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ATTORNEY-CLIENT CONFLICTS OF INTEREST AND THE CONCEPT OF NON-NEGOTIABLE FEE AWARDS UNDER 42 U.S.C. § 1988

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The adoption of 42 U.S.C. § 1988,¹ which gives courts discretion to allow attorney's fees to a prevailing party in civil rights litigation,² has created troublesome ethical dilemmas for plaintiffs' attorneys. Section 1988 gives attorneys a fee interest in the litigation, and that fee interest is frequently at odds with the attorney's obligation to protect the plaintiff's interests during settlement negotiations.

Courts and attorneys have attempted through various devices to avoid or minimize the conflict of interest inherent in settlement negotiations of civil rights claims. Their success, however, has been limited. Proposed solutions either cannot reduce the conflict to a tolerable level or create more problems for the judiciary than they solve.

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1. The text of 42 U.S.C. § 1988 reads in part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 or this title, title IX of Public Law 92-318 [20 U.S.C. §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

2. Section 1988 mentions by name only civil rights actions brought under the Reconstruction Era civil rights statutes, Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972. Although only a limited number of statutory causes of action are mentioned by name as predicates for § 1988 fee awards, § 1988 is potentially applicable to many other civil rights claims as a result of the Supreme Court's decision in *Maine v. Thiboutot*, 448 U.S. 1 (1980). In that case, the Court held that federal statutory claims enforced through 42 U.S.C. § 1983 would support a § 1988 fee award. *See also Maher v. Gagne*, 448 U.S. 122 (1980). *Compare Smith v. Robinson*, 52 U.S.L.W. 5179 (S. Ct. July 5, 1984).

The most satisfactory method of minimizing the conflict between the attorney's fee interest and the plaintiff's interest in the merits of a lawsuit is to make section 1988 attorney's fees non-negotiable during settlement. Courts and attorneys have not directly experimented with the concept of fee non-negotiability when section 1988 claims are made, but they have adopted measures which are intended indirectly to achieve some of the effects of non-negotiability. Those measures, however, consume unnecessary amounts of judicial time and resources as a by-product.

This article explores the concept of fee non-negotiability as a solution to the ethical dilemma facing a plaintiff's attorney during settlement negotiations of a case in which a section 1988 fee award is available. The first section of the article briefly discusses the objectives and impacts of section 1988, and the second section describes the nature of the conflict of interest which exists in settlement negotiations. Both sections provide a foundation for the third section, which discusses the devices to which courts and attorneys have resorted for resolution of the problem, and for the fourth section, which argues that fee awards be considered non-negotiable items during settlement discussions. Although the concept of non-negotiability runs counter to the philosophy that litigants should be encouraged and given the opportunity to settle controversies which otherwise will demand judicial resolution,³ it should nonetheless govern section 1988 fee claims. Whatever additional judicial resources are consumed in resolving non-negotiable fee claims will more than be offset by the fact that courts will no longer have to expend their energies resolving the many issues which arise during settlement negotiations because of the attorney's fee interest. Moreover, non-negotiability has the added, important advantage of ensuring that congressional objectives which prompted the adoption of section 1988 will be fulfilled.

3. The Supreme Court recently reminded parties to civil rights litigation that they "should make a conscientious effort, when a fee award is to be made, to resolve any differences" and reminded courts that they have "a responsibility to encourage agreement." *Blum v. Stenson*, 52 U.S.L.W. 4377, 4381 n.19 (U.S. S. Ct. March 21, 1984). Other courts also view the goal of settlement as so important that it ought not to be compromised by solutions to the conflict of interest problem discussed in this article. See, e.g., *Godwin v. Schramm*, Nos. 83-5065, 83-5129, 83-5130, slip op. (3d Cir., March 30, 1984) (available April 15, 1984, on LEXIS, Genfed library, Cir. file), and *Prandini v. National Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1977).

I. THE OBJECTIVES AND IMPACTS OF 42 U.S.C. § 1988

The copious legislative history of 42 U.S.C. § 1988⁴ reveals that Congress authorized fee awards in lawsuits prosecuted under the Reconstruction Era civil rights statutes, Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972, in order to encourage enforcement of the rights guaranteed by those statutes.⁵ Congress believed that, in the absence of an attorney's fee provision, attorneys might not offer their services to litigate civil rights claims because of the indigency of aggrieved parties,⁶ because civil rights cases frequently result in non-monetary relief from which no contingency fee could be expected,⁷ or because of the unpopular nature of the claim.⁸ Congress also believed that an attorney's fee provision might induce voluntary compliance with federal law and serve as a deterrent to illegal conduct.⁹

Because of section 1988, civil rights litigation is usually conducted with the expectation of an attorney's fee award. Attorneys

4. S. REP. NO. 1011, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5908-14; H.R. REP. NO. 1558, 94th Cong., 2d Sess. (1976); SUBCOMM. ON CONSTITUTIONAL RIGHTS, SENATE COMM. ON THE JUDICIARY, 94th Cong., 2d Sess., CIVIL RIGHTS ATTORNEY'S FEE AWARDS ACT OF 1976 SOURCE BOOK (Comm. Print 1976) [hereinafter, SUBCOMMITTEE REPORT]. See also *The Effect of Legal Fees on the Adequacy of Representation: Hearings Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973), and E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES (1981), for a discussion of the history behind the adoption of § 1988.

5. See the sources cited in note 4, *supra*, and in particular SUBCOMMITTEE REPORT, *supra* note 4, at 4, 6, 8-12, 19-20, 199-200, 209-11. The concept of private attorneys general — private citizens filing court actions to vindicate their civil rights and those of the public as a whole — pervades much of the legislative history of the Act. See also *Hensley v. Eckerhart*, 103 U.S. 1933, 1937 (1983), holding that “[t]he purpose of § 1988 is to ensure ‘effective access to the judicial process’ for persons with civil rights grievances.” (Citations omitted.)

6. SUBCOMMITTEE REPORT, *supra* note 4, at 3, 8, 19, 209.

7. *Id.* at 3, 200, 217.

8. Congress cited with approval the opinion in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). In that case, the “undesirability” of the case was identified as a factor bearing on the reasonableness of a fee award. *Id.* at 719. See SUBCOMMITTEE REPORT, *supra* note 4, at 6.

9. See SUBCOMMITTEE REPORT, *supra* note 4, at 11, 200. In addition to specific references to this aspect of the attorney's fee statute, deterrence of civil rights violations is implicit in the broader purpose of encouraging actions by private attorneys general. See also *Hensley v. Eckerhart*, 103 U.S. 1933, 1944 n.2 (1983) (Brennan, J., concurring in part and dissenting in part); *Cooper v. Singer*, 719 F.2d 1496, 1501 (10th Cir. 1983); *Oldham v. Ehrlich*, 617 F.2d 163, 168 (8th Cir. 1980); and *Dennis v. Chang*, 611 F.2d 1302 (9th Cir. 1980), cited with approval in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 487 n.31 (1982), for the proposition that § 1988 was intended to encourage voluntary compliance with civil rights laws.

frequently request courts to award fees in civil rights cases¹⁰ and, as a result, litigation over the propriety of fee awards proliferates. Since the enactment of section 1988 in 1976, approximately 1730 federal court decisions have interpreted the statute.¹¹ Notwithstanding Justice Powell's optimistic wish that the fee issue not generate its own corpus of judicial opinion,¹² the proliferation of litigation is understandable because the amount of any given fee award may be quite large.¹³

In contrast, prior to the adoption of section 1988, civil rights litigation was handled by attorneys largely on a pro bono basis. Although courts were frequently requested to make equitable fee awards, especially in the late sixties and early seventies,¹⁴ no one assumed that recovery was guaranteed or even routinely to be expected in civil rights cases.¹⁵ Traditionally, courts had been reluctant to award fees absent evidence of bad faith litigation or, perhaps, the presence of a common fund from which to draw the award. In 1974, the Supreme Court adopted these factors as limitations on the inherent equitable authority of federal courts to award fees.¹⁶ Even when

10. See E. LARSON, *supra* note 4, at 1-3. By generously defining who qualifies as a "prevailing party" under §1988, and providing that, while fees are in the courts' discretion, they should rarely be denied to a prevailing plaintiff, the legislators who adopted § 1988 must have anticipated routine application for fees. See SUBCOMMITTEE REPORT, *supra* note 4, at 11, 215.

11. This figure, determined as of June 4, 1984, includes ten cases in which the Supreme Court of the United States has ruled on the attorney's fee issue.

12. *Hensley v. Eckerhart*, 103 U.S. S. Ct. 1933, 1941 (1983).

13. See, e.g., *Association for Retarded Citizens of N.D. v. Olson*, 713 F.2d 1384 (8th Cir. 1983) (award of \$455,738, reduced from district court award of \$521,163); *White v. City of Richmond*, 713 F.2d 458 (9th Cir. 1983) (district court's award of \$694,186, including multiplier of 1.5 used to adjust fee according to "degree of success", affirmed); *Lamphere v. Brown Univ.*, 610 F.2d 46 (1st Cir. 1979) (award of \$272,600 not excessive).

14. See generally *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 421 U.S. 240, 248-49 (1975), for a comprehensive list of relevant cases, see *The Effect of Legal Fees on the Adequacy of Representation: Hearings Before the Suncomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93rd Cong., 1st Sess. (1973); and the history set forth in Berger, *Court Awarded Attorney's Fees: "What is Reasonable"?*, 126 U. PA. L. REV. 281 (1977); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636 (1974) (discussing the private attorney general concept used as the basis for awarding fees subsequent to the Supreme Court's decision in *Newman v. Piggie Park Enterprises, Inc.* 390 U.S. 400 (1968)).

15. The fact that fee recovery was not assured was a cornerstone of the Supreme Court's analysis in *In re Primus*, 436 U.S. 412, 429-31 (1978). See Ehrenweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966), for an early plea for adoption of fee-shifting rules in litigation generally, and Falcon, *Award of Attorneys' Fees in Civil Rights and Constitutional Litigation*, 33 MD. L. REV. 379 (1973), who argued that a fee-shifting statute ought to be available for civil rights litigants.

16. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Thus, between

courts were able to award fees, the amount of the award was unlikely to fully compensate the attorney for time expended in litigation.¹⁷ In other words, fee awards did not become truly significant in civil rights litigation until the adoption of section 1988.¹⁸

Since most attorney services in civil rights litigation were pro bono in nature, those services did not implicate many of the professional canons of ethics and disciplinary rules which constrain the conduct of private practitioners who offer their services for a fee. In some instances, most notably in *NAACP v. Button*¹⁹ and *In re Primus*,²⁰ courts determined that the nonpecuniary motivation for the services exempted an attorney from the usual disciplinary rules.²¹ In other instances, disciplinary rules were inapplicable because, by

1975 and the effective date of §1988, judicial authority to award fees was quite limited.

17. *Souza v. Trivisono*, 512 F.2d 1137 (1st Cir. 1975) (award is not to be based on reasonable marketplace rate, but on Criminal Justice Act fee schedule, which sets rates at one-third to one-half marketplace rate); *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973) (attorneys' fees of \$750 awarded in complex case involving discharge in violation of first amendment right to free speech); *Jinks v. Mays*, 350 F. Supp. 1037 (N.D. Ga. 1972) (award of \$1,500 in class action concerning non-tenured teacher's right to maternity leave which included appeal on the merits). *But cf. Sims v. Amos*, 340 F. Supp. 691 (N.D. Ala. 1972) (three-judge court), *aff'd per curiam*, 409 U.S. 942 (1972) (total award, including costs, clerks, and attorney's fees, of \$28,083, in reapportionment case).

18. The congressional proponents of § 1988 insisted that fee awards had played a significant role in civil rights litigation prior to the Supreme Court's decision in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1974). See, e.g., SUBCOMMITTEE REPORT, *supra* note 4 at 3, 7, 12. The appendices to the legislative history, which list only a relatively small number of cases involving fee requests, belie the proponents' assertions, as does the discussion of the history of judicial awards of attorney's fees contained in the *Alyeska* opinion. See *supra* notes 14 and 17. It cannot be denied, however, that courts became increasingly willing to entertain requests for fees and believed that they had the authority to do so subsequent to *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

19. 371 U.S. 415 (1963).

20. 436 U.S. 412 (1978).

21. In *NAACP v. Button*, 371 U.S. 415 (1963), "staff" attorneys were sometimes compensated by the NAACP at a per diem rate of \$60.00, but the Supreme Court stated that this rate was well below what the attorneys could have expected to receive had they devoted their skill to conventional private litigation. *Id.* at 420-21. The Court characterized the litigation activity of the attorneys and the NAACP as a form of political expression and association. *Id.* at 429-31. *In re Primus*, 436 U.S. 412 (1978), evaluated the conduct of an attorney who had solicited a client for the ACLU, an organization which had asked for an attorney's fee award. The Court differentiated between litigation activities motivated primarily by the goal of vindicating civil liberties and those motivated primarily by pecuniary gain. *Id.* at 429-31. The former were considered by the Court to be constitutionally protected as long as they did not "*in fact* [involve] the type of misconduct at which [the state's] . . . broad prohibition is said to be directed." *Id.* at 434 (emphasis added). See also *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 472-73 (5th Cir. 1980), and *Impervious Paint Indus. v. Ashland Oil*, 508 F. Supp. 720, 723 (W.D. Ky. 1981), which rely on the political/pecuniary distinction.

definition, they applied to financial agreements²² which are non-existent in a pro bono case.

Section 1988 alters the position of civil rights attorneys *vis a vis* canons of professional ethics and disciplinary rules. It gives attorneys a pecuniary interest in the outcome of litigation that is neither speculative²³ nor insubstantial.²⁴ The conflict of interest arising out of section 1988 poses an ethical dilemma which attorneys cannot ignore.²⁵

II. THE CONFLICT OF INTEREST DURING SETTLEMENT NEGOTIATIONS

The nature of the conflict of interest which arises during settlement negotiations has recently been the subject of some judicial discussion and scholarly comment.²⁶ The conflict can best be discussed with reference to an uncomplicated case, in which a named client does not

22. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106, DR 2-107 (1979).

23. Under § 1988, fees are ordinarily to be awarded to prevailing parties in the absence of special circumstances which would render the award unjust. *Hensley v. Eckerhart*, 103 U.S. Ct. 1933, 1937 (1983) (citing S. REP. NO. 1011, 94th Cong., 2d Sess., reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5908).

24. See *supra* note 13.

25. It cannot be assumed that the Constitution of the United States will protect attorneys from the normal application of disciplinary rules. Civil rights attorneys have previously been protected from traditional applications of disciplinary rules by the first amendment, as long as their motivation for providing representation could be characterized as political rather than pecuniary. See *supra* note 21. The distinction between political and pecuniary motives is a difficult one to make, as Justice Rehnquist noted in his dissent in *Primus*, 436 U.S. 440, 441-43 (1978). See also the Supreme Court's decision in *Brotherhood of Ry. Trainmen v. Virginia*, 377 U.S. 1 (1967). The routine availability of fee awards under § 1988 may alter the Supreme Court's analysis of the constitutional protection afforded civil rights attorneys accused of violating canons of professional ethics, because the motives of the attorneys may now be pecuniary in nature. In *Primus*, for example, the Court rested its decision on the fact that pre-§ 1988 fee awards were available only in limited circumstances, were not guaranteed, and would be lower than the fee that could be obtained in private litigation. 436 U.S. at 429-31. Section 1988 makes fee awards generally available and those awards may well be substantial. See *supra* notes 10-13 and accompanying text. In *Primus*, the Court reserved judgment as to what its decision would have been "where the income of the lawyer who solicits the prospective litigant or who engages in the actual representation of the solicited client rises or falls with the outcome of the particular litigation." 436 U.S. at 436 n.30.

