiffs and defendants to pay the fees of their own attorneys regardless of which party has prevailed in litigation.[38] The American rule differs from the rule in England that requires the losing party to pay some portion of the prevailing party's counsel fees.[39]

In *Fleischmann Distilling Corp. v. Maier Brewing Co.*,[40] the United States Supreme Court provided three grounds to justify the denial of attorneys' fees under the American rule. First, shifting fees from the prevailing party to the losing party would unfairly punish the person who brings or defends a suit in good faith.[41] Second, fee shifting would inhibit poor persons from pursuing litigation because the threat of financial ruin if they lose would induce them to forego claims or defenses, even if they were likely to prevail.[42] Third, fee shifting would create significant additional issues that pose substantial burdens for courts.[43]

American courts have recognized a number of exceptions to the American rule. A court may assess attorneys' fees against a party who brings, defends, or conducts a suit in bad faith[44] or violates the procedural rules

38. F.D. Rich Co. v. Indus. Lumber Co., 417 U.S. 116 (1974); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967); Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).

39. R.M. JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND 417-35 (1972); R.J. WALKER AND M.G. WALKER, THE ENGLISH LEGAL SYSTEM 278-83 (2d ed. 1970); Goodhart, *Costs*, 38 YALE L.J. 849 (1929).

40. 386 U.S. 714 (1967). *Fleischmann* was a trademark infringement case brought under the Lanham Act, 15 U.S.C. §§ 1051-1127 (1982). The issue before the Court was whether the Lanham Act authorized an award of attorneys' fees to a party establishing a deliberate infringement of a valid trademark. The Supreme Court, reading the Lanham Act narrowly, refused to award fees. The Court began its analysis by tracing the difference between English and American law on awards of counsel fees to successful litigants.

41. *Id.* at 718.

42. *Id.*

43. *Id.* The court cited the time, expense and difficulties of proof involved in determining a reasonable fee.

44. Vaughan v. Atkinson, 369 U.S. 527 (1962). *Vaughan* was a suit by an injured seaman against a shipowner for failure to pay maintenance and cure. The court found respondent's default willful and persistent despite a clear duty to pay. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399

governing the conduct of litigation.[45] A court may award fees to a successful attorney under the common fund doctrine. That doctrine applies to cases in which a party sues to create, increase, or preserve a common fund on behalf of a group of beneficiaries.[46] The rationale behind the common fund doctrine is that allowing other parties full benefit from the plaintiff's suit without requiring them to assist in paying for the litigation by charging the common fund for fees, would unjustly enrich the other parties at plaintiff's expense.[47] Courts will also enforce statutory exceptions to the American rule such as the Fees Act.[48]

A. The Bad Faith Exception to the American Rule

Bad faith cases concern litigants who have engaged in vexatious, obstreperous conduct.[49] The purpose of the award of attorneys' fees in these cases is to punish a party who litigates in bad faith.[50] Cases arising under the bad faith doctrine by their nature do not involve settlements. The settlement of a lawsuit involves a degree of compromise and cooperation between the parties. Compromise and cooperation are the antithesis of bad faith. Consequently, cases decided under the bad faith exception to the American rule provide no guidance on the issue of the ethics of joint fees-merits negotiation.

B. The Common Fund Exception to the American Rule

The common fund doctrine originated in the case of *Trustees v. Greenough*, decided in 1882.[51] The common fund in *Greenough* consisted of

(1923). The Supreme Court affirmed an award of attorneys' fees against a company found to have been in contempt of court for obstructing the processes of the court. For a discussion of the bad faith doctrine, see Note, *Attorneys' Fees—"Bad Faith" Exception—Attorneys' Fees Allowed Under Bad Faith Exception After Alyeska Decision Narrowed "Private Attorney General" Doctrine: Doe v. Poelker*, 8 CONN. L. REV. 551 (1976).

45. *See, e.g.*, the Federal Rules of Civil Procedure which permit assessment of attorneys' fees for failure to comply with requirements concerning signing pleadings, motions and other forms (Rule 11), pretrial conference and scheduling orders (Rule 16(b)), certification of discovery documents (Rule 26(g)), cooperation in discovery (Rule 37), and summary judgment affidavits (Rule 56(g)).

46. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939) (plaintiff's suit established the rights of beneficiaries to share in the proceeds of a trust); Cent. R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885) (certain unsecured creditors obtained liens on property formerly owned by debtors for the benefit of all unsecured creditors); Trustees v. Greenough, 105 U.S. 527 (1882) (plaintiff bondholder recovered property for a trust fund serving as security for the bondholders of a railroad company.) For a discussion of the common fund doctrine *see generally* Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 HARV. L. REV. 1597 (1974).

47. *Fleischmann*, 386 U.S. at 719; *Greenough*, 105 U.S. at 532.

48. Federal law currently includes more than 100 fee shifting statutes. See 3 M.F. DERFNER & A. WOLF, COURT AWARDED ATTORNEY FEES §§ 29.01-45.07 (1983).

49. *See supra* notes 44-45.

50. In Hall v. Cole, 412 U.S. 1 (1973), a statutory fee shifting case arising under the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 412 (1982), the Supreme Court described the purpose of fee awards under the bad faith doctrine stating, "In this class of cases, the underlying rationale of fee-shifting is, or course, punitive and the essential element in triggering the award of fees is therefore the existence of bad faith on the part of the unsuccessful litigant.' *Id.* at 5.

51. 105 U.S. 527 (1882).

land that had been conveyed by the state to trustees as security for a bond issue. The trustees conveyed the land for their own profit. The plaintiff, a bondholder, successfully sued to recapture the land. His action financially benefited all the bondholders.[52] The Supreme Court approved reimbursement of the plaintiff's attorneys' fees from the assets he had recaptured, noting that the other bondholders who benefited from his efforts ought, in fairness, to share the costs.[53] Three years later in *Central Railroad & Banking Co. v. Pettus,*[54] the Supreme Court allowed attorneys directly to assert the right to obtain fees from any fund obtained for non-client beneficiaries.[55]

Underlying the common fund doctrine is the notion that beneficiaries who have contributed nothing to the cost of litigation have no call to complain if the courts set aside a portion of their benefits to compensate the attorneys whose efforts created, increased, or preserved the common fund. Otherwise the plaintiff, the party most responsible for the successful litigation, would bear the full cost of the suit, and the beneficiaries, the parties least responsible for the endeavor, would obtain all the benefits of the suit without cost.[56]

In settling the merits of these cases, attorneys occasionally have attempted to insulate their fees from scrutiny by the courts or class members. In general, the courts have rejected these attempts. One technique to insulate fees is to include a stipulated amount in settlement of attorneys' fees separate from the money provided in settlement of the merits. Stipulating a specific amount for attorneys' fees reduces the incentive for the court and class members to scrutinize the fees, because a reduction in fees will not result in an increase in the amount provided for settlement of the merits. *Jamison v. Butcher & Sherrerd,*[57] was a class action fraud suit by purchasers of stock against a seller broker. *Norman v. McKee*[58] was a class action brought by investors against the directors, managers and officers of a securities fund for violation of federal laws about excessive fees and commissions. In each case, the trial court disapproved the attempt by plaintiffs to set aside a specific amount for attorneys' fees upon settlement of the merits.[59]

52. *Id.* at 529.

53. *Id.* at 532.

54. 113 U.S. 116 (1885).

55. *Id.* at 124-25.

56. In Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), the Supreme Court justified the common fund fee shifting rationale because, "[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Id.* at 392.

57. 68 F.R.D. 479 (E.D. Pa. 1975).

58. 290 F. Supp. 29 (N.D. Cal. 1968).

59. The settlement in *Jamison* called for distribution of $350,000 to injured stockholders. In addition, the defendants agreed to pay $50,000 in attorneys' fees. In *Norman,* the defendants agreed to reimburse brokerage commissions that plaintiffs alleged were excessive. Defendants further agreed to pay $250,000 in attorneys' fees.

According to the judges in *Jamison*[60] and *Norman*,[61] the parties should determine a gross settlement figure and leave for the court the determination of the amount of the settlement to be set aside for fees and the amount to be provided in settlement of the merits.[62] Under that procedure, a decrease in fees would result in an increase in the merits award. In *Piambino v. Bailey*,[63] the trial judge approved a stipulated attorney fee settlement, because the parties were in agreement and no class member had objected.[64] The appellate court reversed the judgment below, stating that the trial judge had a responsibility to assess the reasonableness of fees independently, despite the stipulation and the lack of objection.[65]

Another technique for insulating attorneys' fees from scrutiny is to fail to disclose the fees prior to settlement. *In re General Motors Corp. Engine Interchange Litigation*[66] was a class action damages claim that arose during a period when General Motors substituted Chevrolet engines in Oldsmobile cars that G.M. built, without informing purchasers of the change in the product.[67] In settling the merits of that suit, General Motors agreed to pay the private attorneys a fee award based upon their hours multiplied by the prevailing hourly rate for attorneys. No amount or estimate of fees was provided to class members prior to settlement.[68] The Seventh Circuit Court of Appeals disapproved the settlement notice. The court determined that the notice provided information about fees "so vague that subclass members could not determine the possible influence of attorneys' fees on the settlement in considering whether to object to it."[69]

The case of *City of Philadelphia v. Chas. Pfizer & Co.*[70] presented a situation similar to that in *In re General Motors Corp. Engine Interchange*

60. 68 F.R.D. at 484.

61. 290 F. Supp. at 36.

62. In *Jamison* and in *Norman*, the trial judge refused to approve the settlement of the merits, finding that the settlement provided no more relief than the class members had previously obtained under administrative actions taken by the Securities and Exchange Commission. In each case the merits settlement was inadequate, and in each case the parties attempted to settle the attorney's fee by establishing a specific figure that defendants would pay directly to the plaintiff's attorney. Had the parties arrived at a gross settlement figure, leaving the determination of fees to the judge, it is possible—although neither judge says so—that the judges would have approved the settlement by providing a larger portion in settlement of the merits and a smaller portion of the gross settlement for attorneys' fees.