Moreover, even if the Supreme Court's constitutional analysis withstands modification because of the adoption of § 1988, attorneys will not be shielded from sanctions imposed for conduct which is in fact unethical because they have subordinated the client's interests to their own interest in a fee award. See *supra* note 21.

26. Levin, *Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in Which Statutory Fees Are Authorized*, 14 CLEARINGHOUSE REV. 515 (1980); Stein and Fisher, *The Proportionality Test in Section 1988 Fee Awards*, 14 LOY. U. CHI. L.J. 1, 4 n.21 (1982).

represent a class²⁷ and in which the client's attorney is not affiliated with a public interest organization.²⁸ These factors complicate and exacerbate a conflict which is inherent in any litigation which involves a statutory fee award. For purposes of clarity, therefore, the more uncomplicated attorney-client relationship will be used as the focus for this discussion. In addition, although a defendant may receive an award of fees under section 1988, the discussion assumes that the party requesting fees is the plaintiff.²⁹

In a certain sense, the conflict of interest existing between attorney and client when a statutory fee award is at stake is similar to the conflict of interest inherent in any contingent fee agreement.³⁰ Both

27. A class action creates a litigation environment in which it is tempting for an attorney to ignore the potentially more remote interests of the class clients in favor of his and the named plaintiffs' more immediate interests. *See generally Note, Attorneys' Fees in Individual and Class Action Antitrust Litigation*, 60 CALIF. L. REV. 1656 (1972).

28. Attorney affiliation with a public interest organization may increase the pressure on attorneys to pay more attention to the interests of the organization than to those of their clients. The pressure may be especially strong if the organization itself expects to benefit from an award of attorney's fees. Fee awards are frequently expected to go to a public interest organization, as in *In re Primus*, 436 U.S. 412 (1978). Usually, however, the pressure is due simply to the intensity of the organization's interest in legal principles at risk in the litigation. That interest may override a concern for the client's interest in more tangible relief. The kind of influence which a public interest organization may exert over litigation is discussed in *In re Primus*, 436 U.S. 412 (1978) and *NAACP v. Button*, 371 U.S. 415 (1963).

29. The ethical difficulties confronting counsel for a defendant seeking a settlement involving attorney's fees would not necessarily differ from those which confront a plaintiff's attorney. Requests made by defendants are, however, rare. The statutory prerequisite for an award of fees to a defendant differs from that for an award of fees to a plaintiff. The latter must only prevail; the former must establish that the litigation was frivolous, unreasonable, or without foundation. *Hughes v. Rowe*, 449 U.S. 5, 14-16 (1980). That difference should affect, of course, the attorney's assessment of the risks of litigating the fee issue. Only one of the judicial decisions which discusses the ethical dilemmas associated with settlement of a statutory fee award involved a defendant's request for fees. *See Obin v. Dist. No. 9 of the Int'l Ass'n of Machinists*, 651 F.2d 574 (8th Cir. 1981).

30. A report of the American Bar Foundation, F. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* (1964), classifies statutory fee awards as contingent fees. *Id.* at 24 & 62. Contingent fee agreements have historically been viewed with some suspicion. It is feared that they create conflicts of interest between the attorney and client, that they may lead to "over-reaching" practices by attorneys, or that they may foster or stir up litigation. *Id.* at 39-44. Although contingent fee awards which are based on a statute like § 1988 rather than on a contract generate some of the same fears, the American Bar Foundation Report does not explore the unique differences in the ethical difficulties associated with statutory contingent fees. The differences can be significant. The American Bar Foundation Report notes, for example, that the validity of contractual contingent fee agreements has depended, to a certain extent, on the type of litigation they may encourage. *Id.* at Ch. 4. Traditional ethical rules attempting to minimize the possibility that litigation will be fostered will have a much different, and presumably minimal, significance when a statute like § 1988 is adopted precisely because it will encourage litigation which might otherwise not be pursued. The American Bar Foundation Report does not discuss the relationship between statutory purpose and ethical constraints on

section 1988 and the contingent fee agreement give an attorney a pecuniary interest in the outcome of the litigation. If the litigation is unsuccessful, the attorney does not receive a fee.³¹ If the client wins a damage award under the contingent fee contract or prevails as required by section 1988,³² the attorney is compensated for services. Unlike the contractual contingent fee, however, the statutory fee award comes from the defendant and not out of the plaintiff's recovery. For that reason, the conflict between attorney and client generated by the statutory fee award may appear to be less troublesome than the conflict inherent in contingent fee contracts which tie an attorney's fee to a percentage of the plaintiff's recovery. The conflict is in fact less troublesome, however, only when the plaintiff prevails after a trial on the merits.

During settlement negotiations, the conflict generated by statutory fee awards is just as severe as that arising from a contingent fee contract. A few examples will illustrate the magnitude of the conflict for the attorney who has an interest in the outcome of the litigation because of a statutory fee provision like section 1988. Some of the conflicts described might also arise if an attorney had a contingent fee agreement, while others are unique to the attorney whose compensation depends on a statutory fee provision.

In typical civil rights litigation, various forms of relief are sought. Injunctive or declaratory relief, as well as damages, may be requested. Under section 1988, a plaintiff may prevail through settlement for purposes of an award of attorney's fees even if all of the requested relief is not obtained.³³ During settlement negotiations, therefore, there is a danger that the defendant will attempt to "buy off" the plaintiff's attorney. Both courts³⁴ and litigants³⁵ recognize

attorney conduct. That relationship is critical to the proposal made in this article.

31. Unless otherwise specified, the contingent fee contracts to which reference is made provide for no attorney compensation in the event litigation is unsuccessful. *See, e.g.*, the sample contingent fee contract recommended by the Colorado Supreme Court. COLO. REV. STAT., Ch. 23.3, Court Rules (Supp. 1983).

32. *See infra* notes 34-43 and 180-89, and accompanying texts for a discussion of how a plaintiff may prevail.

33. *Hensley v. Eckerhart*, 103 U.S. S. Ct. 1933 (1983); *Maher v. Gagne*, 448 U.S. 122 (1980). In fact, a plaintiff may be a prevailing party even if the settlement agreement states that the agreement "does not constitute an admission by any party as to any issue of fact or law regarding discrimination by and/or liability of the [defendant]. . . ." *Ross v. Saltmarsh*, 521 F. Supp. 753, 756 n.7 (S.D.N.Y. 1981).

34. Among the decisions which have recognized the problem is *Prandini v. National Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1977). The court in *Mendoza v. United States*, 623 F.2d 1338 (9th Cir. 1980) notes that the incentives to buy off plaintiff's counsel exist even in cases in which no monetary relief is requested. *Id.* at 1352-53. The fact that *Mendoza* was a class

the existence of the problem.

Assume, for example, that a defendant offers to settle for injunctive relief which is less comprehensive than the damages *and* injunctive relief which the plaintiff initially sought. Assume also that injunctive relief or its equivalent is of special importance to the plaintiff's attorney, who has entered the case with some sympathy for the legal principles at stake. A promise by a defendant to cease challenged conduct and to enter an enforceable consent agreement to that effect secures those principles against future threat from the defendant. It may also benefit individuals who are not parties to the litigation. Under these circumstances, the plaintiff's attorney may advocate acceptance of the defendant's promise in lieu of damages for the client, especially when a consent decree incorporating that promise will satisfy the statutory prerequisite for a court award of attorney's fees. Similarly, a plaintiff's attorney who has little or no interest in the legal principles at stake may be tempted to relinquish comprehensive demands for injunctive relief if he or she can prevail for purposes of section 1988 by securing a more limited and presumably less expensive promise from the defendant. In both situations, the plaintiff would have prevailed under section 1988, and the attorney would be eligible to file a claim for attorney's fees. An award of fees would be legitimate under the statute even though the plaintiff's interests may not have been fully protected by the attorney.

The conflict just described may be negotiated in part by the Supreme Court's recent decision in *Hensley v. Eckerhart*, but *Hensley* may also generate its own ethical dilemma for the attorney.³⁶ In *Hensley*, the Court held that the amount of the fee to which an attorney is entitled under section 1988 is partially dependent on the degree of the plaintiff's success.³⁷ If a plaintiff does not secure all of the relief originally sought, an attorney will be compensated for all time reasonably expended as long as the plaintiff substantially prevails.³⁸ The district court has the discretion to determine what is

action highlighted the conflict. *See also* *Jamison v. Butcher & Sherrerd*, 68 F.R.D. 479 (E.D. Pa. 1975), and *Foster v. Boise-Cascade, Inc.*, 420 F. Supp. 674 (S.D. Tex. 1976).

35. The amicus brief of the Lawyers' Committee for Civil Rights in *White v. New Hampshire Dep't of Empl. Sec.*, 455 U.S. 445 (1982), acknowledged that the appearance of this sort of impropriety resulted from fee negotiations. Levin, *supra* note 26, is especially concerned about a defendant actually or apparently "buying off" a plaintiff's attorney. *Id.* at 516.

36. 103 U.S. Ct. 1933 (1983).

37. *Id.* at 1941.

38. *Id.* at 1938, 1940.

reasonable in light of the plaintiff's success.³⁹

In *Hensley*, the Court stated that the basic formula for calculating a fee award consists of the number of hours expended in litigation multiplied by a reasonable fee rate.⁴⁰ It cautioned, however, that:

[i]f . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were inter-related, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill.⁴¹

In other words, an attorney cannot be assured of full compensation just because she has, in good faith, made reasonable efforts to secure all of the relief requested by the plaintiff. The amount of the fee depends on the "significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."⁴²

Imagine, now, a situation in which the defendant offers to settle and includes an offer of attorney's fees which will adequately compensate the attorney for the time spent up to the point of the settlement offer. The plaintiff, however, is not content with the defendant's settlement offer and is interested in securing an additional item of relief. If the attorney believes that any additional relief secured after trial will be viewed by a court as a relatively insignificant addition to the overall relief which the plaintiff could have secured had the plaintiff accepted the defendant's settlement offer, the attorney may fear that the court will rely on *Hensley* to deny a fully compensatory fee for the additional time spent in bringing the case to trial.

It is not clear whether the *Hensley* rationale will be extended to reduce post-trial fee awards whenever a trial secures no or little more relief than that which a defendant earlier offered in settlement. Other fee statutes have been interpreted to require adjustment of a

39. *Id.* at 1939.

40. *Id.* at 1939-40.

41. *Id.* at 1941.

42. *Id.* at 1940.

fee award in light of settlement negotiations.⁴³ Two courts have held that if a defendant's offer of settlement under Rule 68 of the Federal Rules of Civil Procedure⁴⁴ is not accepted and the plaintiff ultimately recovers less than what was offered, the section 1988 fees incurred by the plaintiff between the time of the offer and the conclusion of the lawsuit must be borne by the plaintiff.⁴⁵ Another court⁴⁶ has refused to hold that a rejection of a Rule 68 offer for settlement can cut off a right to fees under section 1988, but left open the decision as to what would constitute a reasonable fee under those circumstances.⁴⁷ There is a possibility, therefore, either that the *Hensley* decision will be read to permit reduction of a fee or that Rule 68 itself will be interpreted to foreclose the award of a fee.⁴⁸ Thus, an attorney may reasonably fear that a court will ultimately award a less than fully compensatory fee for litigation efforts undertaken subsequent to rejection of a settlement offer. That fear may tempt the attorney to ignore a client's willingness to continue litigation in the hope of additional relief.⁴⁹

43. *Environmental Defense Fund v. Watt*, 722 F.2d 1081 (2d Cir. 1983) (a fee award under the Equal Access to Justice Act should take into account the reasonableness of the defendant's position during settlement negotiations). The language of this statute, however, more directly requires this result than the language of § 1988.

44. FED. R. CIV. P. 68, provides that — if the judgment finally obtained by [the plaintiff] is not more favorable than the offer [made by the defendant], the offeree must pay the costs incurred after the making of the offer.

45. *Bitsounis v. Sheraton Hartford Corp.*, 33 Fair Empl. Prac. Cas. 898 (D. Conn. 1983). (The court also stated, in dictum, that the plaintiff did not have to pay the costs and fees incurred by the defendant subsequent to the rejected offer because to do so would be inconsistent with the objectives of § 1988); and *Walters v. Heublein*, 485 F. Supp. 110 (N.D. Cal. 1979).

46. *Chesny v. Marek*, 720 F.2d 474 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3770 (April 23, 1984).

47. In *Chesny*, the court reviewed the impact which an offer of judgment made by the defendant under Rule 68 of the Federal Rules of Civil Procedure, and rejected by the plaintiff, would have on the plaintiff's recovery of a § 1988 fee award after trial. The plaintiff had secured less comprehensive relief after trial than that which the defendant had offered in settlement. The district court had concluded that the plaintiff could not receive any § 1988 fees for time spent after rejection of the offer. The Court of Appeals for the Seventh Circuit reversed the district court's decision. It remanded, however, so that the court could determine what would be a reasonable fee under the circumstances. It is possible, therefore, that the amount of the fee will be reduced under *Hensley*, although not denied entirely by the court.

48. For other cases construing Rule 68 in the context of a fee application, see *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 363-64 (1981) (Powell, J., concurring in the result); *Fulps v. City of Springfield, Tennessee*, 715 F.2d 1088 (6th Cir. 1983); *Pigeaud v. McLaren*, 699 F.2d 401 (7th Cir. 1983); and *Sheriff v. Beck*, 452 F. Supp. 1254 (D. Colo. 1978).

49. This may especially be the case in civil rights litigation in which plaintiffs are frequently prone to be as interested in the establishment of a principle through the judicial resolution of a controversy as in some practical form of individual relief. See *Ginger, Legal*

Finally, there is a danger that a defendant will attempt to exploit the conflict of interest so as to secure a more beneficial settlement not by "buying off" the unethical plaintiff's attorney but by putting an ethical plaintiff's attorney in such an untenable position that the attorney will have to relinquish the fee claim.⁵⁰ A defendant may offer, for example, to settle under terms which will result in less than full or no compensation to the attorney. The offer may consist of a lump sum, from which both the client and the attorney are expected to satisfy their claim to damages and compensation but which is inadequate to do both. The defendant might also offer to settle only if the request for an attorney's fee award is waived or substantially reduced.⁵¹ The conflict for the attorney confronted with these offers of settlement is obvious. The temptation is for the attorney to cease negotiating a settlement and to proceed to trial, despite the fact that settlement may be in the client's best interests. The ethical attorney will be forced to relinquish a fee claim which Congress intended to secure for the attorney.⁵²

III. SUGGESTED SOLUTIONS TO THE CONFLICT AND THEIR LIMITATIONS

Existing canons of professional ethics and disciplinary rules address only indirectly the issues generated by the attorney's pecuniary

Processes — Litigation as a Form of Political Action, in **LEGAL ASPECTS OF THE CIVIL RIGHTS MOVEMENT** (D. King & C. Quick eds. 1965).

50. See generally Levin, *supra* note 26. The amicus briefs filed in *White v. New Hampshire Dep't of Empl. Sec.*, 455 U.S. 445 (1982), by the NAACP Legal Defense and Education Fund and the Lawyers' Committee for Civil Rights attest to the reality of these practices. The latter brief argues that civil rights litigation is especially vulnerable to them.

51. In *Lisa F. v. Snider*, 561 F. Supp. 724 (N.D. Ind. 1983), for example, the defendant demanded a waiver. The NAACP's amicus brief in *White* asserts that defense counsel have made requests for an "approximation" of the fees that will be sought and have conditioned settlement on the defendant's view of the "reasonableness" of that approximation.

52. Other examples of the conflict of interest can easily be imagined. A plaintiff's attorney, for example, might wish to forego a settlement acceptable to the plaintiff if § 1988 promises a large and fully compensatory fee award subsequent to trial. This might occur in a case in which success is highly likely but the client wishes to settle for his or her own reasons. Perhaps the client is simply weary of the emotional costs of litigation.

One interesting conflict has been described to the author by a colleague. His client was arrested and subjected to criminal prosecution under circumstances which strongly suggested bad faith on the part of the state. On behalf of his client, the attorney filed a lawsuit under 42 U.S.C. § 1983 to halt the prosecution. The complaint requested an award of attorney's fees under § 1988. Subsequent to the filing of the § 1988 claim, the state made an offer to drop the prosecution if the attorney would relinquish his claim for fees. The attorney asked a simple question: If the state's offer is itself unethical because it may be a solicitation of a bribe, how can I appropriately respond to that offer if to do so in an ethical fashion would jeopardize my client's interest in not being prosecuted?

interest in litigation under statutory fee provisions. No clear guidance is given to either plaintiff's or defendant's counsel as to appropriate standards of conduct. Attorneys are simply to avoid conflicts of interest.⁵³ Although the canons of professional ethics and disciplinary rules are no more specific regarding many other troublesome aspects of legal representation, at least there are traditions and routine practices which have long been accepted as proper and with which most attorneys are familiar.⁵⁴ There are, however, no such traditions or practices governing the negotiation of fees when a fee request has been made under section 1988.

It has been proposed that existing canons and rules be amended so as to provide clear guidelines to proper conduct during settlement negotiations.⁵⁵ The difficult question for courts and attorneys, however, is not to decide whether to amend the canons and rules but rather to decide what guidelines should be incorporated into them. That question is also at the heart of other suggested solutions to the conflict of interest problem.

A. Retainer Agreements

One proposed solution to ethical problems inherent in settlement negotiations under section 1988 is for the plaintiff's attorney to insist on a retainer agreement which sets forth the terms on which the attorney agrees to represent the client.⁵⁶ The retainer agreement might serve two purposes. First, it might disclose to the client the fact that the attorney has a substantial interest in the outcome of the litigation and might also attempt to resolve and memorialize in writing, in advance of settlement negotiations, the rights and obligations of the client and the attorney regarding claims which become subject to negotiation. Alternatively, it might provide that the attorney's

53. E.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101, DR 5-103, DR 5-107 (1979). See also Committee on Professional Responsibility and Judicial Ethics, New York City Bar Ass'n Op. 80-84 (Sept. 18, 1981).

54. Contingent fee agreements, for example, have traditionally been viewed with some suspicion, see *supra* note 30. Nevertheless, their use is a commonly accepted practice, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1982), and a considerable body of case law and scholarly comment guide the practicing attorney in their use. See, e.g., *In re Kerr's Estate*, 63 Cal. 2d 875, 409 P.2d 931, 48 Cal. Rptr. 707 (1966); *Brillhart v. Hudson*, 169 Colo. 329, 455 P.2d 878 (1969); *Anderson v. Kenelly*, 37 Colo. App. 217, 547 P.2d 260 (1975); *Chalmers v. Oregon Auto. Ins. Co.*, 263 Or. 449, 502 P.2d 1378 (1972); F. MACKINNON, *supra* note 30; S. SPEISER, ATTORNEYS' FEES (1973). See also the cases and commentary noted in *Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983).

55. Levin, *supra* note 26 at 520-21.

56. *Id.* at 520.

compensation would not be dependent on any amount awarded as fees under section 1988.⁵⁷

Disclosure to the client of the attorney's interest in the outcome of the litigation is worthwhile. It provides partial protection from subsequent allegations that the client was ignorant of the potential conflict of interest and thus agreed to a settlement to which she might otherwise have objected. Ethical rules governing the legal profession frequently utilize the device of disclosure to ensure professional integrity.⁵⁸

An attempt to go beyond disclosure and to predetermine the rights and obligations of both attorney and client, however, would probably fall short of a satisfactory resolution of the conflict of interest inherent in settlement negotiations under section 1988. Any retainer provision which may be construed as a limitation on the ability of the client to settle is likely to be declared invalid.⁵⁹ An attorney cannot insist, for example, on a right to participate equally with the client in determining the propriety of settlement.⁶⁰

Other types of retainer provisions, such as those which acknowledge the authority of the client to control the terms of settlement but which also provide for a readjusted basis of compensation if the client's decision jeopardizes the attorney's interest in a fee, may also be inadequate. Their practical value, as well as their legal validity, is questionable.

Imagine, for example, a retainer agreement providing that the attorney expects to be compensated through a statutory fee award but also providing, in the event the client settles for an award of fees which is less than what the attorney could reasonably have expected to receive from a court,⁶¹ that the client will be obligated to make up the difference. In the alternative, imagine a retainer agreement providing that, if the client refuses to settle and the relief received after trial is not significantly greater than the relief offered through settlement, the client will reimburse the attorney for those additional

57. This solution is proposed in Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 CORNELL L. REV. 207, 251 n.236 (1984).

58. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101 and DR 5-104-A (1982), which require full disclosure to the client before the attorney may enter any relationship with the client or a third party which has the potential of creating a conflict of interest.

59. See F. MACKINNON, *supra* note 30, at 75.

60. *Id.* at 76. (Contingent fee contract clauses which penalize a client for settling against the attorney's advice are invalid.)

61. See *supra* discussion accompanying notes 50-51.

hours spent in litigation for which the attorney will receive no or inadequate compensation under Rule 68 or *Hensley v. Eckerhart*.⁶² It is possible that provisions of this nature would be declared invalid limitations on a client's ability to settle. When similar provisions are included in contingent fee contracts, they are usually determined to be unenforceable.⁶³ Alternatively, a court might decide that ethical constraints as well as section 1988 preclude a retainer agreement from providing greater attorney compensation than that allowed by a court under section 1988.⁶⁴

In addition to the uncertain legal validity of these particular retainer provisions, there is a practical difficulty of equal if not greater dimension. One of the assumptions made by Congress when it adopted section 1988 was that civil rights were not being adequately enforced because persons whose rights were violated did not have the financial resources to hire an attorney.⁶⁵ There is no reason to believe that this assumption is less valid today than it was in 1976. Attorneys undertaking representation of a typical civil rights client know that the client will be unable to compensate them for their services. The retainer provisions described above are, therefore, useless from the attorney's perspective. Only in those rare instances in which the difference between the attorney's expectations of compensation and the court award or the fee negotiated through settlement is not large could an attorney expect a client to make up the difference.

For similar reasons, any attempt entirely to divorce attorney compensation from the statutory fee entitlement will be unsatisfactory. This solution assumes that a court will award a statutory fee to

62. See *supra* discussion accompanying notes 36-49.

63. See *supra* note 61. Compare the standard provision of contingent fee contracts that, if the case goes to trial, the percentage of the attorney's share of any recovery will increase.

64. In *Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983), the court of appeals held that "if the client's section 1988 fee award, calculated as set forth in *Hensley v. Eckerhart*. . . , is less than the amount owed to the attorney under the contingent fee agreement, then the lawyer will be expected to reduce his fee to the amount awarded by the courts." *Id.* at 1506-07. The court's opinion was based partially on the legislative intent of § 1988 and partially on professional canons of ethics. For other cases which discuss the relationship between statutory fee awards and fee contracts, see *United Slate, Tile, and Composition Roofers, Damp and Water-proof Workers Ass'n, Local 307 v. G&M Roofing & Sheet Metal Co.*, 115 L.R.R.M. 3700 (6th Cir. 1984) (a fee contract does not set an upper limit on the amount of a statutory fee award under the FLSA); *Wojtkowski v. Cade*, 725 F.2d 127 (1st Cir. 1984); *Lenard v. Argento*, 699 F.2d 874 (7th Cir. 1983) (a contingent fee contract does not set an automatic upper limit to a § 1988 fee award); *Sullivan v. Crown Paper Board Co., Inc.*, 52 U.S.L.W. 2266 (3d Cir. Oct. 14, 1983); and *Thompson v. Village of Hales Corners*, 340 N.W.2d 704, 115 Wis. 2d 289 (1983); *Sanchez v. Schwartz*, 688 F.2d 503 (7th Cir. 1982).

65. See *supra* note 6, and accompanying text.

the plaintiff rather than to the plaintiff's attorney and that the attorney will then be compensated by the plaintiff, according to the terms of the retainer agreement.⁶⁶ The utility of separating actual compensation from the amount of a fee award is limited, for the most part, to cases in which monetary damages are sought as relief.⁶⁷ A contingent fee agreement simply does not work if equitable relief is the primary objective of the lawsuit. Furthermore, a contingent fee agreement cannot bind members of a class represented by an individual plaintiff and, therefore, is not an effective solution for class actions.⁶⁸ Finally, it is not clear that such a contingent fee arrangement could be enforced in a manner consistent with the objectives of section 1988. Courts have ignored the provisions of contingent fee contracts which, if enforced, would undercut the purposes of section 1988.⁶⁹ One of the purposes of section 1988 is to ensure that a client is reimbursed for legal expenses. If a client is awarded a statutory fee and then is permitted to compensate the attorney according to the terms of a contingent fee agreement, the client may receive a windfall from the award if the agreement obligates the client to pay the attorney less than the full amount of the award. Providing a windfall to the plaintiff was not an objective desired by Congress when it adopted section 1988.⁷⁰

The retainer agreement would, of course, be useful if it contained a formula by which a lump sum settlement would be divided between the attorney and client. If the attorney and the client were both willing to accept the lump sum offer, any potential dispute over the amount of the fee to which the attorney was entitled would be avoided. If, however, the settlement as divided under the formula would not provide what the attorney would consider adequate compensation, there would still be an incentive for the attorney to reject settlement, even if it was in the client's best interests. Retainer agreements are useful devices for disclosing to clients the conflict of interest inherent in a case in which an attorney expects to be paid under a fee statute but, as a practical and legal matter, they are unsatisfactory devices for eliminating the conflict of interest.

66. Green, *supra* note 58, at 251 n.236.

67. *Id.* at 251 n. 236.

68. *Id.*

69. E.g., *Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983).

70. See *Hensley v. Eckerhart*, 103 U.S. S. Ct. 1933, 1947 (1983) (Brennan, J., concurring in part) (fee awards should be structured so as not to permit an attorney to "lard" winning cases solely to augment income), *SUBCOMMITTEE REPORT*, *supra* note 4, at 12.

B. Judicial Scrutiny of Settlement Agreements

Another suggestion for coping with the ethical problem inherent in settlement negotiations when an attorney has a claim to a statutory fee is close judicial scrutiny of settlement agreements to protect the client's interests. Courts routinely and carefully review settlements in class action litigation to ensure that the named plaintiff and attorney have not sacrificed the interests of class members in favor of their own.⁷¹ Rule 23 of the Federal Rules of Civil Procedure requires court review of approval of class action settlements⁷² which may entail a full hearing so that the court is able to assess the propriety and reasonableness of the proposed fee.⁷³ The burden of establishing the fairness of a settlement agreement in a class action rests with the proponents of the settlement.⁷⁴

Section 1988 does not require judicial approval of consent judgments, although other statutes do embody such a requirement.⁷⁵ Thus, in section 1988 actions which are not prosecuted on behalf of a class, it becomes important to determine whether a court has the ability to condition the entry of a consent order on its approval of the terms of the settlement agreement. Although there will be no opportunity for judicial scrutiny to provide a check on conflicts of interest if a consent order is not sought,⁷⁶ in most instances a civil rights plaintiff will want a settlement agreement incorporated into a consent decree to ensure enforceability of the agreement.⁷⁷ A court may

71. Many of the cases discussed in this article involved judicial scrutiny of class action settlements. *See, e.g.*, *Mendoza v. United States*, 623 F.2d 1338 (9th Cir. 1980); *Shlensky v. Dorsey*, 574 F.2d 131 (3d Cir. 1978); and *Lisa F. v. Snider*, 561 F. Supp. 724 (N.D. Ind. 1983).

72. FED. R. Civ. P. 23(e), provides that "[a] class action shall not be dismissed or compromised without the approval of the court. . . ." *See also* FED. R. Civ. P. 23.1 & 23.2.

73. *See, e.g.*, the description of the necessary review set forth in *Parker v. Anderson*, 667 F.2d 1204 (5th Cir. 1982) and *Piambino v. Bailey*, 610 F.2d 1306 (5th Cir. 1980).

74. *Purcell v. Keane*, 54 F.R.D. 455 (E.D. Pa. 1972).

75. *E.g.*, 11 U.S.C. § 50 (bankruptcy suits); 15 U.S.C. § 16(e) (antitrust suits). Cf. Justice Rehnquist's dissenting opinion in *Maryland v. United States*, 103 U.S. S. Ct. 1240 (1983), in which he suggests that the requirement of judicial approval of agreements to which the Justice Department has consented may unconstitutionally interfere with the authority of the executive branch to implement the laws.

76. The court in *Chesny v. Marek*, 720 F.2d 474 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3770 (S. Ct. April 23, 1984), suggests that a client who believes that an attorney is not negotiating with proper concern for the client's interest may ask the court to intervene to arbitrate the negotiations. *Id.* at 478. It is unclear, however, whether a client will have the assertiveness or the knowledge to make a direct approach to the court a realistic option.

77. An attorney may also want court approval to protect himself from potential subsequent allegations of improper representation. *See Note, The Consent Judgment as an Instrument for Compromise and Settlement*, 72 HARV. L. REV. 1314, 1329 (1959) (a fiduciary may

scrutinize the terms of a proposed settlement agreement if a consent decree is sought.

When a consent decree is requested, the court's authority to review the terms of a proposed settlement in which an attorney's fee has been negotiated derives from several sources.⁷⁸ First, courts have recognized authority to supervise members of the bar so as to protect clients from unethical attorney conduct⁷⁹ and the legal profession from distrust.⁸⁰ Courts have relied on this authority to set general guidelines for contingent fee contracts⁸¹ and to set upper limits to fee recoveries in specific cases.⁸²

In addition, 42 U.S.C. § 1988 can be interpreted to extend approval authority to courts. Section 1988 gives courts discretion to award attorney's fees. Congress provided for discretionary awards as a partial check on unethical conduct which some feared section 1988 would encourage.⁸³ If a court is asked to approve a consent decree which includes a provision for attorney's fees negotiated in settlement of a section 1988 claim, the court should exercise its discretion to approve or reject in such a way that the congressional intent underlying section 1988 is not undermined.⁸⁴ The attorney's fee provi-

seek voluntary approval to protect himself).

78. Compare Levin, *supra* note 26 at 517, who suggests that judicial supervision is necessarily limited to class action settlements.

79. Dunn v. H.K. Porter Co., 602 F.2d 1105, 1108-10 (3d Cir. 1979). See F. MACKINNON, *supra* note 30, at 23-24, who states that a court may exercise its "equity jurisdiction over fiduciary relations, in this case, the lawyer-client relationships," as well as "its special power over activities of members of the bar" to review attorney fees.

80. Dunn v. H.K. Porter Co., 602 F.2d 1105, 1108-10 (3d Cir. 1979); Levin v. Mississippi River Corp., 377 F. Supp. 926, 931 (S.D.N.Y. 1974); Schlesinger v. Teitelbaum, 475 F.2d 137, 140 (3d Cir.), cert. denied, 414 U.S. 111 (1973); Farmington Dowell Prod. Co. v. Forster Mfg. Co., 421 F.2d 61, 88 n.60 (1st Cir. 1970).