63. 610 F.2d 1306 (5th Cir. 1980).

64. *Id.* at 1327. The *Piambino* action arose from a pyramid sales scheme. The Court dealt with two settlements involving payments of substantial sums of money. From these sums, the parties stipulated specific amounts to be paid for attorneys' fees.

65. *Id.*

66. 594 F.2d 1106 (7th Cir. 1979).

67. *Id.* at 1113.

68. *Id.* at 1130.

69. *Id.*

70. 345 F. Supp. 454 (S.D.N.Y. 1972).

Litigation.[71] The *Pfizer* litigation raised antitrust claims against manufacturers of broad spectrum antibiotic drugs.[72] Counsel for a group of plaintiffs settled a portion of the claims along with an agreement that defendants would pay counsel "fair and reasonable" fees. If the parties could not agree on fees, the issue would be decided by the court.[73] After failing to reach an agreement on fees, the parties referred the fees issue to the court. Plaintiffs requested fees of $2,000,000.[74] The trial judge was critical of the fee agreement between the parties. He recognized that the fee arrangement involved a conflict of interest.[75] Despite his criticism, the judge enforced the fee agreement, reviewed the fee request, and approved a fee award reduced to $600,000.[76]

The *Pfizer* court's decision to enforce the fee agreement is understandable in light of the circumstances of that case. Initially, the attorney seeking enforcement of the fee agreement had approved settlement of a portion of the antitrust claim for $20 million.[77] Other counsel representing plaintiffs in the suit rejected the settlement and negotiated an improved settlement package in the amount of $32.5 million.[78] Under these circumstances, the interests of the beneficiaries of the settlement had been adequately protected. The court did not have to reject the fee agreement to protect the rights of the absent class members. While enforcing the fee agreement, the trial judge clearly noted his disapproval of the procedure used.[79]

Another technique for insulating fees from scrutiny is to fail to provide a hearing for those class members who wish to contest the amount of the fee. In *City of Detroit v. Grinnell Corporation*,[80] an antitrust action settled by the parties, the trial court refused to hold an evidentiary hearing on the amount of fees to be awarded.[81] On appeal, the Second Circuit reversed, holding that the trial court must hold an evidentiary hearing to establish a reasonable fee award.[82]

At first blush, these cases may appear to be contradictory. Some judges reject settlements that specify an amount for attorneys' fees.[83] Others disapprove settlements that do not provide information in the merits

71. 594 F.2d 1106 (7th Cir. 1979).
72. *Pfizer*, 345 F. Supp. at 454.
73. *Id.* at 470.
74. *Id.* at 482.
75. *Id.* at 471.
76. *Id.* at 482-86.
77. *Id.* at 468-69.
78. *Id.* at 473.
79. *Id.* at 477.
80. 495 F.2d 448 (2d Cir. 1974).
81. *Id.* at 468.
82. *Id.* at 472-74.
83. *See supra* notes 57-65 and accompanying text.

settlement about the amount of attorneys' fees.[84] But there is no contradiction. In all of these cases, the judges reviewing the settlements sought a procedure that would allow for judicial approval of fees after notice to beneficiaries who would have an opportunity to contest the fees. In *Piambino, Jamison,* and *Norman* the separately stated fees settlement reduced the incentive of the trial judges and class members to review fees. In *In re General Motors* and *Pfizer* the court and class members lacked the information necessary to review fees.

In contrast to these cases, the case of *Cantor v. Detroit Edison Co.*[85] presents a procedure that provides information to the court and class members about attorneys' fees without purporting to settle the fees issue. *Cantor* was an antitrust suit brought by retail sellers of light bulbs against an electric utility that provided light bulbs without charge to its customers.[86] In settling that suit, the parties agreed that plaintiff's counsel was entitled to fees and approved a provision that set forth a range of potential fees. Defendant would not object to a fee award up to $690,000. Plaintiff agreed not to seek fees in excess of $1,575,000. Plaintiff set forth the hours, hourly rate, and other bases for seeking a fee up to that amount. Final authority for determining of the fee was left to the judge.[87]

The settlement notice in *Cantor* provided information to class members about the range of fees and the basis for the fee request. The court decided the fees issue after approving settlement, and after holding a hearing on the fee request. Under those circumstances, the court approved the settlement provision on fees.[88]

Three themes emerge from these cases. Parties should not negotiate settlement of fees privately. The court must retain the final authority to determine the amount of fees. The beneficiaries of a suit should have information about fees and merits prior to settlement, and they should have an opportunity to object to the proposed fee award.

C. The Statutory Fee Award Exception to the American Rule

Numerous statutes now provide for payment of attorneys' fees to a successful litigant.[89] Fee shifting statutes are extremely important to parties of limited means who would not otherwise be able to afford the cost of litigation. The nation's civil rights laws authorize injured parties to

84. *See supra* notes 66-79 and accompanying text.
85. 86 F.R.D. 752 (E.D. Mich. 1980).
86. *Id.* at 756.
87. *Id.* at 757-58.
88. *Id.* at 759.
89. Federal law currently includes more than 100 fee shifting statutes. *See* 3 M.F. DERFNER & A. WOLF, COURT AWARDED ATTORNEY FEES §§ 29.01-45.07 (1983) for a compilation of federal fee shifting statutes.

seek redress through private litigation.[90] Private enforcement is a key method for assuring protection of the rights guaranteed by federal civil rights laws. Those rights are not meaningful to injured parties who do not have access to the courts.[91] Congress passed the Fees Act after finding that private attorneys were refusing to take certain cases because they could not be compensated adequately for their efforts.[92] Attorneys could not be compensated adequately because many victims of civil rights violations are too poor to pay counsel fees and because the relief they seek frequently does not provide sufficient money to pay for legal services.[93]

90. Federal civil rights laws generally authorize enforcement either by private litigation or by a combination of private and public litigation. As an example of the former approach, *see* 42 U.S.C. § 1983 (1982) which authorizes an injured party to sue to obtain redress against a person who has subjected the injured party to a deprivation of civil rights. As an example of the latter *see* 42 U.S.C. § 2000a-3(a) (1982) and 42 U.S.C. § 2000a-5(a) which respectively authorize aggrieved persons or the Attorney General of the United States to file suit to stop discrimination in places of public accommodation.

91. By authorizing private enforcement of civil rights laws, Congress avoided the necessity of setting up a large governmental enforcement mechanism. Congress relieved the federal government from much of the burden of enforcing federal civil rights policy and placed that burden on the shoulders of injured parties. Providing attorneys' fees to successful litigants assured that injured parties could fulfill this enforcement function, and a number of civil rights statutes provided for attorneys' fees. The purpose of the Fees Act was to provide attorneys' fees to successful litigants who file suit under civil rights statutes that did not include attorneys' fees awards clauses. The Senate Committee Report in support of the Fees Act makes this clear, as follows:

> The purpose and effect of S. 2278 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 which Congress has passed since 1866. S. 2278 follows the language of Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k) (1982) and section 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. (e) (1982). All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

S. REP. NO. 1011, 94th Cong., 2d Sess. 2 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5909-10.

92. The House Committee Report in support of Fees Act legislation reported, "The Committee also received evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so." H.R. REP. NO. 1558, 94th Cong., 2d Sess. 2 (1976).

93. An attorney may obtain his fee from the plaintiff, the recovery fund or the defendant. Civil rights suits frequently seek injunctive relief or relatively low damages awards and thus do not provide a sufficient fund to provide for fees. Congress recognized that many plaintiffs were too poor to pay for attorneys' fees, leaving the defendant as the only source of fees if civil rights cases are to be filed on behalf of civil rights victims. The Senate Committee Report on the Fees Act stated:

> 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, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. REP. NO. 1011, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5910.

The Fees Act solves this problem by providing that the prevailing party may, at the discretion of the court, obtain reasonable fees from the opposing side.[94] Although the Act speaks of judicial discretion, the legislative history and subsequent judicial interpretation confirm that in the absence of special circumstances rendering the award of fees unjust, a prevailing plaintiff should be able to recover fees.[95] The legislative history and subsequent cases also make clear that plaintiffs may prevail by obtaining a settlement rather than a judgment after trial.[96] By settling a civil rights case, plaintiff's counsel not only assures his client that she will obtain some redress, but also that she will almost certainly be considered the prevailing party and thus be eligible for an award of attorneys' fees.

Knowing that settlement of civil rights cases subjects them to liability for fees, defendants frequently seek to settle the fees issue along with the merits in order to establish their total liability at the time of settlement.[97] Unless joint negotiation of fees and merits is prohibited as unethical, it will likely prevail as a prominent feature in civil rights litigation.

III. SETTLEMENT OF COMMON FUND CASES AND CIVIL RIGHTS CASES

The decisions in common fund cases addressing the issue of settlement of attorneys' fees cannot be reconciled with civil rights cases that order bifurcated settlement negotiations. In common fund cases the courts require counsel to disclose all available information about fees to the ben-

94. *See supra* note 1.

95. Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, included a provision authorizing an award of attorneys' fees at the discretion of the court to a successful party. 42 U.S.C. § 2000a-3(b) (1982). In Newman v. Piggie Park Enters. Inc., 390 U.S. 400, 402 (1968), the Supreme Court held that a successful plaintiff "should ordinarily recover an attorney's fees unless special circumstances would render such an award unjust." The Senate Judiciary Committee Report on the Fees Act approved this standard for fees awards under the act. S. REP. NO. 1011, 94th Cong., 2d Sess. 4 (1976). The Supreme Court, citing this legislative history, applied the same standard to a Fees Act case in Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).

96. The Senate Judiciary Committee Report stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or order without formally obtaining relief." S. REP. NO. 1011, 94th Cong., 2d Sess. 5 (1976). The Supreme Court, citing this language, affirmed that a party may prevail by settlement and retain the right to fees. Maher v. Gagne, 448 U.S. 122, 129 (1980).