81. F. MACKINNON, *supra* note 30, at 23-24.

82. See *supra* the cases cited in notes 79 and 80, Cooper v. Singer, 719 F.2d 1496 (10th Cir. 1983) (attorney cannot recover more than fee award set by court under § 1988, despite provision of contingent fee contract); and Sargeant v. Sharp, 579 F.2d 645 (1st Cir. 1978) (court may set an upper limit to attorney's fee, despite provisions of contingent fee contract).

83. The primary congressional concern was that attorneys would stir up frivolous or harassing litigation given the prospect of a § 1988 fee recovery. See SUBCOMMITTEE REPORT, *supra* note 4, at 4, 11, 75, 215, and the discussion in Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346, 351 (1980). See also *infra* notes 151-54, and accompanying text.

84. See Shadis v. Beal, 685 F.2d 824 (3d Cir. 1982). Cf. Environmental Defense Fund v. Watt, 722 F.2d 1081 (2d Cir. 1983) (the purposes of the Equal Access to Justice Act require a searching review of the litigation process, even when that process culminates in a settlement); Farmington Dowell Prod. Co. v. Forster Mfg. Co., 421 F.2d 61, 88 n.60 (1st Cir. 1970) (settlement of statutory attorney's fee should be reviewed to ensure that intent of the antitrust statute is effectuated); and Foster v. Boise Cascade, Inc., 420 F. Supp. 674 (S.D. Tex. 1976), aff'd, 577 F.2d 335 (5th Cir. 1978) (Title VII requires review of settlement

sion should not be approved if it reflects unethical conduct which Congress attempted to constrain when it adopted section 1988.

A court also has a legitimate interest in not approving a consent decree which it would not enforce.⁸⁵ If an attorney unethically compromises a claim of his client for his own advantage, a consent judgment incorporating that unethical compromise may be subject to direct or collateral attack.⁸⁶ Thus, a court may review a settlement agreement to assure itself that the terms of the agreement are enforceable.

Finally, courts have authority to review proposed consent judgments if the public interest might be adversely affected.⁸⁷ One court has explicitly held that judicial review of fee settlements under section 1988 is warranted because courts have a special responsibility to the public under fee-shifting statutes. In *Jones v. Amalgamated Warbasse Houses*,⁸⁸ the Court of Appeals for the Second Circuit held that this special responsibility justified a district court in reducing the amount of a fee award agreed to during a settlement. The district court had found no evidence of collusion or ethical impropriety in the settlement negotiations. It simply believed that the hourly rate to which the parties had agreed for purposes of computing the fee was out of line with the hourly rates generally used by courts in awarding fees.⁸⁹ The court of appeals stated that the district court was authorized in its actions if it believed revision of the settlement agreement would promote confidence in the judicial process⁹⁰ and ensure that public perception of the appropriateness of the award would not be offended.⁹¹ Thus, courts have ample authority to review settlements of section 1988 fee claims.⁹²

agreement).

85. See Note, *The Consent Judgment as an Instrument for Compromise and Settlement*, *supra* note 78, at 1316-17.

86. *Id.* at 1321-34.

87. *Id.* at 1316.

88. 721 F.2d 881 (2d Cir. 1983).

89. *Id.* at 883.

90. *Id.* at 885.

91. *Id.* Other decisions in which courts have supervised the amount of § 1988 fee awards include *Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983) and *Sargeant v. Sharp*, 579 F.2d 645 (1st Cir. 1978).

92. Compare the exercise of judicial discretion to review settlement agreements in which defendants, in anticipation of an equitable (rather than a statutory) fee award, attempt to resolve the fee issue during settlement negotiations. For example, although courts have no statutory authority to award antitrust plaintiffs an attorney's fee if the plaintiffs prevail through settlement, *Hew Corp. v. Tandy Corp.*, 480 F. Supp. 758, 760 (D. Mass. 1979); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); *Lindy Bros. Bldrs., Inc. v. American*

Despite recognized judicial authority to review proposed settlements, there are several reasons why that review will not adequately resolve the conflict of interest problem inherent in settlement negotiations. First, as a practical matter, in a lawsuit which is not prosecuted as a class action, courts have historically been reluctant to interfere with settlement agreements.⁹³ Judicial review of these settlement agreements may not be conducted as thoroughly or as rigorously as the review conducted under Rule 23.⁹⁴

A more significant difficulty with judicial scrutiny of settlement agreements is that such a review is retrospective.⁹⁵ Judicial review of proposed settlements is intended to help the court determine whether the settlement agreement reveals an actual conflict of interest, not to eliminate prospectively a potential conflict between attorney and client.

In a retrospective review, there may be many factors relevant to the question of whether the attorney subordinated the client's interest to her own.⁹⁶ Those factors include the terms of the settlement agreement which, on their face, may reveal the conflict.⁹⁷ A court may also consider whether the settled relief amounts to a fraction of the plaintiff's potential recovery, and it may compare the strength of

Radiator & Standard Sanitary Corp., 487 F.2d 161, 164-65 (3d Cir. 1973), they have asserted an equitable power to make such an award, e.g., *City of Detroit*, 495 F.2d at 469; *Lindy Bros.*, 487 F.2d at 165-66, and review settlements of fee claims. See Note, *Attorney's Fees in Individual and Class Action Antitrust Litigation*, 60 CALIF. L. REV. 1656, 1675-78 (1972).

93. Compare *Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881 (2d Cir. 1983) (settlements are accorded a presumption of regularity) with *Purcell v. Keane*, 54 F.R.D. 455 (E.D. Pa. 1972) (the burden of establishing the fairness of a settlement agreement in a Rule 23 action rests with the proponents). Cf. *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) (the proponent of modification of a consent decree previously entered, with the approval of all concerned, bears a heavy burden). Levin, *supra* note 26, may therefore be correct as a practical if not a legal matter that judicial review of settlement agreements will not adequately address the conflict of interest problem.

94. See, e.g., *State of Illinois v. Harper & Row Publishers, Inc.*, 55 F.R.D. 221 (N.D. Ill. 1972) (court reviews fees on behalf of class members, but does not interfere with contingency provision for the named client).

95. Note, *Attorneys' Fees in Individual and Class Action Antitrust Litigation*, 60 CALIF. L. REV. 1656, 1675 (1972), identifies this as a problem with judicial scrutiny of settlement agreements even in a Rule 23 class action.

96. Cf. *International Travel v. Western Airlines*, 623 F.2d 1255, 1277 (8th Cir. 1980); and *Dunn v. H.K. Porter Co.*, 602 F.2d 1105, 1110 (3d Cir. 1979) (the court lists the factors which it may review to determine whether a contingent fee contract represents an unethical bargain between attorney and client).

97. See *People v. Radinsky*, 176 Colo. 357, 490 P.2d 951 (1971); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1979). Attorneys are to avoid both the fact and the appearance of "windfall fees", *Hensley v. Eckerhart*, 103 U.S. S. Ct. 1933 (1983); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).

the case on the merits to the settled amount.⁹⁸ A court may take into account whether a government agency, such as the Justice Department, has concurred in the agreement if the court believes that the government would likely not concur in a settlement which is the product of attorney overreaching.⁹⁹ A court might also seek to determine whether a particular, questionable settlement reflects a pattern of similar, equally questionable dealings with clients.¹⁰⁰ In most instances the question of whether a conflict of interest has affected the settlement will not be easily answered. Because of the nature of the factual inquiry, the retrospective review is not likely to uncover all or even most instances in which an attorney subordinates the client's interest to her own.¹⁰¹ The conflict would be more readily identifiable if a court could review the process of negotiations rather than, simply, the terms of the settlement agreement. There is, however, no record of settlement negotiations. Moreover, courts cannot rely on the usual adversary process to reveal evidence of collusion if there is a possibility that the plaintiff's attorney has been bought off by the defendant. Neither plaintiff's nor defendant's attorney would have an interest in bringing evidence of that collusion before the court.¹⁰²

Finally, judicial review of settlement agreements puts the court in an adversarial position with which a court may not be entirely comfortable. Courts have expressed concern at being asked to assume an adversarial role,¹⁰³ and one has even appointed a guardian ad litem to represent the interests of parties whose interests had arguably been unethically ignored by an attorney.¹⁰⁴ The retrospective review is, therefore, institutionally as well as substantively difficult to pursue with success.

98. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974).

99. *Mendoza v. United States*, 623 F.2d 1338, 1353 (9th Cir. 1980).

100. *Lynn v. Arizona*, 80 F.R.D. 665 (D. Ariz. 1978), and *Munoz v. Arizona State Univ.*, 80 F.R.D. 670 (D. Ariz. 1978).

101. See, e.g., *McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416 (7th Cir. 1977), in which the court carefully reviewed an allegation that the settlement agreement reached was the product of unethical conduct. The court concluded that the record did not support the allegation. *Id.* at 424. See also *City of Philadelphia v. Charles Pfizer & Co.*, 345 F. Supp. 454, 470-71 (S.D.N.Y. 1972).

102. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUDIES 399, 441 (1973).

103. *Prandini v. National Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1977).

104. *Haas v. Pittsburgh Nat'l Bank*, 77 F.R.D. 382 (W.D. Pa. 1977).

C. *Bifurcated Settlement Negotiations: Prandini v. National Tea Co.*

The United States Court of Appeals for the Third Circuit has proposed another solution to the conflict of interest problem inherent in settlement negotiations in statutory fee cases. In *Prandini v. National Tea Co.*,¹⁰⁵ a damages award and attorney's fees were negotiated simultaneously. The court insisted that settlement procedures be conducted with propriety.¹⁰⁶ It recognized that the simultaneous negotiation of fees and merits raised the possibility that the fee agreement was made at the expense of the client and represented a "sweetheart contract" with the defendant.¹⁰⁷ The *Prandini* court suggested, therefore, that trial courts:

insist upon settlement of the damage aspect of the case separately from the award of statutorily authorized attorneys' fees. Only after court approval of the damage settlement should discussion and negotiation of appropriate compensation for the attorneys begin. This would eliminate . . . , in practical effect, one fund divided between the attorney and client.¹⁰⁸

Prandini requires a bifurcated settlement procedure; neither the plaintiff nor the defendant is able to merge negotiations of fees and merits in any case.¹⁰⁹

The *Prandini* solution is not a completely satisfactory method of coping with the attorney's fee conflict of interest inherent in settlement negotiations. First, it is unrealistic to believe that the parties

105. 557 F.2d 1015 (3d Cir. 1977).

106. *Id.* at 1021.

107. *Id.*

108. *Id.*

109. Usually, it is advantageous to the defendant to merge negotiations, because the defendant has an interest in settling all of the elements of the case and disposing of the entire liability at one time. In some situations, however, it may also be to the plaintiff's advantage to attempt to merge negotiations. If a plaintiff has a relatively weak (but plausible) case on the merits, a claim for attorney's fees may be used in settlement negotiations to persuade the defendant to agree to give some relief to the plaintiff. The *quid pro quo* would be the relinquishment of the claim for fees. Levin, *supra* note 26, at 517, assumes that *Prandini* restricts only the conduct of plaintiff's counsel and that defendants are free, under *Prandini*, to make lump sum offers of settlement or otherwise to inject the fee issue into settlement negotiations. Levin's interpretation of *Prandini* is unnecessarily narrow but, if adopted, is a serious defect in the *Prandini* solution to the ethical problem. Note that the new ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 8.4(a), provide that it is "professional mis-conduct for a lawyer to . . . knowingly assist or induce another to [violate the Rules of Professional Conduct]." See also Committee on Professional Responsibility and Judicial Ethics, New York City Bar Ass'n Op. 80-84 (Sept. 18, 1981).

negotiating a settlement will not take into account the possibility of a statutory fee award, even if attorney's fees are not discussed during negotiation of the merits of the plaintiff's claim. A request for statutory attorney's fees is frequently included in the complaint and, even if it is not, the participants in the negotiation sessions are, or ought to be, aware of the potential claim.¹¹⁰ If one can assume that courts will clarify the guidelines for calculating a reasonable fee subsequent to settlement,¹¹¹ then all parties can roughly calculate what would be an appropriate fee. Negotiation of the merits will proceed on an implicit understanding of what a reasonable fee claim would be, and that understanding will inevitably influence the negotiation. Defendants may provide a cushion for subsequent fee claims when negotiating the merits of a settlement, and plaintiffs' attorneys, cognizant of the defendants' strategy, may not vigorously protest the strategy because the amount of the fee is at stake. Worse yet, the attorneys on each side may even be tempted to enter into collusion to the detriment of the plaintiff's interest.¹¹²

If the *Prandini* court's objective of excluding the attorney's fee issue from settlement negotiations on the merits can be satisfied only by an initial settlement agreement which is completely silent on the subject of attorney's fees, there is a further difficulty associated with the *Prandini* bifurcated settlement procedure. *Prandini* precludes the negotiation of fees at the time the merits of the case are settled, but

110. Fee applications may appear for the first time after judgment, as in *White v. New Hampshire Dep't of Empl. Sec.*, 455 U.S. 445 (1982). See generally E. LARSON, *supra* note 4, for a discussion of the procedural characteristics of fee applications; and Green, *supra* note 57, at 246, for a discussion of whether a fee claim should be included in the complaint.

111. See *infra* notes 190-214 and accompanying text. If no guidelines exist for calculating a reasonable fee subsequent to settlement, adherence to *Prandini* may have the unfortunate consequence of discouraging settlement negotiations. A defendant may be unwilling to settle unless his total liability, including that for fees, is resolved. If negotiations are bifurcated, and the defendant has no way of calculating his total liability, he may prefer to proceed to trial. Thus, although *Prandini* may encourage plaintiffs' attorneys to engage in settlement discussions by removing the defendant's opportunity to exploit a conflict of interest, it may discourage defendants from pursuing negotiations. See *White v. New Hampshire Dep't of Empl. Sec.*, 455 U.S. 445 (1982), in which the Court notes that defendants may legitimately insist on knowing the extent of their total liability before settling. Levin, *supra* note 26, at 517, discusses this concern. Green, *supra* note 58, at 249-50, rejects *Prandini* because it precludes a defendant from knowing the total extent of liability. See also *MANUAL FOR COMPLEX LITIGATION*, §§ 1.46 and 1.47 (4th ed. 1977), which acknowledges the legitimacy of simultaneous negotiations as a means of ensuring that defendants know the extent of their liability. Compare *Lisa F. v. Snider*, 561 F. Supp. 724, 726 (N.D. Ind. 1983), in which the court requires bifurcated negotiations in part to avoid interference with the policy of encouraging good faith efforts by plaintiffs to settle, *with White*.

112. Note, *Attorney's Fees*, 51 TEMP. L.Q. 799, 800 n. 12 (1978).

it does not necessarily preclude the absolute waiver of fees at that time. The *Prandini* court was concerned only about the conflict posed when a settlement provides for a lump sum from which both attorney and client are expected to satisfy their claims.¹¹³ That concern is different from the issue which arises when there is a question of fee waiver. The problem with permitting a defendant to demand a fee waiver is that an ethical plaintiff's attorney may be forced to relinquish a valid claim, a claim which Congress intended to exist to fulfill important legislative objectives, in order to represent her client's interests effectively.¹¹⁴

Because *Prandini* did not provide an analysis of or a solution for the waiver issue, if the initial settlement reached under *Prandini* does not mention or reserve for subsequent negotiation the pending claim for fees, the court has no way of knowing whether the plaintiff, through the settlement agreement, has relinquished a claim to attorney's fees.¹¹⁵ If the plaintiff eventually files a claim, the defendant may argue that a settlement agreement which does not mention the pending fee claim was intended by the parties to dispose of all claims related to the litigation.¹¹⁶ In that event, a court will be required to spend time resolving the issue of the parties' intent.¹¹⁷ Silence may

113. See *supra* notes 105-08 and accompanying text.

114. See *Lisa F. v. Snider*, 561 F. Supp. 724 (N.D. Ind. 1983), for that analysis.

115. Even the defendant may not know whether the plaintiff has intended to relinquish a fee claim until many months have passed. In *White v. New Hampshire Dep't of Empl. Sec.*, 455 U.S. 445 (1982), the Supreme Court held that a claim for attorney's fees is not governed by the ten-day time limit of Rule 59(e) of the Federal Rules of Civil Procedure. The majority did not determine whether a fee request should be governed by the time limitations set forth in Rules 54(d) and 58 of the Federal Rules of Civil Procedure. *Id.* at 454. Nevertheless, it did appear to approve of the decision in *Obin v. District No. 9 of the Int'l Ass'n of Machinists*, 651 F.2d 574 (8th Cir. 1981), in which the court held Rules 54(d) and 58 inapplicable to a fee request. Thus, barring surprise, see note 119 *infra* and accompanying text, or a local rule providing for a time limitation on the filing of a fee request, see *White*, 455 U.S. at 454, a valid fee request may be filed many months after judgment on the merits. In *White*, the complaint did not include a request for fees and a motion for fees was not filed until four and one-half months after a settlement was reached. Subsequent to settlement, a defendant could, of course, ask the plaintiff whether a fee request will be made. There is no assurance of an answer. More importantly, a defendant may not wish to remind the plaintiff of his right to claim a fee award by asking the question.

116. See the arguments made by the defendants in *White v. New Hampshire Dep't of Empl. Sec.*, 629 F.2d 697, 699 n.2 and 705 (1st Cir. 1980), *rev'd*, 455 U.S. 445 (1982); *Burke v. Guiney*, 700 F.2d 767 (1st Cir. 1983); *Brown v. General Motors Corp.*, 722 F.2d 1009 (2d Cir. 1983); *Regalado v. Johnson*, 79 F.R.D. 447 (E.D. Ill. 1978); and *Balcaen v. Herschberger*, 415 F. Supp. 333 (E.D. Wis. 1976).

117. It is the parties' intent which determines the validity of the fee claim subsequent to settlement. See the discussion in *Brown v. General Motors Corp.*, 722 F.2d 1009 (2d Cir. 1983); and *Chicano Police Officers' Ass'n v. Stover*, 624 F.2d 127, 132 (10th Cir. 1980).

be construed as a waiver of any claim to attorney's fees.¹¹⁸ Finally, even if silence is not construed as a waiver of an attorney's fees claim, a court may in its discretion deny a fee award if a fee request comes as a surprise to the defendant.¹¹⁹ Courts may also deny fee requests if the defendant has been misled or if there are other circumstances which would render a fee award unjust.¹²⁰

A settlement agreement negotiated in strict adherence to *Prandini* such that it does not mention the fee issue is, therefore, as likely to generate as to conclude litigation. On the other hand, if a court attempts to avoid litigation over issues of waiver or surprise and encourages plaintiffs to reveal their intentions by reserving the claim to attorney's fees in the initial settlement agreement, the effectiveness of the *Prandini* procedure will be undermined. Negotiation of the merits will be affected by explicit reservation of the pending fee claim.¹²¹

The response of courts to the *Prandini* proposal of mandatory bifurcated settlement negotiations has been mixed. Some have distinguished *Prandini* on a factual basis.¹²² Some have indicated approval

118. *Aho v. Clark*, 608 F.2d 365 (9th Cir. 1979). *But see Benitez v. Collazo*, 571 F. Supp. 246, 249 (D.P.R. 1983), in which the court suggests that *Aho* is no longer good law in the Ninth Circuit. Many more courts have refused to construe silence in this way. *See, e.g.*, *Burke v. Guiney*, 700 F.2d 767 (1st Cir. 1983); *Chicano Police Officers' Ass'n v. Stover*, 624 F.2d 127 (10th Cir. 1980); *Benitez v. Collazo*, 571 F. Supp. 246 (D.P.R. 1983); *Regalado v. Johnson*, 79 F.R.D. 447 (E.D. Ill. 1978); and *Balcaen v. Herschberger*, 415 F. Supp. 333 (S.D. Wis. 1976). *Cf. Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939). Finding a waiver from silence alone would appear to be inconsistent with the congressional intent not to penalize counsel for seeking a settlement. *SUBCOMMITTEE REPORT*, *supra* note 4, at 215.

119. In *White v. New Hampshire Dep't of Empl. Sec.*, 455 U.S. 445 (1982), the consent agreement was silent on the fee question, but the Supreme Court nonetheless approved an award of fees. It did, however, caution that courts have discretion to deny fee requests if they come as a surprise. *Id.* at 454. *See also Baird v. Bellotti*, No. 83-1167 slip. op. (1st Cir. Jan. 13, 1984); and *FED. R. CIV. P.* 41(b).

120. *See, e.g.*, *Chicano Police Officers' Ass'n v. Stover*, 624 F.2d 127 (10th Cir. 1980), and *Aho v. Clark*, 608 F.2d 365 (9th Cir. 1979).

121. *See supra* note 111 and accompanying text.

122. In *Parker v. Anderson*, 667 F.2d 1204 (5th Cir. 1982), the challenged settlement agreement provided for a single fund from which both class relief and attorney's fees were to be paid. The court was to determine the amount of the fee. For that reason, compliance with the *Prandini* procedure was not mandated. *Id.* at 1213-14. The court of appeals stated that "the evil feared. . . can best be met by a careful district judge, sensitive to the problem [of unscrupulous attorneys negotiating large fees at the expense of an inadequate settlement for the client], properly evaluating the adequacy of the settlement for the class and determining and setting a reasonable attorney's fee. . . ." *Id.* at 1214. In *Shlensky v. Dorsey*, 574 F.2d 131 (3d Cir. 1978), the court of appeals refused to require compliance with the *Prandini* procedure because the settlement did not involve "one fund," as in *Prandini*, and the defendant was not indifferent to the allocation of the settlement fund between attorney's fees and class relief. *Id.* at 150. *Cf. McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416 (7th Cir. 1977) (the court

of the procedure as a method of avoiding conflicts of interest, but have not had occasion to order the parties to comply with the procedure.¹²³ One has encouraged attorneys voluntarily to comply with the procedure and has stated that simultaneous negotiations of the fees and merits will cause it to scrutinize carefully any settlement agreement to determine whether other circumstances "neutralize the potential for impropriety."¹²⁴ The Supreme Court of the United States has indicated that it would not approve of the *Prandini* mandatory procedure because "[i]n 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."¹²⁵ Only one court has directly ordered parties to comply with the *Prandini* proce-

reserved judgment on the *Prandini* issue because the record did not support the allegation of a conflict of interest).

123. In *Malchman v. Davis*, 706 F.2d 426 (2d Cir. 1983), a party objected to an anti-trust class action settlement because the court "permitted fee discussions to take place and agreement on the fee to be reached before all substantive issues affecting the class had been resolved." *Id.* at 432. The appellate court simply remanded the case to the trial court for resolution of factual questions pertaining to the fee award. Although it repeated the objector's question regarding negotiations, it did not state definitively that *Prandini* should be followed. *Id.* at 435-36. In *Benitez v. Collazo*, 571 F. Supp. 246 (D.P.R.) 1983) and *Regalado v. Johnson*, 79 F.R.D. 447 (E.D. Ill. 1978), the courts entertained fee requests submitted subsequent to the approval of consent agreements which did not mention the fee issue. They did not construe the agreements as waivers of the fee because "[the attorney's] interest in the fee makes it improper for the lawyer . . . to inject the question of attorney's fees into the balance of settlement discussions." *Regalado*, 79 F.R.D. at 451 (citing *Prandini*). See also *Benitez*, 571 F. Supp. at 249; *Folsom v. Butte County Ass'n of Governments*, 32 Cal. 3d 668, 652 P.2d 437, 186 Cal. Rptr. 589 (1982). In *Munoz v. Arizona State University*, 80 F.R.D. 670 (D. Ariz. 1980), and *Lyon v. Arizona*, 80 F.R.D. 665 (D. Ariz. 1978), the fact that fees and merits were negotiated simultaneously was used by the court to explain its refusal to certify the named plaintiff as an adequate class representative under Rule 23 of the Federal Rules of Civil Procedure. Other courts which have noted the ethical problems associated with simultaneous negotiation but have not discussed *Prandini* include *Gram v. Bank of Louisiana*, 691 F.2d 728 (5th Cir. 1982); *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 503 n.1 (5th Cir. 1981); *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1315 (4th Cir. 1978); and *City of Philadelphia v. Charles Pfizer & Co.*, 345 F. Supp. 454, 470-71 (S.D.N.Y. 1972).

124. *Mendoza v. United States*, 623 F.2d 1338, 1353 (9th Cir. 1980).

125. *White v. New Hampshire Dep't of Empl. Sec.*, 455 U.S. 445, 453 n.15 (1982). The Court did not directly reject the *Prandini* rule. It merely refused to rest its decision in *White* on a rationale which implicitly would have approved the *Prandini* procedure. See *supra* note 111, and accompanying text. Compare the rationale in *Obin v. District No. 9 of the Int'l Ass'n of Machinists*, 651 F.2d 574, 582 (8th Cir. 1981), which was discussed in *White*. *Levin, supra* note 26 at 519, states that the court in *Vega v. Bloomsburgh*, 427 F. Supp. 593 (D. Mass. 1977) (the citation is not to the settlement phase of the litigation), refused to prohibit a defendant from discussing fee waiver during settlement negotiations because of views similar to those of the Supreme Court that there is necessarily a give and take in the negotiations. This article rejects the suggestion that defendants have no way of making a reasonable estimate of fee liability which may be imposed by a court subsequent to a settlement of the merits. See *infra* notes 189-214, and accompanying text.

dure.¹²⁶ Courts recognize the ethical problems posed by settlement negotiations in cases in which a statutory fee award is available, but they are not uniformly willing to require bifurcated negotiations to avoid those difficulties.¹²⁷

It has been suggested that plaintiffs' attorneys voluntarily resort to the *Prandini* procedure to avoid the appearance of improper conduct during negotiations.¹²⁸ Although voluntary compliance sounds useful,¹²⁹ it will not necessarily achieve the intended objective. A defendant may simply refuse to go along with the suggestion. Moreover, because it is not clear that voluntary compliance with the *Prandini* procedure will always be in the best interests of the plaintiff, the procedure must be used with caution. If the defendant's liability is sufficiently uncertain and a substantial amount of attorney time has been expended by the plaintiff's attorney in preparing for trial, the defendant may be unwilling to discuss settlement if negotiations do not include the fee claim. It is when the defendant's liability is uncertain that the plaintiff has the greatest interest in settlement. Thus, insistence on adherence to the *Prandini* procedure in all negotiations might actually work to the disadvantage of the plaintiff.¹³⁰

The *Prandini* procedure does much to minimize the potential conflict of interest between attorney and client, but it is a procedure which is in need of refinement if it is not to create, through inflexible application or failure to confront the waiver issue,¹³¹ as many problems as it solves. Its chief defect, however, is that it only postpones and does not eliminate the negotiation of the fee question. As long as fees are negotiable and attorneys are aware of that fact, the conflict of interest cannot be completely avoided.

126. *Lisa F. v. Snider*, 561 F. Supp. 724 (N.D. Ind. 1983). The court justified its order not only because of the ethical problems generated by simultaneous negotiation of the fees and merits but also because of the policies which led to the adoption of 42 U.S.C. § 1988 and the policy of encouraging good faith efforts to settle.

127. Judicial authority to require bifurcated negotiations is supported by FED. R. Civ. P. 42(b), as well as by the many other sources of authority discussed in this article.

128. Levin, *supra* note 26 at 521.

129. *Id.*; see also *Chrapliwy v. Uniroyal, Inc.*, 509 F. Supp. 442, 448 (N.D. Ind. 1981).

130. Levin, *supra* note 26 at 520, states that the client must always be consulted before voluntary resort to *Prandini* is made because of the possibility that the procedure will not be conducive to securing the best settlement for the client.

131. The Committee on Professional Responsibility and Judicial Ethics of the New York City Bar Association has taken the position that a defendant's insistence that fee claims be entirely or partially waived as a condition to settlement is unethical, because it prejudices a vital aspect of the administration of justice and interferes with efforts to make counsel available to those who cannot afford it. New York City Bar Ass'n, Op. 80-84 (Sept. 18, 1981).

D. Trial Strategems

Attorneys have resorted to various trial strategems designed to achieve the effects of fee non-negotiability. These attorney-generated responses to the conflict of interest inherent in a system which permits fee negotiability are undesirable because they tend to consume judicial time and resources. There are two devices which an attorney might use to ensure judicial involvement in the fee question and thereby achieve the effect of fee non-negotiability. The first requires silence regarding the fee issue during negotiation of the merits of the claim. A plaintiff's attorney may choose not to introduce the subject of fees into the negotiation or, perhaps, not even include a specific request for fees in the original complaint. Subsequent to the completion of settlement negotiations and the entry of a consent order, that attorney is apparently free to petition the court for an award of fees.¹³² If the attorney adopts this strategem, a court will find itself having to resolve questions of the intent of the parties during settlement,¹³³ whether the fee request came as a surprise to the defendant,¹³⁴ or whether there are other circumstances which would render the award of a fee unjust.¹³⁵ As noted earlier, these issues are not easy to resolve.

An attorney might also attempt to ensure judicial involvement in the fee award by requesting an interim award of fees, which is available under section 1988.¹³⁶ Interim fee awards are normally not the subject of negotiation. They are available if a plaintiff has prevailed, for example, on one but not all of the causes of action. Although it is not entirely clear when a court has authority to make an interim fee award,¹³⁷ an attorney may attempt to structure litigation so as to present appropriate circumstances for interim awards. It is possible that interim fee awards would render a later fee claim so

132. See *supra* notes 110, 115, and 119-20 and accompanying text.

133. See *supra* notes 116-17 and accompanying text.

134. See *supra* notes 119-20, and accompanying text.

135. *Id.*

136. See SUBCOMMITTEE REPORT, *supra* note 4, at 11, 216.

137. In *Hanrahan v. Hampton*, 446 U.S. 754 (1980), the Supreme Court determined that a party requesting an interim award must establish some liability and that successful pursuit of discovery would not suffice. *Hanrahan* is the only Supreme Court guidance on the issue. In 1981, the Court denied certiorari in *Alioto v. Williams*, 625 F.2d 845 (9th Cir. 1980), *cert. denied*, 450 U.S. 1012 (1981) (a plaintiff had received an interim award for prevailing on a motion for a preliminary injunction; the case became moot), and in *Weber v. Barrett*, 615 F.2d 916 (5th Cir. 1980), *cert. denied*, 450 U.S. 1022 (1981) (the plaintiffs received an interim award of fees by defeating a motion to intervene). See generally E. LARSON, *supra* note 4 at 241-42, 244-49.

minimal that it would create no significant conflict of interest for the attorney during subsequent negotiations. It is even more possible that defendants, unaware of the availability of interim fees or unsure of the circumstances under which a court will award them, will forego opportunities to negotiate their amount. In *Benitez v. Collazo*,¹³⁸ for example, the plaintiff secured a partial consent agreement providing most of the relief which had been requested in the complaint.¹³⁹ The agreement did not mention the issue of attorney's fees. The plaintiffs then successfully petitioned for an interim award of fees, which was substantial.¹⁴⁰ In *Benitez*, the plaintiff's strategem for securing a judicial fee award raised the difficult question of fee waiver, because the partial consent agreement had not mentioned the fee issue. Interim fee applications which might be presented in other circumstances would not require resolution of this issue. The strategem would be undesirable, nonetheless, because it might result in artificially structured settlement negotiations or litigation strategies and repeated and time-consuming requests for interim awards.