97. There are no statistics on the extent to which defendants seek joint negotiation of fees and merits in pursuing settlement. It is logical to assume that defendants often try to settle fees and merits jointly because an important factor inducing defendants to settle is that settlement reduces uncertainty and clarifies defendant's costs. As the Supreme Court said in White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 454 n.15 (1982). "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." One attempt to quantify the extent of joint negotiation is the oft cited estimate of the national staff counsel for the American Civil Liberties Union that defendants seek waiver of fees as a condition of settlement in more than half of all litigated civil rights cases. *Fee Waiver Requests Unethical: Bar Opinion*, 68 A.B.A.J. 23 (1982).

eficiaries prior to settlement. The trial judge must approve the settlement. The beneficiaries have an opportunity to dispute the fairness of the settlement including the provisions for fees prior to approval. The courts in these cases rely on disclosure of fees prior to settlement and the requirement of judicial approval to protect the interest of clients and class members from overreaching by their attorneys.[98] In civil rights cases mandating bifurcated settlement negotiations, the courts prohibit the parties from providing information about fees to clients and class members. The attorneys may not discuss or determine fees. Neither the parties, nor their attorneys, nor the courts have any information about fees at the time they assess the reasonableness of the settlement.[99] The cases that prohibit joint fees-merits negotiation in civil rights cases have not recognized the inconsistency between the prohibition and the full disclosure required in common fund cases. Two cases from the Third Circuit, *Prandini v. National Tea Company*[100] and *Shlensky v. Dorsey,*[101] exemplify the discrepancy.

Prandini was one of the earliest decisions to articulate a requirement that settlement negotiations in civil rights cases be bifurcated. *Prandini* was a sex discrimination in employment case.[102] The settlement provided for payment to the class of more than $99,000, and payment to plaintiffs' counsel of $50,000 in attorneys' fees.[103] The merits settlement figure was 90% of the amount sought by the plaintiffs in their complaint.[104] The trial judge approved the merits settlement but reduced the attorneys' fees award to $35,000.[105] One of the law firms representing the plaintiffs appealed from the proportionate reduction of its share of the fees.[106]

The court of appeals, in *Prandini,* first dealt with the district court's determination of the reasonableness of the fees settlement.[107] The appellate court then turned its attention to the propriety of joint fees-merits negotiation. The appellate judges expressed concern with what they referred to as the possibility of a "sweetheart contract" between defendant and plaintiffs' attorneys.[108] They feared that defendants would offer generous

98. *See supra* notes 57-88 and accompanying text.

99. *See infra* notes 102-11 and accompanying text.

100. 557 F.2d 1015 (3d Cir. 1977).

101. 574 F.2d 131 (3d Cir. 1978).

102. 557 F.2d at 1017. The statute at issue in *Prandini* was the attorneys' fee provision under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000b-5(k) (1982). That statute is identical in purpose and effect to the Fees Act. *See supra* note 1.

103. *Prandini,* 557 F.2d at 1017.

104. The 90% figure is reported in the note on *Prandini* found in 51 TEMPLE L.Q. 799, 809 n.75 (1978).

105. *Prandini,* 557 F.2d at 1017-18.

106. *Id.* at 1018. The National Tea Company, having agreed to the fees settlement at the trial level, neither contested the fee request at the district court nor participated in the appeal.

107. *Id.* at 1018-19. The appellate court remanded for reassessment of fees.

108. *Id.* at 1021.

settlement terms to the attorneys and the named plaintiffs in order to obtain a low overall settlement. The appellate court stated, "Reasoning that in cases of this nature a defendant is interested only in disposing of the total claim asserted against it, the [trial] court noted that the allocation between the class payment and the attorneys' fees is of little or no interest to the defense."[109]

In effect, the court feared that class members could be cheated out of a fair settlement by a defendant offering high attorneys' fees and a low merits settlement to plaintiff's attorney. So long as the defendant is satisfied with the overall amount of the settlement, the relative portion accruing to the benefit of the attorney or to the class does not concern the defendant. The defendant has no incentive to negotiate for a relatively high merits settlement and proportionately low settlement fee.

In order to protect the interests of beneficiaries of the settlement, the *Prandini* court proposed a bifurcated settlement procedure. The attorneys should not discuss attorneys' fees until they have settled the merits of the suit and obtained approval of the settlement from the court. The court of appeals in *Prandini* asserted that this bifurcated procedure would eliminate cases in which one fund of money is divided between the attorney and client.[110] The court also justified a bifurcated negotiation procedure on the ground that the procedure would preserve adversariness. The court reasoned that defendant would continue to have an economic interest in bargaining over fees after the merits settlement. According to the appellate court, separating fee disputes from damages also would reduce the conflict between the attorney and the client.[111]

Shortly after the Third Circuit decided *Prandini*, a different panel of judges from the Third Circuit decided another case involving joint settlement of fees and merits. *Shlensky v. Dorsey*[112] was a stockholders' derivative action consolidated from eight separate suits filed against Gulf Oil Corporation, numerous directors and officers of Gulf, and the corporation's former independent certified public accountant and auditor.[113] The action sought recovery of more than $18 million in corporate funds illegally contributed to various political campaigns. The money, much of which was laundered through a Bahamian subsidiary of Gulf, was distributed to "political individuals and entities in the United States and foreign countries."[114]

The parties settled the merits of the suit. In conjunction with the set-

109. *Id.* at 1020.
110. *Id.* at 1021.
111. *Id.*
112. 574 F.2d 131.
113. *Id.* at 135.
114. *Id.* at 135-36.

tlement, Gulf agreed not to oppose plaintiff's application to the court seeking attorneys' fees up to $600,000 and expenses up to $25,000.[115] Appellant, Project on Corporate Responsibility, a Gulf shareholder, opposed the settlement and appealed, following approval of the settlement by the district court over the Project's objection.[116] The appellant objected both to the merits settlement and to the attorney's fee award.[117] The court of appeals rejected appellant's contention that joint settlement of fees and merits was improper.[118]

The Third Circuit attempted to distinguish the facts in *Shlensky* from those in *Prandini*. The court described *Prandini* as a case in which the attorneys negotiated the allocation of a single recovery fund between the plaintiffs' attorneys and class members.[119] Defendants were not concerned with the allocation between counsel and class members; they were concerned only with the overall amount of the settlement. Plaintiffs' counsel, according to the court, had a conflict of interest with the class in negotiating the allocation of the recovery fund.[120]

The Third Circuit denied that the *Shlensky* case involved allocation of a single recovery fund.[121] The purpose of the suit was to recover funds for the treasury of Gulf Oil Corporation. The stockholders' aim in bringing suit was to restore funds to Gulf that the corporation's agents and directors had spent illegally. According to the court, Gulf had an interest in maximizing its recovery.[122] While the merits recovery would revert to the Gulf's treasury, the attorneys' fees would be paid to the attorneys for the stockholders who had filed suit. Thus, according to the court, this was not a single recovery fund case and did not give rise to a conflict of interest as did *Prandini*.[123]

Ironically, the appellants in *Shlensky* raised the very same issues that the Third Circuit was concerned about in *Prandini*, and rejected in *Shlensky*. *Shlensky* was filed because Gulf illegally had spent millions of dollars in corporate funds between 1960 and 1975. Plaintiffs sought return of the funds and attorneys' fees. Appellant shareholders appealed contending that plaintiffs' counsel did not obtain an adequate settlement of the merits and that plaintiffs' counsel received too much in attorneys' fees. The same appellate court that feared that the National Tea Company would bribe Mr. Prandini's attorneys to accept an inadequate settlement expressed no

115. *Id.* at 138-39.
116. *Id.* at 139.
117. *Id.*
118. *Id.* at 150.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*

concern that Gulf Oil Corporation would bribe Mr. Shlensky's attorneys to accept an inadequate settlement.[124]

In *Prandini* not one party objected to the settlement of either the merits or the fees. None of the class members complained.[125] The defendant did not participate in the appeal. The appellate court sympathized with the "unpleasant situation" the lower court experienced in considering the reasonableness of the attorneys' fees when none of the parties or class members objected to the fees.[126] Despite the lack of objection to the settlement and the apparent reasonableness of the merits settlement, the *Prandini* court was concerned that joint fees-merits settlement did not maintain the appearance of propriety.[127] The court preserved the "appearance of propriety" by instituting an inflexible rule barring joint fees-merits negotiations in civil rights cases.

In *Shlensky* one party did object to the merits settlement and two parties objected to the fees settlement.[128] The defendants were a corporation and its officers who had embarked on a fifteen year program of illegal and criminal corporate expenditures.[129] The defendants certainly had an incentive to avoid a public trial that would have exposed the details of their activities over the previous fifteen years. They might well have been willing to offer generous attorneys' fees in order to settle the suit quietly and cheaply. Yet the court saw no "appearance of impropriety" in joint fees-merits negotiations in that suit. It rejected the objections of appellants without even considering the likelihood that the settlement agreement was a "sweetheart contract."[130]

The decisions in *Shlensky* and *Prandini* inaccurately assess the inclination of defendants to bargain about attorneys' fees. They also demonstrate two points worth noting. First, one cannot predict whether a defendant will offer high attorneys' fees as an inducement to obtain a low merits settlement by looking at the type of lawsuit that plaintiff has filed. A defendant's settlement strategy will vary with the particular circumstances of each case and not because a case may be described as a

124. *Id.* at 150.

125. *Prandini*, 557 F.2d at 1021. Perhaps there was no objection because, as noted previously, the plaintiffs in *Prandini* obtained 90% of the amount they sought. *See supra* note 104.

126. *Id.* at 1020-21.

127. *Id.*

128. *Shlensky*, 574 F.2d at 135. The court in *Shlensky* considered the fact that the overwhelming majority of Gulf shareholders did not object to the settlement as a factor in determining the fairness of the merits settlement. *Id.* at 148. While lack of objection to the settlement created an unpleasant situation in *Prandini*, substantial lack of objection to the settlement constituted evidence of the fairness of the settlement in *Shlensky*.