Another attorney strategem is designed to circumvent adverse consequences to the attorney's fee interest when it does become subject to negotiation. Assume, for example, that a plaintiff's attorney has been forced to confront the fee issue by a defendant who insists on either a waiver or a substantial reduction of fees as a condition of settlement. The attorney decides that the best way ethically to cope with the demand is temporarily to accede to the defendant's demands in order to secure a settlement for a client. The attorney then approaches a court with either a motion to set aside the judgment¹⁴¹ or with a new complaint for damages in which section 1988 is used as the basis for a new cause of action.¹⁴² The plaintiff's attorney would argue that the defendant's settlement demand was impermissible, given the ethical dilemma which it created for the attorney and the purposes of section 1988, and that the attorney should thus receive a fee award. This strategem, like the others, generates unneces-

138. 571 F. Supp. 246 (D.P.R. 1983).

139. Only right to treatment issues remained to be litigated. *Id.* at 248.

140. The total award amounted to \$110,530.01. *Id.* at 254.

141. Levin, *supra* note 26, at 521. As Levin notes, there is a possibility that a "selective Rule 60(b) [FED. R. CIV. P.] motion" cannot be made. Rule 60(b) may not permit a court to set aside those parts of a judgment it does not like while preserving the remainder of the judgment. In the settlement context, in which the entire agreement may have been essential to the parties' acquiescence in it, the argument against selective Rule 60(b) motions is particularly strong.

142. *Id.*

sary litigation and appeals and tempts attorneys to structure artificial litigation strategies. It undesirably consumes judicial time and resources.

IV. NON-NEGOTIABILITY OF ATTORNEY'S FEES

In order adequately to insulate both the fact and the amount of an attorney's fee award from pressures which tempt an attorney to ignore the client's best interests, courts should consider prohibiting the attorney's fee from being included as a negotiable item during settlement discussions. Once a request for attorney's fees is made under section 1988, the court with jurisdiction of the civil rights claim should assert its authority to decide whether a fee should be awarded¹⁴³ and, if so, in what amount.

Courts may treat fee awards as non-negotiable either if section 1988 is construed to make those awards non-negotiable or if courts themselves have the authority to require non-negotiability as a matter of judicial discretion. The possibility that section 1988 will be construed to require non-negotiability is not great, but the advantages of non-negotiability are such that courts should consider utilizing their discretion to prevent negotiation of fees.

A. Advantages and Disadvantages of Non-negotiability

The advantages of fee non-negotiability are few but important. The first advantage is simply practical. If attorney's fees were always to be determined by a court, defendants could not structure a settle-

143. It is important that non-negotiable fee awards not be confused with mandatory fee awards. Although the latter are usually non-negotiable, the former are not necessarily mandatory. The language of the two kinds of statutes differs markedly: mandatory fee statutes stipulate that a prevailing plaintiff "shall recover . . . a reasonable attorney's fee", *see, e.g.*, the Clayton Act, 15 U.S.C. § 15 (1914); discretionary fee statutes provide that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . ."; 42 U.S.C. § 1988 (1976). The purpose of a mandatory award is usually to preserve the damage award from reduction in payment of attorney's fees, *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1312 (9th Cir. 1982), and while the amount of the award is within the discretion of the trial court, the fact of the award itself is not within the discretion of the parties or the trial court. *Id.; Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 531 (3d Cir. 1976), *cert. denied*, 429 U.S. 825 (1976). The mandatory provision of the Clayton Act has been construed narrowly, and applies only to actions in which the plaintiff has been awarded treble damages, *Bryan Concretanks, Inc. v. Warren Concrete Products Co.*, 374 F.2d 649 (3d Cir. 1967). By contrast, § 1988 and similar statutes vest the trial court with discretion over both the fact and the amount of an attorney's fee award, *David v. Travisono*, 621 F.2d 464 (1st Cir. 1980). The difference between the two types of awards was considered by Congress during its deliberations concerning § 1988. *See SUBCOMMITTEE REPORT, supra* note 4, at 213-14.

Retention of judicial discretion under § 1988 is an important component of the concept of non-negotiability.

ment offer and exploit ethical dilemmas so as to gain a bargaining advantage over plaintiffs' attorneys. Plaintiffs' attorneys could not be forced to choose between protecting their own fee interests or protecting the interests of their clients. They could not be bought off, and the appearance of impropriety would also be avoided. They would receive whatever a court determined was due as a fee. The inherent conflict of interest which exists between attorney and client cannot, of course, be completely avoided through fee non-negotiability. As long as the attorney has a fee interest in the outcome of the litigation, there will be some conflict. Non-negotiability, however, greatly reduces the possibility that a defendant will be able to play on that conflict to the disadvantage of the plaintiff.¹⁴⁴

Although the practical effect of eliminating attorney-client conflicts of interest is in and of itself worthwhile, the concept of non-negotiability is equally important because it furthers congressional objectives which led to the adoption of section 1988. First, it may encourage an early settlement in those cases which especially interested Congress when it adopted section 1988. Congress provided for attorney's fee awards through section 1988 to encourage defendants to comply voluntarily with the obligations imposed under certain civil rights statutes.¹⁴⁵ When there is a relatively clear violation of civil rights laws, and a plaintiff has a good chance of winning a lawsuit, the presence of a non-negotiable attorney's fee will encourage voluntary compliance through early settlement. When the plaintiff has a strong case, defendants know that they will probably have to provide most of the relief requested, either through settlement or after a trial. The attorney's fee award is the only real variable in the case which can affect the ultimate extent of liability. A defendant, knowing that a court is certain to award attorney's fees if the plaintiff prevails at trial, has an interest in cutting anticipated losses under section 1988 through settlement. If the fee is non-negotiable at the time of settlement, defendants will try to minimize the amount of the award by settling as quickly as possible.¹⁴⁶ If the fee

144. For example, the conflict described at notes 43-48,*supra*, is one which exists even if fees are non-negotiable. The conflicts are substantially reduced, however. Although a defendant who can calculate the likely amount of a fee award may try to build a cushion into the settlement of the merits, see the discussion at *supra* notes 110-12, regarding the *Prandini* procedure, the plaintiff's attorney whose fee is assessed under *Hensley*, has no incentive to agree to this cushion as she might were the fee to be subject to negotiation.

145. See *supra* notes 5 and 9 and accompanying text.

146. It is assumed that the defendant will assess and respond reasonably to the economic consequences of the fee award. If the defendant has unlimited resources or is committed to

is negotiable, however, defendants may drag out the litigation because they know that whenever they decide to initiate a settlement negotiation, they can attempt to secure a waiver or a substantial reduction of fees during negotiation. Non-negotiability may also encourage plaintiffs to settle,¹⁴⁷ but its primary value is that it encourages defendants' voluntary compliance through early settlement, a goal which is consistent with the objectives of section 1988.

Non-negotiability is also consistent with several other purposes of section 1988. Congress intended to provide for fees adequate to attract competent counsel to civil rights litigation,¹⁴⁸ to deter civil rights violations and to secure voluntary compliance with civil rights laws,¹⁴⁹ and to ensure that the implementation of section 1988 would not encourage unethical conduct.¹⁵⁰ Fee non-negotiability achieves these objectives by ensuring that attorney's fees will be awarded unless circumstances reveal that an award would be unjust. A defendant cannot play on the ethical obligations of the plaintiff's attorney by demanding a waiver or a substantial reduction of a fee request as a condition to settlement and thereby routinely avoid the assessment of fees in section 1988 cases. Non-negotiability also mitigates the severity of ethical problems generated by section 1988, a problem of which Congress was not unaware. For example, the provision for judicial discretion in the assessment of fees was designed in part as a check on attorneys who might otherwise engage in harassing or malicious litigation.¹⁵¹ Although the precise ethical difficulty which is the subject of this article was not debated by Congress,¹⁵² one senator did introduce into the legislative record a law review article on fee awards in antitrust litigation¹⁵³ which referred to conflicts of interest

litigation as a matter of principle, the defendant may not be encouraged to settle early or at all, even if the fee is non-negotiable.

147. If a plaintiff has a strong case and a defendant makes an early settlement offer, the plaintiff will be encouraged to respond to that offer in good faith if § 1988 is construed to require reduction of a fee award anytime a trial or later settlement negotiation secures only relief which could have been obtained through an earlier settlement offer rejected by the plaintiff. *See supra* notes 43-48, and accompanying text.

148. *See supra* notes 5-8, and accompanying text, and SUBCOMMITTEE REPORT, *supra* note 4, at 12.

149. *See supra* note 9, and accompanying text.

150. *See generally* the concerns expressed in the debate, SUBCOMMITTEE REPORT, *supra* note 4, at 27, 63, 67-68, 167, and 180.

151. *Id.* at 268-69.

152. *Id.* at 27, 63, 67-68, 167 (discussion of the incentive given to attorneys to stir up litigation); and at 180 (question whether a judge would be tempted to render a favorable decision on the merits so as to ensure that a particular attorney would get a fee award).

153. *Id.* at 151 (introducing Note, *Attorneys' Fees in Individual and Class Action Anti-*

during settlement and which proposed that courts always retain control of fee awards.¹⁵⁴

Additionally, if fees were non-negotiable, plaintiffs' attorneys would not need to resort to undesirable legal strategems designed to achieve the effects of non-negotiability. It is not unrealistic to expect attorneys to resort in the future to these strategems, for attorneys have manifested a willingness to use them in the past.¹⁵⁵ The strategems are, however, undesirable because they tend to consume judicial time and resources which would not be expended were the concept of fee non-negotiability adopted.

There are, of course, also potential disadvantages of fee non-negotiability. One potential difficulty is that required judicial involvement in fee issues at the time of settlement may arguably necessitate expenditure of additional and inordinate amounts of judicial resources. It cannot be denied that, if the concept of fee non-negotiability is adopted, courts will have to devote time to fee requests which otherwise would not have been presented to the court. Whether, on balance, the time spent will result in an actual increased demand on judicial resources is, however, questionable.

The time which will be required of courts to set fee awards under recent Supreme Court guidelines is not necessarily substantial. The amount of a fee award has not been treated as a jury question.¹⁵⁶ Both *Hensley* and the Supreme Court's recent decision in *Blum v. Stenson*¹⁵⁷ establish that the fee is determined primarily by multiplying the number of hours expended in representing the client by a reasonable rate. Attorneys who expect to receive a full fee must keep detailed time records.¹⁵⁸ In one jurisdiction, the reasonableness of the claimed hours is tested by measuring the claim against the annual norm of attorney billable hours,¹⁵⁹ by asking whether the hours claimed are for tasks normally billed to clients,¹⁶⁰ by assessing the complexity of the case,¹⁶¹ and by looking for claims for dupli-

trust Litigation, 60 CALIF. L. REV. 1656 (1972)).

154. *Id.* at 160 (Note, at 1678).

155. See *supra* notes 132-42, and accompanying text.

156. Green, *supra* note 57 at 237-88.

157. 52 U.S.L.W. 4377 (U.S. S. Ct. Mar. 21, 1984).

158. See *Hensley v. Eckerhart*, 103 U.S. S. Ct. 1933, 1941 n.12, 1942 n.13 (1983) (if reasonable time records are not kept, a reduced fee is appropriate); *Wojtkowski v. Cade*, 725 F.2d 127, 130-31 (1st Cir. 1984); *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983); and *Benitez v. Collazo*, 571 F. Supp. 246, 252 (D.P.R. 1983).

159. *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983).

160. *Id.* at 554.

161. *Id.*

cated services or for the attendance of unnecessary numbers of attorneys at hearings.¹⁶² The court will determine if there are hours which are not compensable because entirely unrelated to litigation of the claim which supports a section 1988 fee by looking at the time records.¹⁶³ Although a hearing may be held on the issue, most of these inquiries can be resolved through a review of documents, briefs, and with reference to the court's own observations.¹⁶⁴

In order to establish an hourly rate, the plaintiff must produce "satisfactory evidence . . . that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."¹⁶⁵ Testimony as well as the attorney's own affidavits may be required to establish the rate but, ordinarily, that testimony should be limited.¹⁶⁶ According to the Supreme Court, a "rate determined in this way is normally deemed to be reasonable. . . ."¹⁶⁷

In *Blum*, the Supreme Court rejected arguments that the basic rate-times-hours fee should be adjusted upwards because of the novelty and complexity of the issues, the exceptional quality of representation, the nature of the benefits achieved for the plaintiffs, or the contingent nature of the claim. The Court determined that the number of attorney hours expended would normally reflect the novelty and complexity of the issues in a case;¹⁶⁸ that the quality of representation would normally be reflected in the hourly rate;¹⁶⁹ that benefits achieved are usually taken into account only when a court assesses the results obtained and their relationship to the claimed hours;¹⁷⁰ and that the record did not support an upward adjustment for a contingency factor.¹⁷¹ Thus, the *Blum* decision removes from

162. *Id.* In *Benitez v. Collazo*, 571 F. Supp. 246, 251-52 (D.P.R. 1983), the court notes that an adjustment is often made by a percentage reduction and not by a time-consuming, item-by-item examination of records.

163. *Ramos*, 713 F.2d at 556.

164. In *Blum*, the Court found that the defendants had waived an evidentiary hearing and approved the district court's use of affidavits and time records to resolve the fee issue. *Blum*, 52 U.S.L.W. at 4378 n. 5.

165. *Id.* at 4379 n.11.

166. *Id.*; *Wojtkowski v. Cade*, 725 F.2d 127, 130 (1st Cir. 1984) (court may bring to bear its own knowledge of local rates).

167. *Blum*, 52 U.S.L.W. at 4379 n.11.

168. *Id.* at 4381.

169. *Id.* at 4380.

170. *Id.* at 4381.

171. *Id.* The Court reserved the issue of whether a contingency factor should ever be utilized in calculating a fee award. Leubsdorf, *The Contingency Factor in Attorney's Fee Awards*, 90 YALE L.J. 473 (1981) argues against a contingency factor because it puts the

judicial consideration most subjective factors which might result in an adjustment of the basic award and which might require more extended deliberation. The product of rate times hours, which can be determined largely with reference to time records and affidavits, "is presumed to be the reasonable fee contemplated by 1988."¹⁷²

In addition, appeals taken from judicially determined fee awards are not likely to consume more judicial resources than subsequent litigation associated with settlement agreements. Although consent judgments are generally enforced without modification,¹⁷³ they may be subject to either direct or collateral attack if it is alleged that the settlement was a product of unethical attorney conduct.¹⁷⁴ Proposed settlements may be challenged in class actions by members of the class who believe that their own interests have been compromised by the named plaintiff and attorney.¹⁷⁵ In addition, because it is not entirely clear under what circumstances a party will be deemed to have waived a claim to attorney's fees during settlement negotiations, numerous appeals can be expected on this issue.¹⁷⁶ Thus, current settlement practices already generate numerous appeals related to the ethical propriety and intent of settlement discussions.¹⁷⁷ If appellate courts adhere to the principle that judicially determined awards should be overturned only if there is no evidence in the record to support the exercise of the trial court's discretion,¹⁷⁸ any time spent by courts in setting non-negotiable fees would be largely offset by the time saved because courts did not have to litigate the ethical or other questions which the negotiable fee inevitably generates. Moreover, even if some additional judicial time is expended, that time is not inordinate if it preserves the appearance and fact of ethical conduct, as well as the purposes of section 1988.

attorney in the position of arguing that the case was not strong on the merits, to the possible disadvantage of the client, or of disclosing confidential information. *Id.* at 482-84.