129. *Shlensky*, 574 F.2d at 136.

130. The court in *Shlensky* does not use the "appearance of impropriety" as a standard to measure the propriety of joint fees-merits negotiation. Nor does the court mention the possibility of a "sweetheart contract" between the parties.

stockholders' derivative suit, a common fund suit, or a civil rights suit. Second, the decisions demonstrate a basic misapprehension about the nature of the conflict that arises in a joint fees-merits negotiation. The conflict in such a case is between the plaintiff and her attorney. The conflict arises because the attorney's interest in a fee may dilute his loyalty to his client. If the attorney believes that the fee offer is too low, he may advise his client to reject an otherwise adequate settlement offer; if the fee offer is high, he may urge the client to accept an otherwise inadequate offer.

In *Shlensky* and *Prandini,* the Third Circuit did not focus attention on the relationship between the plaintiff and her attorney. Rather, it looked at whether the defendant could be presumed to have an economic interest in keeping the attorneys' fees low.[131] But the incentive of the defendant to bargain over fees does not alter the conflict between the plaintiff's attorney and his client. The attorney's loyalty to his client is compromised whether or not the defendant is willing to be generous with fees or to bargain at length over them. The defendant's presumed settlement strategy ought not be viewed as the vehicle that protects the plaintiff against the disloyalty of her own attorney. If joint fees-merits negotiation did create an intolerable conflict of interest, then joint negotiation should be barred in all cases. In truth, joint negotiation need not create an intolerable conflict, and the court should look to other means to reduce any bias that does arise.

The contention that joint fees-merits negotiation creates a conflict of interest is exemplified by two diametrically opposed fact patterns that may be denominated as the "sweetheart contract" and the "fee waiver." *Prandini v. National Tea Company*[132] exemplifies the sweetheart contract problem. The concern is that plaintiff's attorney will subordinate his client's interest in the merits to his own interest in a fee. *Evans v. Jeff D.*[133] exemplifies the fee waiver case where the concern is that plaintiff's attorney must deny himself the fee that he is entitled to in order to fulfill his obligation to protect the interests of his client.

Fee waiver cases occur frequently.[134] Fee waivers are so common that two commentators have treated them as a separate class of Fees Act cases for purposes of analysis.[135] Justice Brennan, in his dissent in *Jeff D.*,

131. *Compare Prandini,* 557 F.2d at 1021 *to Shlensky,* 574 F.2d at 150.

132. 557 F.2d 1015 (3d Cir. 1977).

133. 106 S. Ct. 1531 (1986).

134. *See supra* note 97.

135. Comment, *Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal and Ethical Considerations,* 131 U. PA. L. REV. 793 (1983); Kraus, *Ethical and Legal Concerns in Compelling the Waiver of Attorney's Fees by Civil Rights Litigants in Exchange for Favorable Settlement of Cases Under the Civil Rights Attorney's Fees Awards Act of 1976,* 29 VILL. L. REV. 597 (1984).

argued that negotiating fee waivers violates the purposes of the Fees Act whereas negotiating the amount of fees jointly with the merits of a suit does not.[136] The majority decision in *Jeff D.* did not distinguish between the two fact patterns. Justice Stevens described fees as one item in the arsenal of remedies available to combat civil rights violations. Fees may be negotiated and waived just as any other remedy may.[137]

This writer contends that the ethical considerations governing attorney's fee negotiations are the same whether a case involves a fee waiver demand or a negotiation of fees giving rise to the possibility of a sweetheart contract between the defendant and plaintiff's attorney. In either instance the attorney's interest in his fee is different than his client's interest in the merits. At issue is whether this difference creates a conflict of interest that can be resolved only by barring the parties from jointly negotiating settlement of fees and merits.

IV. THE ATTORNEY'S INTEREST IN HIS FEE AND THE CLIENT'S INTEREST IN THE MERITS

A. Ethical Provisions Governing Conflicts of Interest Do Not Apply to Joint Fees-Merits Negotiations

Not every potential conflict between an attorney and client is deemed to create a conflict of interest. One could not construct a system in which attorneys and clients shared an identity of interest in their cases. The Model Code of Professional Responsibility (Model Code) describes those conflicts that require attention by counsel.[138] The Model Code's general rule on personal conflicts of interest states, "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be

136. 106 S. Ct. at 1551 (Brennan, J., dissenting). Justice Brennan argued that the Fees Act encourages attorneys to file civil rights cases by making it economically feasible for them to bring meritorious claims on behalf of impoverished clients. Permitting defendants to demand fee waivers as a condition of settlement discourages attorneys from representing clients in civil rights cases and is contrary to the purposes of the Fees Act. *Id.* at 1551-54. Permitting joint fees-merits negotiation, according to Justice Brennan's dissent, does not interfere with the purposes of the Fees Act because joint negotiation allows the parties to establish a reasonable fee and makes it easier for the parties to dispose of civil rights cases. *Id.* at 1557.

137. *Id.* at 1538-40. Attorneys' fees are, according to Justice Stevens, simply one more potential remedy for a civil rights violation. Fees may be waived or compromised as can any remedy. Under this view of fees, there need be no distinction between negotiations about the amount of fees or waiver of fees.

138. Each state is responsible for policing the conduct of the members of the bar within its jurisdiction. The American Bar Association adopted the Model Code in 1969, and it is the model for the ethical regulations in force in most states. In 1983, the A.B.A. adopted the Model Rules of Professional Conduct (Model Rules) to replace the Model Code. A number of states have enacted regulations based on the Model Rules. Many other states will be considering adopting versions of the Model Rules in the near future. Except as noted, the purpose and effect of the parallel provisions of the Model Rules and the Model Code are similar, and both are cited herein.

or reasonably may be affected by his own financial, business, property, or personal interests."[139]

Under this rule the attorney's financial interest must threaten to prejudice his loyalty to his client before there is a conflict of interest. The attorney is permitted to represent the client in spite of the conflict if the client consents after full disclosure. If a conflict of interest exists between an attorney and a person seeking representation, absent a waiver, the attorney is not permitted to represent the client. The rule makes no provision for limited representation or representation with special provisions to minimize the adverse impact of a conflict. It is an all or nothing rule. Either the attorney is free to represent the client fully or the client must look elsewhere to obtain counsel.

Another feature of the conflict of interest rule is that it deals with the relationship between a particular attorney and a particular client. The attorney must decline representation when his own financial interests may affect his loyalty to the client. Inherent in the rule is an assumption that if the particular attorney in question has a conflict, the conflict can be resolved by referring the client to another attorney.[140]

The Model Code contains other conflict of interest rules dealing with five commonly recurring conflicts: (1) when the attorney may be called as a witness,[141] (2) when the attorney has a proprietary interest in the cause of action or the subject matter of the suit,[142] (3) when the attorney's judgment may be affected by his representation of another client,[143] (4)

139. MODEL CODE, DR 5-101(A) (1980). MODEL RULE 1.7(b) (1983), the counterpart to DR 5-101(A) provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation.

Id. Although phrased differently, both the Model Code and the Model Rule deal with situations in which the personal interests of an attorney differ from the interests of his client. Both restrict the attorney from representing the client only when the attorney's personal interests may adversely affect his professional conduct.

140. If the rule assumed that a conflict could be present no matter which attorney represented the client, then it would have to permit representation and require procedures to minimize the conflict. By prohibiting representation, absent a waiver by the client, the rule must assume that the client can obtain conflict-free counsel elsewhere. Therefore, any conflicts must be peculiar to the particular attorney and client.

141. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) (1980). MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1983). Both the Model Code and Model Rules contain a general prohibition against any attorney representing a client when the attorney will be called as a witness and both contain limited exceptions.

142. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(A) (1980). MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(j) (1983). Both the Model Code and Model Rules prohibit an attorney from acquiring a proprietary interest in the suit and both except from the prohibition contingent fee agreements and attorney's liens that may be placed on the proceeds of the litigation to secure the lawyer's fees. The language of the two provisions are almost identical.

143. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980). MODEL RULES OF PRO-

when the attorney is settling the claims of multiple clients,[144] or (5) when the attorney is being paid by someone other than the client.[145] These rules have the same features as the general conflict of interest rule. In each case the conflict arises out of a fact that is peculiar to the particular attorney whose representation of the client is at issue. None of the rules provide for limited representation or procedures to minimize the conflict. The only option available to the client who does not wish to waive the conflict is to obtain new counsel.[146] In certain cases, the conflict is not waivable and the client must obtain another attorney.[147]

The conflict ascribed to joint fees-merits negotiation bears little resemblance to the conflicts listed in the Model Code. The joint negotiation conflict inheres in the attorney-client relationship; it does not arise from circumstances that are peculiar to the particular attorney-client relationship. The client will not escape the joint negotiation conflict by obtaining new counsel. The new attorney will have the right to seek fees from the defendant and will have the same potential conflict as did the prior attorney. The solutions set forth in the Model Code for resolving conflicts of interest do not help parties subject to a joint negotiation conflict. The client cannot resolve the conflict by obtaining new counsel. Waiver of the conflict is not a realistic solution because the client's only alternative to waiver is to forego representation. The client is forced either to waive the conflict or to give up any realistic opportunity to secure redress.

B. The Bias That Arises In Joint Fees-Merits Negotiation Is Similar To The Biases That Arise In Other Attorney-Client Fee Arrangements

Although the bias arising from joint fees-merits negotiation in civil rights cases is not similar to those conflicts of interest described in the Model Code, the joint negotiation bias is comparable to those biases that

FESSIONAL CONDUCT Rules 1.7 and 2.2 (1983). Both rules generally prohibit an attorney from representing multiple clients whose interests conflict. Both rules create exceptions when the attorney can adequately represent all parties and the parties consent.

144. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-106 (1980). MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) (1983). Both provisions prohibit an attorney from making an aggregate settlement of claims on behalf of multiple clients unless each client consents after full disclosure.

145. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(A) and (B) (1980). MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (1983). Both the code and the rules prohibit an attorney from representing a client and obtaining a fee from a third party, unless the client consents. If the client consents, the attorney is prohibited from permitting the third party to interfere with the attorney-client relationship.

146. Under the following provisions, the client may waive the conflict: MODEL CODE DR 5-101(A) (personal conflicts). MODEL RULES 1.7(a)(2) and 1.7(b)(2) (personal conflicts or conflicts among different clients when the representation will not be adversely affected). MODEL CODE DR 5-105 (conflicts among different clients). MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-106 and MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) (aggregation of settlements). MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107 (A) and DR 5-107(B) and MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (payment from someone other than the client).

147. Under these provisions, the client may not waive the conflict of interest: MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) and MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7

arise out of other attorney-client fee arrangements.[148] No fee payment method is free of bias and each carries the risk of diluting the attorney's loyalty to the client. Under each method the attorney has a different interest in fees than the client has in the merits.

A contingent fee contract[149] for legal services in personal injury litigation creates a clear conflict between the interests of the client and the lawyer. The attorney has an economic interest in a percentage of the recovery. Whether an action is economically attractive to the attorney will depend on whether the increase in the attorney's portion of the recovery will be greater than the administrative costs of the action to be taken. Because the client does not pay administrative costs in a contingent fee case, her economic interest in the recovery is based upon whether an action will increase her portion of the recovery. The attorney and client, thus, have different interests in pursuing a contingent fee case depending on the likely return on any course of action taken in the case and the cost of the course of action.[150]

The attorney and client in a contingent fee case also have different interests in accepting a settlement offer based on their respective levels of income. A high income attorney is more apt to prefer waiting for a potentially higher offer or to accept the risks of trial. A low income attorney is more apt to prefer an immediate settlement. The client's income level has a similar effect on her judgment. It would be fortuitous for an attorney and client to have the same economic perspective toward risk.

Despite the potential conflicts, contingent fee arrangements are the

(the attorney is a witness); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(A) and MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(j) (acquiring a property interest in the litigation); MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7(a)(1) and 1.7(b)(1) (personal conflicts or conflicts among different clients when the representation is likely to be adversely affected).

148. Attorneys enter into a variety of fee arrangements with their clients including contingent fee agreements, hourly fee for service arrangements and lump sum agreements. In what may be more accurately described as a fee nonarrangement, an attorney may agree to perform a service for a client without specifying a fee. In such cases, the attorney may assess a reasonable fee based on an implied agreement that the client will pay the reasonable value of the attorney's services.

149. Under a contingent fee agreement, the attorney will obtain a fee only if the client recovers damages. The attorney's fee will be a percentage of the damages awarded to the client. For a discussion of contingent fee agreements see *generally*, F.B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES (1964).

150. M. Schwartz & D. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125 (1970); D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE 95-116 (1974). Schwartz & Mitchell and Rosenthal both analyze personal injury cases to assess how the interests of the client and attorney vary. Both agree that the attorney's economic interest in settlement substantially differs from the interest of the client. For example, Mr. Rosenthal analyzed the economic interests of attorneys and clients in medium-value claims. He concluded, "Pressures, especially economic ones, often work against the lawyer's providing disinterested service to his client in making a personal injury claim. In many cases the lawyer's financial interest lies in an early discounted settlement while the client's interest lies in waiting out the insurer." Rosenthal at 115. Schwartz and Mitchell similarly established a disparity of interest between attorneys and clients in contingent fee cases.

primary method of payment by plaintiffs seeking recovery in the United States.[151] Neither the courts nor the Code of Professional Responsibility requires attorneys to disclose the existence of this conflict to clients, to seek a waiver of the conflict from the client or to take any other action to reduce the potential adverse impact on the client that may flow from the conflict.

In many non-tort cases, the attorney sets the fee after completing his services.[152] When an attorney performs services for a client and the client receives the benefits of the services, the law will bind the client to pay the reasonable value of the services.[153] A considerable body of law exists defining the circumstances in which an implied agreement to pay for legal services arises.[154] It is difficult to imagine a situation in which the interests of the attorney and client are more in conflict than that which arises under an implied agreement. At the end of the representation the attorney has virtually unfettered discretion to charge a fee for the services rendered.

The conflict in this situation is even greater than that which arises in joint negotiation cases because there are fewer constraints restricting the attorney in the former case. In a joint fees-merits settlement the client retains the authority to reject the settlement if the net proceeds she will receive are inadequate. The client knows what the net proceeds of the settlement will be prior to deciding whether to accept the offer because the merits settlement terms are separate from the attorney's fee. In the case of an implied contract the attorney may decide what fee to charge and collect after settlement. The client only knows the gross settlement offer. She will not know the net amount that she will retain until she accepts the offer and subsequently receives the attorney's bill.

If the implied contract does not give rise to an ethical conflict of interest between attorney and client then it is difficult to imagine why joint fees-merits negotiation is deemed to create an ethical dilemma.[155] Similarly, if the defendant, in the course of a settlement negotiation, offers a fixed

151. MacKinnon, *supra* note 149, at 4.

152. *Id.* at 20.

153. *See* generally E. WOOD, FEE CONTRACTS OF LAWYERS 47-66, Chapter V, THE IMPLIED FEE CONTRACT FOR LEGAL SERVICES (1936). The author states, "A promise to pay a fee to a lawyer for legal services may be implied, under certain circumstances, in every jurisdiction in the United States." *Id.* at 47. Where a lawyer's fee is not specified, he may seek payment on a quantum meruit basis. H. DRINKER, LEGAL ETHICS 170-71 (1953).

The Model Code of Professional Responsibility states that it is desirable for an attorney to reach a clear agreement with his client on fees and that it is beneficial to reduce the agreement to writing, but these suggestions are not mandatory. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19. The Model Rules of Professional Conduct requires the attorney to communicate the basis or rate of his fee to a new client, preferably in writing. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(b).

154. For cases detailing the circumstances that raise an implied promise by a client to pay the attorney the reasonable value of his services *see*, Annot., 78 A.L.R.2d 318 (1961).

155. The author's research has uncovered neither a court decision nor a bar disciplinary committee or grievance committee opinion intimating that there is an ethical conflict in this situation.

to imagine why a joint fees-merits settlement creates an ethical dilemma and an implied attorney's fee contract settlement does not.

Other payment schemes also create conflicts. An attorney who represents a client on an hourly fee for service basis receives more money by maximizing the amount of time spent on litigation.[156] The attorney's bias in such a case would be to spend as much time as possible on pre-trial matters before negotiating and recommending settlement, regardless of the potential advantage to the client from the additional time invested by her attorney. An attorney representing a client for a lump sum fee has an inducement to handle the case as quickly and routinely as possible.[157]

One other attorney fee scheme is noteworthy because it is strikingly similar to the Fees Act procedure authorizing shifting the obligation to pay attorneys' fees from the client to the opposing party. Attorneys representing non-working spouses in divorce and dissolution actions frequently obtain their fees from the other spouse.[158] Fee payment is a proper matter for negotiation and often is included in the separation agreement entered into by the parties.[159] The justification for fee shifting in divorce cases is quite similar to the rationale expressed by Congress to justify fee shifting in civil rights cases. It would be unfair to deny a poor spouse the means to prosecute or defend a divorce suit merely because the spouse could not afford to pay an attorney.[160] Joint fees-merits negotiation is a commonly accepted practice in divorce cases, and research discloses no authority suggesting that the practice raises an ethical obstacle for attor- settlement and allows the attorney to determine the allocation between himself and his client, then the two situations are identical. It is difficult

156. Under an hourly fee for service agreement, the client pays a set hourly rate for the number of hours the attorney devotes to her legal problem.

157. The hourly fee for service agreement and the lump sum payment agreement create biases that affect the amount of time an attorney will devote to a given case. For any given legal problem, a certain number of tasks must be performed to provide competent service. Beyond the minimum, there will be a range of activities that the attorney can do that may be beneficial to the client. The fee payment method affects the likelihood that an attorney will invest additional time in a case.

For a study comparing attorney activity under contingent fee agreements and fee for service arrangements, *see* H. Kritzer, W. Felstiner, A. Sarat and D. Trubek, *The Impact of Fee Arrangement on Lawyer Effort*, 19 LAW AND SOCIETY REVIEW 251 (1985). The authors conclude that for cases involving less than $6,000, contingent fee lawyers devote less time than hourly fee for service attorneys. This does not hold true for larger cases where the authors find that if there is any effect it may be in the opposite direction. *See* also E. Johnson, *Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 L. AND SOC'Y REV. 567 (1980-81).

158. *See generally* Annot. 59 A.L.R.3d 152 (1974).

159. Kirk v. Kirk, 263 F.2d 271 (D.C. Cir. 1959) (Husband's agreement to pay wife's attorney's fees incurred in connection with separation agreement, justifies awarding fees on wife's suit to recover arrearages). For a discussion of attorneys' fees provisions in separation agreements *see* A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS 22-23 (1978).

160. Alldredge v. Alldredge, 229 P.2d 681 (Utah 1951); Herrick v. Herrick, 54 Nev. 323, 15 P.2d 681 (1932); Zerega v. Zerega, 200 S.W. 700 (Mo. 1918). *Compare* Kiger v. Kiger, 29 Utah 2d 167, 506 P.2d 441 (1973) (reversing *Alldredge* on procedure for establishing amount of fees, while affirming that spouse has right to obtain fees).

neys, although the identical practice is under attack in civil rights litigation.[161]

C. *The Application of Ethical Provisions Governing Attorneys' Fees To Joint Fees-Merits Negotiation*

The ethical problem arising out of joint fees-merits negotiation is a fees problem, not a conflict of interest problem. Any fee system providing payment for attorneys who represent clients introduces a bias into the attorney-client relationship. The attorney's interest in the fee will not be congruent with the client's interest in the merits of a legal dispute. Ethical provisions governing conflicts of interest cannot protect clients against the biases that arise due to the nature of the fee payment scheme. Those provisions cover the conflicts that are peculiar to the relationship between a particular client and attorney and that can be resolved by having the client obtain new counsel.[162] The ethical rules that deal with attorneys' fees provide better guidance on the ethical problems that arise in civil rights cases when the attorneys negotiate settlement of fees and merits jointly.

The Model Code includes a number of provisions about the fees that an attorney may charge for his services. The code prohibits an attorney from contracting for, charging or collecting an excessive fee and establishes factors to be considered in determining an adequate fee.[163] The Model Code advises the attorney to avoid controversies over fees and to avoid suing for fees except in egregious cases.[164] The Model Code also advises the attorney to enter into a clear agreement with clients about

161. *See* H. Drinker, *supra* note 153, at 129-30. (It is not considered unethical or apparently as indicating "collusion" for the wife's lawyer to be paid by the husband.)

162. *See supra* notes 138-47 and accompanying text.

163. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(A) (1980). MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1983), provides than an attorney's fee shall be reasonable and lists the same factors that are included in the Model Code for determining what is a reasonable fee. Those factors are:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
(3) The fee customarily charged in the locality for similar legal services.
(4) The amount involved and the results obtained.
(5) The time limitations imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent.

164. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-23 (1980). The Model Rules do not contain an analogous provision. The comments advise attorneys to comply with any procedure established by the bar for resolution of fee disputes such as arbitration or mediation procedures. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 comment [5] (1983).

fees and to reduce the understanding to writing.[165] The general theme of these rules is that fees should not be excessive, and that the client should be made aware of the amount of, or basis for determining, fees when the attorney agrees to represent her. There is no bias-free attorney fee payment system. Any payment system dilutes the attorney's loyalty to his client. The client is protected against overreaching by her attorney by having information about the fees that will be charged and by the general ethical proscription against charging excessive fees.

While the ethical provisions on fees contained in the Model Code and Model Rules are more appropriate than conflict of interest rules for dealing with the ethics of joint fees-merits negotiation, the provisions are less than ideal. They may be criticized on two grounds. First, the rules governing excessive fees are imprecise and difficult to enforce.[166] Second, the rules governing written fee agreements are not mandatory.[167] If the rules on fees should be strengthened, it is because they do not adequately protect the interests of clients under any of the methods of payment utilized by attorneys. All clients, not just clients in civil rights cases, should be better protected. In the absence of any modification of the ethical rules on fees, courts handling civil rights cases can take some modest steps that will increase the protection of civil rights clients consistently with the purpose of the rules.

The first criticism of the ethical provisions on fees is that they are imprecise. Courts can and have taken steps to increase the precision with which one can determine fair fees in civil rights cases. The Model Code lists eight factors for consideration in determining whether a fee is reasonable.[168] The Code does not state how these factors are to be weighted or whether there are priorities among them. No guidance is offered on how the factors are to be used. An early court of appeals decision under the Fees Act took a similar approach in determining what fees are reasonable under the Fees Act. In *Johnson v. Georgia Highway Express*,[169]

165. MODEL CODE OF PROFESSIONAL RESPONSIBLITY EC 2-19 (1980). The Model Rules require the attorney to inform the client about fees unless the attorney has regularly represented the client, advise the attorney to provide the fee information in writing and mandate that any contingent fee agreement be written. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.5(b) and 1.5(c) (1983).

166. *See* R. ARONSON, ATTORNEY CLIENT FEE ARRANGEMENTS: REGULATION AND REVIEW 15-18 (1980) for a discussion of the difficulties in enforcing regulations on excessive fees and why virtually no cases may be found interpreting Model Code DR 2-106.

167. The provision on written fee agreements in the Model Code is an ethical consideration contained in EC 2-19. Ethical considerations are aspirational in character as distinguished from disciplinary rules which are mandatory. *See* PRELIMINARY STATEMENT TO THE MODEL CODE OF PROFESSIONAL RESPONSIBILITY. The Model Rules provide merely that it is preferable that the fee terms be written. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(b).

168. *See supra* note 163.

169. 488 F.2d 714 (5th Cir. 1974).

the Fifth Circuit Court of Appeals established twelve factors that trial courts should consider in determining appropriate fees in civil rights cases without stating how these factors should be weighed.[170]

The United States Supreme Court, in two Fees Act cases, has clarified and simplified the method for determining appropriate fees. In *Hensley v. Eckerhart*,[171] the Court recognized that the starting point for determining fees should be establishing a reasonable hourly rate and the reasonable number of hours spent on the case by counsel.[172] These figures, multiplied together, provide a lodestar figure that will generally constitute a fair fee. That figure may be adjusted in cases of "exceptional success."[173] In *Blum v. Stenson*,[174] the Supreme Court emphasized that in most cases the lodestar figure will determine the fee. Courts are to adjust the lodestar figure only in exceptional cases.[175]

Except in unusual cases, the *Blum* and *Hensley* decisions greatly simplify the method for establishing fair fees in civil rights cases. By simplifying the procedure for establishing fees and by basing fees on readily available information—hours spent on a case and hourly rates—the Supreme Court has reduced the potential conflict between attorney and client regarding proper fees.

The second weakness with the fee provisions under the Model Code and Rules is that neither clearly requires written fee agreements.[176] Because fees are likely to be the subject of discussion between parties in the course of the litigation, it is imperative that the plaintiff and her attorney prepare a written document that clearly sets forth the rate or basis for establishing a fee and that states whether the client will be responsible for a fee if the attorney cannot obtain a fee award from the defendant. Courts should require all attorneys handling civil rights cases

170. The twelve factors listed in *Johnson* include:
1. The time and labor required;
2. The novelty and difficulty of the questions;
3. The skill requisite to perform the legal service properly;
4. The preclusion of other employment by the attorney due to acceptance of the case;
5. The customary fee;
6. Whether the fee is fixed or contingent;
7. Time limitations imposed by the client or the circumstances;
8. The amount involved and the results obtained;
9. The experience, reputation, and ability of the attorneys;
10. The "undesirability" of the case;
11. The nature and length of the professional relationship with the client;
12. Awards in similar cases.

Johnson, 488 F.2d at 717-19.

171. 461 U.S. 424 (1983).

172. *Id.* at 433.

173. *Id.* at 435.

174. 465 U.S. 886 (1984).

175. *Id.* at 897.

176. *See supra* note 167.

to enter into written fee agreements with their clients in conformity with the general purpose of the Model Code and the specific need for clear information about the attorney's basis for establishing his fee in civil rights actions.

V. BIFURCATED SETTLEMENT VS. JOINT FEES-MERITS NEGOTIATION

A. Settlement and the Sweetheart Contract

Defining the ethical problem in joint fees-merits negotiation as a "fees" problem rather than a "conflict of interest" problem does not resolve the issue of the propriety of joint fees-merits negotiation in civil rights cases. One could argue, as did the appellate court in *Prandini*, that a bifurcated negotiation rule is necessary to prevent plaintiff's counsel from being in a position to extract excessive fees.[177] Although the rules in common fund cases take the opposite approach—that fees and merits must both be considered prior to settlement[178]—differences exist between civil rights cases and common fund cases.

The parties in a common fund case are concerned with sums of money. They measure the amount of money potentially available to the injured parties under the substantive law giving rise to the suit. Plaintiff's attorney may seek a portion of the fund for his fee. The defendant is not obligated to pay an additional sum as counsel fees beyond the amount determined to be due plaintiffs by virtue of their rights to a portion of the common fund.

Fee shifting under the Fees Act differs significantly from fee allocation under common fund cases. The Fees Act establishes attorneys' fees as a separate compensable item independent of the recovery obtained by plaintiffs. Under the Fees Act, attorneys' fees are proper in any case in which the plaintiff has prevailed whether or not the relief obtained by the plaintiff includes an award of damages.[179] The Fees Act provides that the amount of attorneys' fees awarded to counsel for the prevailing party should be "reasonable."[180] The fee is not limited to a portion of the sum awarded to the plaintiffs.[181] Part of the rationale for enacting the Fees Act was that

177. 557 F.2d at 1020-21.

178. *See supra* notes 57-88 and accompanying text.

179. The Senate Committee Report on the Fees Act makes clear that fees should be determined by the same standards that apply in other complicated cases and should not be reduced because civil rights cases may not be pecuniary. *See* S. REP. NO. 1011, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5913.

180. *See supra* note 1.

181. Attorneys' fees in civil rights damages cases are not deducted from the merits award. Nor are attorneys' fees limited by the amount of the damages award. In City of Riverside v. Rivera, 106 S. Ct. 2686 (1986), the United States Supreme Court held that a successful plaintiff in a civil rights damages action could obtain an award of attorneys' fees in excess of the amount of damages awarded on the merits.

civil rights cases do not generate enough revenue to attract private attorneys.[182] In order to assure that attorneys' fees in civil rights suits would be adequate to attract competent counsel, Congress was compelled to make certain that the method for determining the fee would not be dependent on the amount of money recovered in the suit.

The amount of attorneys' fees in a civil rights case is not entirely dependent on the amount of relief provided to the plaintiff. At issue is whether that fact supports a bifurcated settlement rule. If the fees are not tied to the merits, then presumably the attorney has leeway to negotiate a better deal for himself at the expense of his client. That justification for bifurcated settlement cannot withstand critical analysis. Under a bifurcated settlement neither the plaintiff, nor the defendant, nor their attorneys know what plaintiff's attorneys' fees will be at the time they settle the merits. The absence of information about attorneys' fees is not likely to improve the plaintiff's bargaining position on the merits. It is more likely that the absence of information about fees will reduce the settlement package that defendant is willing to offer to the plaintiff.