172. *Blum*, 52 U.S.L.W. at 4380.

173. *United States v. Swift & Co.*, 286 U.S. 106 (1932); *Rajender v. Univ. of Minnesota*, 34 Fair Empl. Prac. Cases 607 (8th Cir. 1984).

174. Note, *The Consent Judgment as an Instrument for Compromise and Settlement*, 72 HARV. L. REV. 1314, 1324-34 (1959).

175. *FED R. Civ. P.* 23(e).

176. E.g., *Benitez v. Collazo*, 571 F. Supp. 246 (D.P.R. 1983); and the discussion at notes 115-18, *supra*.

177. E.g., *Lisa F. Snider*, 561 F. Supp. 724 (N.D. Ind. 1983); and the cases cited in note 101, *supra*, and accompanying text.

178. *Dawson v. Pastrick*, 600 F.2d 70, 75 (7th Cir. 1979) (§ 1988); *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 115 (3d Cir. 1976). See *Hensley v. Eckerhart*, 103 S. Ct. 1933 (1983) (Brennan, J.), in which the majority of the Court is criticized for being too rigorous in its scrutiny of a fee award. *Id.* at 1948-51.

A second possible difficulty with non-negotiable fee awards is that, unless judicial standards for awarding fees subsequent to settlement are clearly defined, defendants may not wish to settle the merits of a case because they will be unable to estimate their total liability. Two related issues must be resolved if defendants are to be able to estimate their liability with some degree of accuracy. The Supreme Court must provide certain standards both for determining when a party prevails through settlement and for calculating what is a reasonable fee award when a settlement achieves relief different from that requested in the complaint or from what a court might have granted had the case gone to trial.

Although the Supreme Court has stated that a plaintiff may qualify as a prevailing party under section 1988 by securing relief through settlement,¹⁷⁹ the Court has not determined whether all relief secured through settlement satisfies the prevailing party requirement or whether the relief must have some basis in law. Some courts require only that the consent agreement be causally related to the lawsuit.¹⁸⁰ Others insist that, additionally, the consent agreement have a legal basis.¹⁸¹

Two years ago, in denying a petition for a writ of certiorari in *Long v. Bonnes*,¹⁸² the Supreme Court rejected an opportunity to resolve the question, although it is of no little import. When a fee is awarded subsequent to adjudication of the merits of a case, the relief secured by the plaintiff is, by definition, rooted in the substantive law applicable to the case. In contrast, a settlement agreement frequently incorporates relief which, although beneficial to the plaintiff, is not necessarily required by law.¹⁸³

Justice Rehnquist has argued that, because section 1988 fees should be awarded to encourage the enforcement of civil rights laws, "unless an action brought by a private litigant contains some basis in law for the benefits ultimately received by that litigant,"¹⁸⁴ a litigant should not qualify as a prevailing party under section 1988.¹⁸⁵ Be-

179. *Maher v. Gagne*, 448 U.S. 122 (1980).

180. See, e.g., *Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127, 131 (10th Cir. 1980); *Bonnes v. Long*, 599 F.2d 1316 (4th Cir. 1979); *Dawson v. Pastrick*, 600 F.2d 70, 78 (7th Cir. 1979); and *Ross v. Saltmarsh*, 521 F. Supp. 753, 756 (S.D.N.Y. 1981).

181. See, e.g., *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978).

182. 651 F.2d 214 (4th Cir. 1981), cert. denied, 455 U.S. 961 (1982).

183. See, e.g., the terms of the consent agreement in *Ross v. Saltmarsh*, 500 F. Supp. 935, 946 (S.D.N.Y. 1980).

184. *Long v. Bonnes*, 455 U.S. 961, 967 (1982) (Rehnquist, J., dissenting).

185. *Id.*

cause Justice Rehnquist's suggested prevailing party standard would not require judicial inquiry into the merits of a legal claim which has already been settled,¹⁸⁶ an inquiry which would defeat the purposes of settlement,¹⁸⁷ it may be a useful and appropriate way to determine whether a party has prevailed through a settlement agreement. Until the Supreme Court addresses the question, however, there will be some uncertainty regarding the effect of a settlement agreement on liability for fee awards and that uncertainty may affect the willingness of the parties to settle.¹⁸⁸

The Supreme Court must also set forth guidelines for determining the amount of a reasonable fee if litigants are to be given the degree of certainty as to fee liability which is a prerequisite to settlement of the merits. Although *Hensley v. Eckerhart*¹⁸⁹ sets forth guidelines for judicial use subsequent to adjudication of the merits of a case, those guidelines are not necessarily appropriate for calculating the amount of a reasonable fee subsequent to settlement.

Hensley requires a court to adjust the base, rate-times-hours fee whenever the plaintiff prevails on some but not all claims.¹⁹⁰ If the plaintiff achieves "excellent results,"¹⁹¹ no adjustment is to be made

186. *Id.* at 966 n.3. In *Gagne v. Maher*, 594 F.2d 336 (2d Cir. 1979), the court adopted a similar approach to an analogous issue. In *Gagne*, the plaintiff had filed a complaint based on both a constitutional claim which, if successful, would have supported a § 1988 fee award and a statutory claim which, arguably, would not have supported an award. The plaintiff secured a settlement based on the statutory claim. The court held that a § 1988 fee award was appropriate, even if the settlement did not incorporate relief based on the constitutional claim, if the constitutional claim met the jurisdictional test of "substantiality" set forth in *Hagans v. Lavine*, 415 U.S. 528 (1974). *Gagne*, 594 F.2d at 340.

187. *Gagne*, 594 F.2d at 340. See *Dawson v. Pastrick*, 600 F.2d 70, 78 (7th Cir. 1979) and *Gagne v. Maher*, 594 F.2d 336, 340 (2d Cir. 1979), *aff'd on other grounds*, *Maher v. Gagne*, 448 U.S. 122 (1980), for judicial assertions that courts should not engage in such an inquiry, especially when the merits involve a constitutional question which courts have traditionally avoided addressing unless necessary.

188. On the prevailing party issue, see generally Note, *Awards of Attorney's Fees in the Federal Courts*, 56 ST. JOHN'S L. REV. 277, 286-94 (1982), and the authorities cited therein.

Prior judicial decisions have taken the position that a fee should not be denied simply because in the process of negotiating a settlement agreement the plaintiff relinquished some claims. *Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127 (10th Cir. 1980); *Dawson v. Pastrick*, 600 F.2d 70 (7th Cir. 1979); and *Bonnes v. Long*, 599 F.2d 1316 (4th Cir. 1979). Settlement agreements presuppose compromise and, because it is clear from legislative history that Congress intended § 1988 to apply to settlement agreements, a denial of fees because the plaintiff compromised some claims would undercut the purposes of § 1988. *Bonnes v. Long*, 599 F.2d at 1318. A similar argument might be made that there should be no automatic reduction of fee awards simply because a settlement agreement incorporates relief which is not legally required.

189. 103 U.S. S. Ct. 1933 (1983).

190. *Id.* at 1940.

191. *Id.*

even if some alternative ground for relief has been rejected¹⁹² or injunctive rather than monetary relief is secured.¹⁹³ If the plaintiff achieves only "partial success," however, a court must adjust the base fee award to account for the "degree of success."¹⁹⁴ The base fee may be excessive if the plaintiff's success is only partial even if the plaintiff's claims were "interrelated, nonfrivolous, and raised in good faith."¹⁹⁵ The Supreme Court acknowledged in *Hensley* that the possible range of a plaintiff's success is great and did not set forth precise guidelines for determining the appropriate adjustment.¹⁹⁶ It left that adjustment to the discretion of the trial court,¹⁹⁷ which was instructed to "focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."¹⁹⁸

Application of the *Hensley* guidelines to fee awards subsequent to settlement is problematic. A settlement agreement may incorporate compromises which are not necessarily tied to the merits of a plaintiff's claim and complicate any evaluation of the degree of the plaintiff's success. In *Illinois Welfare Rights Org. v. Miller*,¹⁹⁹ the Court of Appeals for the Seventh Circuit attempted to perform the calculation required by *Hensley*. It stated that any relief which becomes part of a settlement agreement because of events entirely independent of the litigation should be excluded when the degree of the plaintiff's success is evaluated.²⁰⁰ Once that relief is excluded, the degree of success is to be calculated by comparing the relief secured with the relief sought in the complaint.²⁰¹ The court concluded that when application of *Hensley* to a settlement becomes difficult, courts should simply adopt *Hensley*'s "central teaching"²⁰² as the ultimate guideline for calculating a fee award: the reasonableness of the proposed fee should be assessed in light of the plaintiff's overall success.²⁰³

Obviously, if fee awards based on settlement agreements must

192. *Id.* at n.11.

193. *Id.*

194. *Id.* at 1940.

195. *Id.*

196. *Id.* at 1941.

197. *Id.*

198. *Id.* at 1940.

199. 723 F.2d 564 (7th Cir. 1983).

200. *Id.* at 567.

201. *Id.*

202. *Id.*

203. *Id.*

be calculated under a degree of success standard derived from *Hensley*, settlements may be discouraged because defendants will be unable to estimate with any reasonable degree of certainty their total liability. It is not clear, however, why the *Hensley* degree of success standard should be utilized in the calculation of fee awards subsequent to settlement. The Supreme Court adopted the *Hensley* adjustment to the base, rate-times-hours fee for a specific reason which is not relevant to settlements.

When the degree of success was first posited by courts as a factor relevant to the determination of a reasonable fee award, it was simply one of twelve factors which were to be weighed together in calculating fee awards.²⁰⁴ It was not a factor which was to be used to adjust a rate-times-hours calculation, a calculation which was presumed to state the amount of a reasonable fee. The twelve-factor balancing process produced widely varying fee awards.²⁰⁵ In an attempt to achieve some uniformity in fee awards, therefore, some courts proposed basing fees primarily on the product of the hours expended and a reasonable attorney fee rate.²⁰⁶ That base, or "lode-star", fee might be adjusted, if appropriate, but the fee was to be primarily dependent on those two factors, the rate charged and the time expended.

In *Hensley*, the Supreme Court effectively adopted the "lode-star" approach to fee calculations. Its more recent decision in *Blum v. Stenson*²⁰⁷ affirmed that approach. Together, the *Hensley* and *Blum* opinions reveal that the degree of success adjustment is used for a very specific purpose. The adjustment is not intended to produce an accurate measurement of an appropriate fee award. Indeed, the degree of success adjustment is not equally applicable to both potential enhancements and to downward adjustments,²⁰⁸ as one would expect it to be were it intended simply as a guideline for fine-

204. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) (court should look at the results obtained in calculating a reasonable fee in a Title VII case). Although *Johnson* was a Title VII case, it was cited with approval in the legislative history of 1988. See SUBCOMMITTEE REPORT, *supra* note 4 at 6.

205. See Note, *Awards of Attorney's Fees in the Federal Courts*, 56 ST. JOHN'S L. REV. 277, 337-41 (1982).

206. *Id.* at 341-48.

207. 52 U.S.L.W. 4377 (U.S. S. Ct. Mar. 21, 1984). See *supra* notes 157-72 and accompanying text.

208. In *Blum*, the Court was asked to approve enhancement of a fee award to reflect the results obtained. It refused to do so. See *supra* note 170 and accompanying text. In *Hensley*, however, it approved a downward adjustment of fee awards if plaintiffs were only partially successful. See *supra* notes 190-98 and accompanying text.

tuning the lodestar fee calculation. Rather, the degree of success adjustment is required as a means of ensuring that plaintiffs' attorneys exercise the same judgment regarding the efficacy of pursuing litigation which they would exercise were they constrained by the need to satisfy a client that the hours expended in litigation were reasonable.

All of the opinions of the Justices in *Hensley* manifest this concern. The majority opinion speaks of a need to ensure that plaintiff's counsel will utilize "billing judgment" even when the defendant rather than the plaintiff will be responsible for fees.²⁰⁹ Chief Justice Burger's concurring opinion emphasizes the need for making plaintiffs' attorneys accountable to a neutral judge for the choices made in pursuing litigation.²¹⁰ Justice Brennan's concurring and dissenting opinion approves of the degree of success adjustment because it operates as a check on insubstantial litigation,²¹¹ potentially pursued because the defendant will be responsible for fees. The *Hensley* degree of success adjustment is a manifestation of the Supreme Court's concern that attorneys not be given license to exploit the section 1988 fee statute to acquire windfalls in contravention of Congress' intent.²¹²

The concern which prompted the Court to adopt the degree of success adjustment for fee awards in cases which have proceeded to trial is not a realistic concern when the parties have agreed to settle the merits. If a plaintiff agrees to settle, there is strong evidence that the plaintiff is not dragging out the litigation in pursuit of frivolous or insubstantial claims so as to pad the attorney's income. A settlement agreement suggests that the plaintiff has been willing to compromise when a compromise is appropriate. *Hensley* itself offers some assurance that a plaintiff will not proceed to trial with insubstantial claims which are unlikely to produce significant relief.

Second, a defendant does have some ability to control fee liability by offering reasonable settlements at appropriate times. If either Rule 68 or *Hensley* is interpreted so as to require reduction of fee awards whenever plaintiffs reject settlement offers and subsequently receive relief no more favorable than that which was offered in settlement, defendants are not at the mercy of plaintiffs' attorneys who drag out litigation simply to pad income.²¹³

209. 103 U.S. S. Ct. 1933, 1939-40 (1983).

210. *Id.* at 1943.

211. *Id.* at 1947.

212. *See supra* note 70.

213. *See supra* notes 36-49, and accompanying text. Nuisance suits brought simply to harass a defendant into settlement might also be dealt with by a determination that a plaintiff

Given the fact that *Hensley* gives plaintiffs' attorneys an incentive not to pursue insubstantial claims to trial, that defendants have some ability to exert control over fee liability through offers of settlement, and that a settlement agreement is itself evidence that a plaintiff has been willing to compromise when appropriate rather than pursuing an arguably insubstantial claim to trial, there is no reason for the Supreme Court to require adjustment of the lodestar fee calculation for degree of success when the parties have settled the case. The hours reasonably expended in reaching settlement should be accepted as the basis for a fee award. Those hours could be easily determined by defendants prior to settlement of the merits through discovery. Defendants could thus arrive at a reasonably accurate estimate of fee liability, and fee non-negotiability would not discourage settlement of the merits.²¹⁴

Finally, it may be argued that the concept of fee non-negotiability is insufficiently flexible because it does not accommodate the attorney who decides that a better settlement for the client can be secured if the claim for fees is relinquished and who wishes to relinquish that claim in the client's interest. The argument is not persuasive. It rests on an invalid assumption that the attorney's decision to relinquish the fee award is made voluntarily and posits flexibility as desirable without regard to the uses to which flexibility is put.

In many instances in which an attorney decides to relinquish a fee claim to secure a better settlement for the client, the defendant will have insisted that the fee request be waived or substantially reduced as a condition to settlement.²¹⁵ If the plaintiff's attorney has the flexibility to accede to the defendant's demand, the client will benefit, but the client will do so at the expense of the goals which Congress sought to achieve when it adopted section 1988.²¹⁶ The flexibility which enables defendants to take advantage of an ethical dilemma so as routinely to avoid an assessment of fees is not a flexibility which is consistent with public policy. The concept of fee non-negotiability, in contrast, would preclude a defendant from insisting on the involuntary waiver or reduction of fees.