Plaintiff's dilemma in settling a suit under a bifurcated negotiation is most readily apparent in a lawsuit for damages. Prior to settlement defendant determines how much he is willing to spend to forego the uncertainties of trial. Among those uncertainties will be the likelihood that defendant will have to pay attorneys' fees if plaintiff prevails on the merits and the likely amount of fees that will be awarded. If attorneys' fees cannot be discussed prior to settlement of the merits, defendant will be wise to set aside a generous amount to cover fees. The total settlement pot will be reduced by that amount. After the parties negotiate settlement of the merits, the plaintiff has the choice of accepting or rejecting the offer without having any information about potential attorneys' fees. If plaintiff accepts the offer, the amount set aside for fees becomes the subject of a second round of negotiation. In that round either plaintiff's attorney will get a generous fee or the defendant will save some money. The one party who will never benefit from the amount set aside for fees is the plaintiff.

The bifurcated negotiation process induces defendants to set aside the maximum foreseeable attorney fee request, thereby directly reducing the money available for the plaintiff. Plaintiff's attorneys may applaud an ethical mandate that induces defendants to retain a relatively large sum of money to cover attorneys' fees. It does not follow, however, that such a mandate is an ethical necessity. It makes little sense to require a bifurcated settlement procedure that reduces the potential merits settlement and increases the potential attorney's fee settlement in order to protect

182. *See supra* notes 91-93 and accompanying text.

the plaintiff from the threat that her attorney will negotiate a low merits settlement in order to obtain a high attorney's fee.

When assessing the propriety of joint or bifurcated fees-merits settlement negotiations, the central question should be whether the parties who must assess the settlement are in a better position to do so with or without information about attorneys' fees. Should the judge, the plaintiff, and the class members know how much money plaintiff's attorney expects to receive upon settlement when they consider the propriety of the merits settlement? Unquestionably they are in a better position to analyze the adequacy of the settlement if they have information about attorneys' fees. This is true whether the fees are linked to the merits settlement as they are in common fund cases or are independently derived figures as they are in Fees Act cases.[183]

A bifurcated settlement negotiation rule would engender other problems as well. It is likely that fewer cases would be settled under a bifurcated negotiation procedure. Some defendants will refuse to settle without knowing what their full settlement cost will be.[184] Furthermore, in a bifurcated procedure the judge is less able to restructure a settlement for the benefit of the plaintiff class than he would be in a joint settlement procedure.

183. In Cantor v. Detroit Edison Co., 86 F.R.D. 752 (E.D. Mich. 1980), an antitrust action, the court discussed the potential conflict of interest between plaintiff's attorneys and the plaintiff class in a joint fees-merits settlement. The decision concluded that full disclosure of fees and careful judicial oversight are the means to meet potential conflict problems. In his opinion, Judge Feikens stated:

> I am satisfied that in this case any possible conflict of interest problem was met by a full disclosure in the notice of settlement that went to members of the class as to the amount of fees being claimed by petitioners. In addition proceedings on the attorneys' fees were held only after the settlement was entered. As to the matter of the public perception of such attorney fee award, the court best handles this by a careful analysis of the fee petition, the utilization of the adversary process, and extensive hearing, and a detailed investigation followed by an opinion containing specific findings and conclusions.

Id. at 759.

184. A common observation and criticism of bifurcated negotiation is that it discourages settlement. In El Club Del Barrio v. United Community Corp., 735 F.2d 98 (3d Cir. 1984), a panel of judges in the Third Circuit criticized the prior Third Circuit decision in *Prandini*, 557 F.2d 1015 for this reason. The panel noted:

> It is understandable that many defendants will want to settle the entire case, not just part of it, and therefore will be unwilling to settle the underlying claim without also resolving counsel fees, which sometimes exceed plaintiff's recovery.

Id. at 101, n.3.

A task force report on court awarded attorneys' fees, issued by a panel appointed by the chief judge of the Third Circuit, concluded that bifurcated negotiations inhibit settlement. One member of the panel dissented from this view. Report of the Third Circuit Task Force, *supra* note 7 at 41 n.101. Justice Stevens, in Evans v. Jeff D., 106 S. Ct. 1531, justifies joint negotiation, in part, because a bifurcated procedure reduces the likelihood of settlement. *Id.* at 1541, n.23. The dissenters do not dispute this observation. They would resolve the problem by permitting joint fees-merits negotiation but prohibiting fee waiver demands. *Id.* at 1557.

Under a bifurcated settlement procedure, the court assesses attorneys' fees after settlement of the merits. If the judge determines that the fees are excessive, he can reduce the fees, to the advantage of the defendant, but he cannot take any action at that point that will accrue to the benefit of the class members. In a joint settlement procedure, the judge is in a position to promote a modification of the settlement that will reduce fees and increase the remedial portion of the settlement. Joint settlement negotiation will also eliminate the potential for evasion that exists under a bifurcated settlement rule. Typically, counsel for parties in litigation negotiate settlements privately. If they discuss fees or signal their position on fees during the course of negotiation, the court, the class members and other interested parties are not likely to discover the decisions reached in those discussions. Many attorneys have expressed the opinion that there is widespread violation of bifurcated negotiation rules in those jurisdictions that profess to follow such rules.[185] In the absence of strong evidence supporting the need for a bifurcated settlement rule, the unenforceability of the rule is a good argument against its adoption.

B. Settlement and the Fee Waiver Demand

The above arguments essentially respond to the sweetheart contract pole of the joint negotiation dilemma, which contends that defendants will bribe attorneys into accepting cheap settlements with high fees offers. Declaration of the proposed fees and merits prior to settlement better protects the interests of the parties than does the prohibition against declaration of proposed fees that is mandated by bifurcated settlement procedures. The question remains whether an attorney can protect himself from a defendant who offers a settlement that satisfies the plaintiff, but also calls for the attorney to waive any claim for fees?

An attorney faced with a settlement offer conditioned upon waiver of attorneys' fees is in a difficult situation. Under the Model Code, he is obligated to communicate the offer to his client and to accept the offer if his client so chooses.[186] By accepting the offer, he will deny himself

185. *See El Club Del Barrio*, 735 F.2d at 101, n.3 (*Prandini* bifurcated settlement rule may be "more honored in the breach"); A. MILLER, ATTORNEYS' FEES IN CLASS ACTIONS 222 n.39 (1980) (Some attorneys disapprove of *Prandini* solely because it cannot be enforced); Report of the Third Circuit Task Force, *supra* note 7 at 41. ("It is suspected that fee discussions do take place and that agreements on fees are withheld from the court until after settlement is approved").

186. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980):

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

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983):

> A lawyer shall abide by a client's decisions concerning the objectives of rep-

the fees that he deserves. The defendant, by shrewd tactical maneuvering, can evade the economic burden placed on him by the Fees Act. The plaintiff's attorney faces the choice of violating his ethical obligation to his client or giving up his right to receive adequate compensation for his services.

There is another adverse consequence of waiver of fees in settled civil rights cases. Congress passed the Fees Act to assure that the victims of civil rights violations would not be denied access to the courts because of their poverty or the small monetary value of their claim.[187] The Fees Act induces attorneys to take civil rights cases that they could not afford to handle on a private fee-for-service basis. If defendants can nullify the Fees Act by demanding waivers of fees in settled cases, then the victims of civil rights violations may, once again, find themselves unable to obtain counsel to represent them.[188] The very purpose of the Fees Act may be subverted by permitting defendants to couple merit offers with fee waiver demands.

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

The source of the contention that an attorney is bound to abide by the client's decision on settlement is an ethical consideration in the Model Code.[189] Unlike disciplinary rules, ethical considerations are aspirational, not binding.[190] The corresponding Model Rule is both binding and more direct.[191] In either event, these ethical precepts do not authorize a client who is dissatisfied with the net proceeds obtainable under a settlement offer to require the attorney to enhance the net proceeds by contributing

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> resentation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

187. *See supra* notes 91-93 and accompanying text.
188. *See* Evans v. Jeff D., 106 S. Ct. at 1551-54 (Brennan, J., dissenting).
189. *See supra* note 186.
190. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement, 1 (1980).
191. *See supra*, note 186.

a portion of his fee. The regulations do nothing more than prohibit the attorney from interfering with the client's decision about whether to accept the net proceeds obtainable under the proposed settlement.[192]

The same result obtains when the defendant offers a settlement coupled with a demand that the attorney waive fees. The attorney is not bound to abide by his client's decision to accept such an offer. There is no more reason to require the plaintiff's attorney to waive his right to a fee upon demand of the defendant than upon demand of his own client.[193] The results under any other conclusion would be anomalous. The defendant would have a superior right to require a breach of the fee agreement between the plaintiff and her attorney than would the plaintiff. The defendant would have both the right and an economic incentive to use attorneys' fees as a bargaining chip to balance against the other issues in obtaining a satisfactory settlement. In damages cases it is likely that the fee waiver would be ineffective if the plaintiff's attorney were bound to accept his client's decision that he waive attorneys' fees under a settlement offer. Although the attorney would have waived his right to obtain a fee from the defendant, he would retain a valid fee agreement with his client. Under that agreement, the attorney would have the right to impose a lien on the settlement. Attorney liens are permissible under the Model Code.[194] The attorney could collect his fees from the proceeds of the judgment and the client would be in no better position than she would have been

192. To illustrate this point, consider three cases. In Case One, the attorney agrees to represent the plaintiff for $3,000. Suit is filed and defendant offers $10,000 in settlement, a settlement that would net $7,000 for plaintiff. The plaintiff is dissatisfied with this offer, demands $8,000 for herself and asks the attorney to reduce his fee to $2,000. In Case Two, the plaintiff has a contingent fee agreement with counsel who will receive 30% of any damages obtained from defendant. Defendant offers a settlement of $10,000. Plaintiff wants $8,000 in damages and asks the attorney to reduce his fee to 20% of the settlement offer. In Case Three, the plaintiff's attorney agrees to obtain fees from defendant under a fee-shifting statute at the rate of $100 per hour. After the attorney has put 30 hours of work into the case, defendant offers to settle for $7,000 in damages and $3,000 in attorneys' fees. Plaintiff wants $8,000 in settlement and asks counsel to waive $1,000 in attorneys' fees. Plaintiff's attorney is not obliged to accept the client's request for a reduced fee in any of the above cases. Plaintiff is not merely accepting or rejecting the settlement offer. She is also seeking to modify the fee agreement she previously entered into with the attorney. The plaintiff's authority to accept or reject the settlement does not include the authority to mandate modification of a proper fee agreement.

193. Of course, the attorney should convey the offer to the plaintiff. The plaintiff may agree to accept the $10,000 settlement and pay the attorney's fee out of the proceeds. The attorney has no right to complain about the form of the settlement so long as his right to a fee is protected.

194. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(A) (1980) and MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(j) are, except for minor grammatical changes, identical. Model Rule 1.8(j) states:

> A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
>
> (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
>
> (2) contract with a client for a reasonable contingent fee in a civil case.

had her attorney not been bound to accept the client's settlement decision. In fact, the client would be in a worse position, because she would have lost her right to reject the offer and force the defendant to choose either to increase his offer or to go to trial. Permitting the attorney to insist upon his right to attorneys' fees in these circumstances does not reduce the plaintiff's net proceeds from settlement. It assures that the plaintiff will know what her net proceeds will be when she decides whether to accept or reject the settlement offer.

C. Settlement and the Attorney's Interest in the Cause of Action

Has the plaintiff's attorney, by insisting on his right to a fee under the Fees Act, violated the ethical prohibition against obtaining a proprietary interest in the cause of action?[195] In essence, this argument challenges the existence of fee-shifting statutes rather than joint fees-merits negotiations. Every statute that authorizes the plaintiff's attorney to collect a fee from the defendant if litigation is concluded successfully, gives the attorney an interest in the cause of action. Neither bifurcated settlement negotiations nor joint negotiations eliminates counsel's interest in the litigation. The purpose of the prohibition against an attorney obtaining a proprietary interest in the cause of action is not to prevent an attorney from obtaining his fee from the defendant's pocket if litigation is successful. This point is made clear by two specific exceptions to the prohibition, contingent fee agreements and attorney judgment liens.[196] These devices assure that the attorney will be able to collect his fee from the proceeds of a successful lawsuit. The attorney's right to a fee under a fee-shifting statute is no less ethical than contingent fee contracts or attorneys' liens.[197]

195. *Id.*

196. *Id.*

197. The predecessor to the Model Code, the canons of Professional Ethics approved in 1908, provide further evidence that the prohibition against an attorney acquiring an interest in litigation is not designed to inhibit the attorney's right to enforce his fee agreement. Canon 10 decreed, "The lawyer should not purchase any interest in the subject of the litigation which he is conducting."

In his classic text on legal ethics, Henry Drinker, the former chairman of the A.B.A. Ethics Committee, described the purpose of Canon 10 as follows:

> This Canon must be read in connection with Canon 28 forbidding the stirring up of litigation, as part of the age-long policy which gave rise to the statutes against champerty, maintenance, and barratry. Its purpose is to prevent lawyers from the temptation to litigate on their own account. Significantly the Canon uses the word "purchase," not "acquire." Every lawyer is intensely interested in the successful outcome of his case, not only as affecting his reputation, but also his compensation. Canon 13 specifically permits the lawyer to contract for a contingent fee which, of itself, negatives the thought that the Canons preclude the lawyer's having a stake in his litigation. As pointed out by Professor Cheatham on page 107 n. of his Case Book, there is an inescapable conflict of interest between lawyer and client in the matter of fees. Nor, despite some statements to the contrary in Committee opinions, is it believed that, particularly

The above argument is not meant to suggest that joint negotiation will never give rise to ethical or tactical problems if the plaintiff and her attorney have a written fee agreement. Disputes may arise despite the existence of a fee agreement. The possibility of disputes over fees does not, by itself, support the contention that attorneys' fees issues should be deferred until settlement of the merits. Fee disputes need not be intractable. There are measures that can be taken within the framework of the Fees Act to reduce or eliminate disputes over fees. One or both parties may refer the fees issue to the court or seek guidance from the judge about a fair fees resolution. The Fees Act grants authority to the trial judge, not the parties, to determine a reasonable fee award.[198] The judge may, in such a case, instruct the parties to defer settlement of the fees issue or to submit documentation and briefs justifying their respective positions on fees. The judge may decide certain disputed issues—such as the reasonable hourly attorney fee rate—and thus remove those issues from negotiation. Having discretion under the statute to determine the attorney's fee, the judge is in a powerful position to assure that the fees issue does not unduly interfere with the ability of the parties to settle the merits of their dispute. Potential problems may arise from joint negotiation, but that does not justify a blanket rule that forbids the parties from negotiating fees prior to settlement of the merits.

D. Settlement of Class Actions

The arguments that support joint fees-merits negotiation over bifurcated negotiation in civil rights actions apply to class actions as well as individual suits. In a class action, unlike individual actions, the court should review the attorney fee settlement as a matter of course when reviewing the settlement of the merits to determine if the fees are reasonable. In an individual action, the court need not review the settlement of fees in the absence of a request to do so by a party. In an individual action, the fee agreement between the plaintiff and her attorney protects the interests of the client. The judge need intervene in a fee settlement only to resolve a dispute that has arisen despite the fee agreement. Prior judicial approval of fees in class actions is necessary because the fee agreement between the named plaintiffs and their attorney does not serve the same purpose in a class action as does the fee agreement in an individual action.

> in view of Canon 13, Canon 10 precludes in every case an arrangement to make the lawyer's fee payable only out of the results of the litigation. The distinction is between buying an interest in the litigation as a speculation, which Canon 10 condemns, and agreeing, in a case which the lawyer undertakes primarily in his professional capacity, to accept his compensation contingent on the outcome. (Footnote omitted.)

H. DRINKER, LEGAL ETHICS 99 (1953).

198. *See supra* note 1.

Counsel in a class action must be concerned not only with the interests of the named plaintiffs, with whom he should have a fee agreement, but also with the interests of the class members. There are potential conflicts between the interests of the named plaintiffs and the members of the class.[199] The rule governing class actions filed in the federal courts recognizes the potential conflicts in a number of ways. The court must determine that the named plaintiffs' claims are typical of the claims of class members.[200] Plaintiffs must adequately represent the interests of the class.[201] To assure that the interests of the class and named plaintiffs do not diverge, the named plaintiffs must be members of the class.[202] Despite these requirements, the interests of class members are not always in harmony. Ideological or economic differences may cause some class members to oppose remedies sought by plaintiffs and their counsel.[203] To protect class members the federal civil rules require court approval of dismissals or settlements of class actions.[204] The rules also provide for notice to class members, who may voice concern or opposition to any proposed settlement.[205] The court can approve settlement over the objection of some of the named plaintiffs or class members.[206] This very procedure places the plaintiff's attorney in an ambiguous position. He must seek court approval of the proposed settlement in accordance with the mandate of his clients, the named plaintiffs. Yet he also must adequately represent the interests of the class. Potential conflicts abound in class litigation. Conflicts are inherent in the nature of the litigation, much like the conflict that is inherent when an attorney litigates a claim under a fee shifting statute. The client and class do not escape the conflicts by replacing the particular attorney with another one.[207]

In an individual action, the attorney fee agreement ameliorates the conflict between plaintiff and counsel by defining their economic rights and obligations. Plaintiff's attorney can negotiate fees and merits jointly in conformity with the terms set forth in the agreement. A fee agreement cannot serve this function in a class action. In a class action, plaintiffs' attorney does not have a fee agreement with the class members; the agreement is with the named plaintiffs. Some courts have disapproved

199. *See generally* D. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982).

200. FED. R. CIV. P.23(a)(3).

201. FED. R. CIV. P. 23(a)(4).

202. Bailey v. Patterson, 369 U.S. 31 (1962). *See generally*, 3B J. Moore & J. Kennedy, MOORE'S FEDERAL PRACTICE 23.07[2] (3d ed. 1984).

203. D. Rhode, *supra* note 199. *See also* D. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

204. FED. R. CIV. P. 23(e).

205. *Id.*

206. Kincade v. General Tire and Rubber Co., 635 F.2d 501 (5th Cir. 1981). *See generally* 3B MOORE'S FEDERAL PRACTICE at 23.80(4).

207. *See supra* notes 138-47 and accompanying text.

attempts by counsel to obtain fee agreements with class members.[208] Even if courts would approve such arrangements, obtaining fee agreements with all of the members of a class would usually be impractical, because the class must meet a numerosity requirement as a prerequisite to certification.[209] By filing a suit as a class action, the named plaintiffs and their attorney obtain additional leverage over the defendant. The existence of the class increases defendant's potential liability.

The potential conflict between the class attorney and class members over fees is not significantly different than other potential conflicts that may arise in the course of settling a class action. Among the procedures for protecting class members in federal courts, is the requirement of judicial approval of proposed settlements. Explicit judicial approval of the amount of attorneys' fees agreed to by counsel in settled class actions is necessary to protect against the increased potential for unethical overreaching by attorneys representing class plaintiffs in civil rights actions.

VII. CONCLUSION

It is not possible to construct a world in which an attorney's loyalty to his client is completely insulated from his personal and economic interests. The attorney's interest in his fee inevitably will be different than the client's interest in the results of a law suit. A bifurcated settlement rule attempts to resolve the conflict by forcing the parties, their attorneys and the court to consider the propriety of a proposed settlement without information about the fee plaintiff's attorney will earn for his efforts. Joint fees-merits settlement better serves the interests of the parties by permitting them to assess the propriety of a settlement with all relevant information in full view. Any potential conflict between the attorney and client is minimized by requiring a written fee agreement that sets forth the fees that counsel will seek for his services. Judicial interference with the settlement of fees is necessary in individual actions only upon request of a party or attorney. Judicial approval of proposed fees in class actions is necessary to protect class members, for the same reasons that it is necessary for the trial judge to approve the proposed merits settlement.

208. *See, e.g.*, Kiser v. Miller, 364 F. Supp. 1311 (D.D.C. 1973), *aff'd sub nom.*, Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974).

209. FED. R. CIV. P. 23(a)(1).