In only one situation can an attorney's relinquishment of a fee

has not prevailed. See *supra* notes 179-88 and accompanying text.

214. This assumes, of course, that courts do not refuse to apply the proper standards for arbitrary reasons or because of a bias for or against statutory fee awards.

215. *E.g.*, *Lisa F. v. Snider*, 561 F. Supp. 724 (N.D. Ind. 1983).

216. *Id.* at 725-26.

request be said to be truly voluntary. In that situation, however, public policy also argues against flexibility to relinquish the fee request. Consider, for example, an attempt to lever a relatively weak claim on the merits into a favorable settlement by asserting a claim for fees.²¹⁷ The plaintiff's attorney would suffer nothing were the fee claim relinquished. Although *Hensley* may help to ensure that a relatively weak claim will not support a substantial fee,²¹⁸ if the threat of a substantial fee award were sufficiently real, the defendant might enter an otherwise unacceptable settlement on the merits, on the condition that the fee award be relinquished. There is, however, little public interest in preserving a flexibility which enables a section 1988 fee request to be used to lever a weak or questionable claim into a settlement.²¹⁹ As long as the attorney and client have the freedom at the outset of litigation to determine whether a fee will be sought,²²⁰ sufficient flexibility is preserved.²²¹

217. Perhaps the attorney is salaried or for some other reason is not dependent on a fee award for compensation.

218. *See supra* notes 36-49 and accompanying text.

219. The practice, unlike threats of criminal prosecution or malicious litigation, is probably not unethical. *Compare MODEL CODES OF PROFESSIONAL RESPONSIBILITY DR 7-105* (1982). There is, however, little public interest in permitting an attorney to induce a defendant to settle a claim favorably to the plaintiff by threatening to pursue an essentially independent attorney's fee claim.

220. It should be noted that implicit in *Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983), is the suggestion that attorneys have an ethical obligation to request § 1988 fee awards if that request will ensure that clients do not have to pay fees from their own pockets. *Id.* at 1506. Perhaps, however, an attorney would only be required to advise the plaintiff of the opportunity to request a fee and of the potential conflict of interest associated with that opportunity. The plaintiff could then choose the desired method of compensation.

221. One other argument against non-negotiability should be mentioned, although it has little merit in most situations. If an attorney's fee is always set by the court, it may be argued that the attorney will be so divorced from the control of the client that the attorney will be insufficiently predisposed to exercise his professional judgment on behalf of the client. An analogy may be drawn to the situation in which an attorney's fee is paid not by the client but by a third party. In that situation, rules of professional ethics acknowledge the likelihood that an attorney may be tempted to ignore the best wishes of the client. *MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107, EC 5-21-24* (1979). There is a difference in the situations, however. When an attorney's fee is paid by a third party, there is a fear that the third party has an interest in the litigation which will cause her to try to persuade the attorney to represent the client in a way which is more consistent with her own interests than with those of the client. When an attorney's fee is paid by a court, there is no basis for that fear. In fact, the court is given the responsibility for setting the fee precisely because it is assumed to be neutral and to have the ability to protect the interests of the client against those of the attorney, whenever they are likely to come into conflict. *Cf. Brown v. General Motors Corporation*, 722 F.2d 1009 (2d Cir. 1983), in which the court denied standing to a discharged attorney to litigate a fee claim as an independent request to the court because the court feared that to do otherwise would put an individual who had little or no loyalty to the client in a position to interfere with the client's best interests.

B. The legal status of fee non-negotiability.

Regardless of the practical advantages of fee non-negotiability, those advantages are moot if there is no justification in law for its use. If section 1988 were construed to require fee non-negotiability, courts would have to implement that concept. As the following discussion will indicate, however, the likelihood that section 1988 will be so interpreted is not great. A judicial recognition of the practical advantages of fee non-negotiability which will foster imposition of that concept as a matter of judicial discretion is more likely.

1. Non-negotiability and the interpretation of 42 U.S.C. § 1988

Section 1988 does not state in unambiguous terms that attorney's fees should be either negotiable or non-negotiable items during settlement. It simply provides that courts may, at their discretion, award fees to prevailing parties.²²² Other federal statutes with comparable language, including those on which section 1988 was modeled, have been construed to permit fee negotiability.²²³ Even when statutes provide for mandatory fee awards when a party prevails after trial²²⁴ — a provision usually interpreted to preclude interference with judicial awards of fees²²⁵ — the issue of fees is considered to be negotiable prior to trial.²²⁶ Congress did not even provide for mandatory fee awards after trial in section 1988. It would be difficult, therefore, to conclude solely from the statutory language that Congress intended fees to be non-negotiable. Courts and litigants, of course, have assumed that section 1988 permits fee negotiability.

Balanced against statutory language, judicial precedent, and attorney practice in interpreting section 1988 is the fact that fee non-negotiability is a concept which is consistent with and would further the purposes of section 1988. The strongest argument for non-negotiability is rooted in the objectives of section 1988. Non-negotiability is consistent with and would further the objectives of attracting com-

222. See *supra* note 1.

223. E.g., 42 U.S.C. § 20002-3(b) (1964); 42 U.S.C. § 2000e-5(K) (1964).

224. E.g., the Clayton Act, 15 U.S.C. § 15 (1914); Perishable Agricultural Commodities Act, 7 U.S.C. § 499g (1930).

225. See *Twin City Sportservice, Inc. v. Charles D. Finley & Co., Inc.*, 676 F.2d 1291 (9th Cir. 1982); *Baughman v. CooperJarrett, Inc.*, 530 F.2d 529 (3d Cir. 1976) cert. denied, 429 U.S. 825 (1976); *Lewis v. Pennington*, 400 F.2d 806 (6th Cir. 1968), cert. denied, 393 U.S. 983 (1968).

226. See *supra* note 130.

petent counsel to civil rights litigation,²²⁷ deterring civil rights violations,²²⁸ and securing voluntary compliance with civil rights laws.²²⁹ It would further these objectives without encouraging unethical conduct which some feared section 1988 would foster.²³⁰

The effects of non-negotiability have been discussed previously, and provide some justification for interpreting section 1988 to require non-negotiability. Courts have rendered decisions in section 1988 cases intending to preserve these objectives against conduct of both plaintiffs and defendants which would otherwise defeat it. In *Lisa F. v. Snider*,²³¹ for example, a district court refused to permit the defendant to condition settlement discussions on simultaneous negotiation and a demand for waiver or reduction of the fee request. The court in *Lisa F.* ordered mandatory compliance with the bifurcated negotiation procedure outlined in *Prandini*.²³² In addition, in *Shadis v. Beal*,²³³ the Court of Appeals for the Third Circuit refused to honor a contract prohibiting a legal services corporation from requesting or accepting section 1988 fees in suits brought against the Commonwealth of Pennsylvania or its employees. The decision was based on the court's determination to preserve the objectives of section 1988.²³⁴

Finally, in *Cooper v. Singer*,²³⁵ the Court of Appeals for the Tenth Circuit held that a contingent fee agreement could not limit the amount of court-awarded fees under section 1988. Despite an agreement between the attorney and client providing for lesser compensation, the court of appeals insisted that, in order to further the objective of general deterrence, the court should award fees in accordance with a calculation based on *Hensley v. Eckerhart*.²³⁶ The decision in *Cooper* was also strongly influenced by the court's desire to minimize ethical conflicts between attorney and client. The court of appeals decided that a contingent fee contract should not be permitted to limit the amount of a section 1988 fee because otherwise:

. . . a lawyer who undertakes an institutional reform case

227. See *supra* note 148 and accompanying text.

228. See *supra* note 149 and accompanying text.

229. See *supra* notes 145-47 and accompanying text.

230. See *supra* notes 151-54 and accompanying text.

231. 561 F. Supp. 724 (N.D. Ind. 1983).

232. *Id.* at 726.

233. 685 F.2d 824 (3d Cir. 1982).

234. *Id.* at 831.

235. 719 F.2d 1496 (10th Cir. 1983).

236. *Id.* at 1506-07.

under a percentage contingent fee arrangement may be inclined to direct his primary efforts to proving damages, rather than advocating effective injunctive relief, because a small damage award will limit his fee. . . .

According to *Cooper*, such a limitation might also encourage a lawyer to maximize the ceiling on section 1988 fee awards by increasing his share of the recovery under the contingent fee agreement. The limitation thus could both exert upward pressure on attorney's fees and reduce the opportunity for a litigant to receive full compensation for his civil rights injury.²³⁷

Section 1988 has been interpreted and implemented so as to ensure that section 1988 fee claims are pursued ethically and in furtherance of congressional objectives. Nonetheless, one would have to strain principles of statutory interpretation to conclude that Congress intended to utilize fee non-negotiability to achieve the purposes of section 1988. Most courts have simply used these factors as a justification for exercising their judicial discretion to avoid the conflict of interest inherent in cases supporting a section 1988 fee claim.

2. Judicial discretion to preclude fee negotiability

If courts believe that the concept of fee non-negotiability will further the congressional objectives of section 1988 and that no seri-

237. *Id.* at 1503. The court also felt that attorneys might be influenced to choose between "two potential contingent fee clients whose claims have an equal likelihood of success . . . by selecting the client whose claim has the higher damage award potential" and, thereby, maximizing their own fees. *Id.*

In addition, the court held that an attorney has an ethical obligation to reduce the amount of the fee provided for in a contingent fee contract if that amount was greater than the judicial fee award under § 1988. *Id.* at 1506. As *Cooper* reveals, interpretations of § 1988 which minimize conflicts of interest can attenuate the relationship between the attorney and client in fee matters. That effect, which in itself has consequences for the ethical conduct of the attorney, see *supra* note 221, might be viewed as an undesirable byproduct of non-negotiability. Other interpretations of § 1988 which also attenuate the relationship between attorney and client have not been rejected because of this difficulty. In *Hensley v. Eckerhart*, 103 S. Ct. 1933 (1983), Chief Justice Burger noted that the *Hensley* standard was premised on the notion that, even if a client were to agree that hours expended by an attorney on the case (and, therefore, the requested fee) were reasonable, a neutral judge should have the power independently to assess the reasonableness of the hours (and the fee). *Id.* at 1943. *Hensley*'s rationale persuaded the court in *Cooper* to conclude that a contingent fee contract is, in litigation which supports a § 1988 claim, realistically a nullity. 719 F.2d at 1506-07. In addition, the Supreme Court's decision in *White v. New Hampshire Dep't of Empl. Sec.*, 455 U.S. 445 (1982), was based on a determination that a § 1988 fee claim is sufficiently independent of the merits of a claim to consider it outside the ambit of Rule 59(e) of the Federal Rules of Civil Procedure. But see *Green*, *supra* note 57, who argues that fee claims and the merits of a lawsuit ought not to be considered independent matters for purposes of appellate jurisdiction.

ous practical drawbacks to its use exist, they have the power to make fees non-negotiable items during settlement. Both section 1988 and the judiciary's traditional authority to maintain the integrity of the legal profession and judicial institutions are sources of a judicial right to supervise the amount of attorney compensation²³⁸ and related procedures, including settlement negotiations.²³⁹

When courts have exercised their discretion to affect the award of fees, rarely have they completely deprived defendants of the ability to control the extent of their liability through settlement. For example, if a court permits the parties to negotiate a lump sum settlement which includes damages as well as attorney's fees only if the precise amount of the fee is left for judicial determination,²⁴⁰ the defendants can still control the maximum amount of their liability. Even if a court requires the parties to utilize a bifurcated *Prandini* procedure, defendants still have effective control of the maximum amount of their liability.²⁴¹ Although the bifurcated procedure interferes somewhat with that control because it requires the defendant to agree to settle the merits before discussing the fee award, defendants are able to make realistic estimates of likely fee liability under *Hensley* and those estimates affect decisions made in the course of negotiations on the merits.

Fee non-negotiability intrudes no more substantially on the defendant's control of ultimate liability. Defendants may be unable to bargain on the issue of fee liability but, assuming that an appropriate formula for judicial calculation of fees is devised for settlement agreements, they will be able to make a reasonable estimate of what to expect as a judicial fee award. That estimate, which undoubtedly will also be made by plaintiff's attorneys, may affect the negotiation of the merits. It is the defendant's interest in *knowing* the limits of liability,²⁴² not necessarily in being able to bargain about items constituting that liability, which is valuable. Fee non-negotiability interferes with that interest no more than the *Prandini* procedure or other devices to which courts currently resort to minimize the conflict of interest.²⁴³

238. See *supra* notes 78-92 and accompanying text.

239. See *supra* notes 105-26 and accompanying text.

240. See, e.g., *Parker v. Anderson*, 667 F.2d 1204 (5th Cir. 1982) and note 122, *supra*.

241. See *supra* note 110 and accompanying text.

242. *White v. New Hampshire Dep't of Empl. Sec.*, 455 U.S. 454 (1982).

243. Consider a retrospective judicial review of a settlement agreement and subsequent adjustment of a fee to which the parties have agreed. That review is, of course, appropriate. E.g., *Jones v. Amalgamated Warbassee Homes*, 721 F.2d 881 (2d Cir. 1983). See *supra* notes

Several federal court decisions have indicated that fee awards based on a settlement of the merits should be left to judicial control. Although none of the decisions involved section 1988, they are relevant to section 1988 fee awards. In *Norman v. McKee*,²⁴⁴ a court decided not to approve a proposed settlement agreement which relinquished many of the plaintiffs' original claims but included an award of \$250,000 to the plaintiffs' attorneys.²⁴⁵ The court noted that it was not "good practice" for a settlement agreement to stipulate that a fee would be paid directly to the attorneys because that stipulation might lead to a premature or inadequate settlement of the merits.²⁴⁶ The court determined that "[a]ny proposed settlement should be presented in terms of the gross consideration to . . . [those on whose behalf the suit was brought] and the matter of attorneys' fees left for judicial determination and award."²⁴⁷

Other courts have followed the *Norman* lead. In *Jamison v. Butcher & Sherrerd*,²⁴⁸ the parties had agreed both to relief for the plaintiffs and to a \$50,000 attorney's fee award. The court insisted that the agreement should not include a payment for the attorney and that fees should be left to judicial discretion.²⁴⁹ In *Boyd v. Bechtel Corp.*,²⁵⁰ an agreement provided for the payment of attorney's fees in an amount to be determined by the court but with an upper limit of \$120,000. When a member of the plaintiff's class objected to the agreement, the court responded that it had "made it abundantly clear that it alone has the authority to determine whether and how much attorney's fees will be awarded in this case, and that it will not be bound by any agreements between the parties regarding fees."²⁵¹ *Boyd* is especially relevant because it involved a fee award under Title VII, which served as a model for section 1988.

Although courts following *Norman* have so far reviewed only class action settlements,²⁵² there is no reason courts cannot use their

88-91 and accompanying text.

244. 290 F. Supp. 29 (N.D. Cal. 1968), *aff'd*, 431 F.2d 769 (9th Cir. 1970).

245. One of the named plaintiffs was an attorney, and expected to share in the fee award. *Id.* at 36.

246. *Id.*

247. *Id.*

248. 68 F.R.D. 479 (E.D. Pa. 1975).

249. *Id.* at 484.

250. 485 F. Supp. 610 (N.D. Cal. 1979).

251. *Id.* at 628.

252. See also *Anthony v. Superior Ct. for Los Angeles County*, 59 Cal. App. 3d 760, 772 (1976).

discretion in the future to make fees non-negotiable in other cases.²⁵³ Previous judicial interference with negotiation of fee awards has been limited only because courts have assumed that negotiability and settlement of fee issues ought to be encouraged as a matter of public policy²⁵⁴ and not because they have assumed that they had no authority to preclude fee negotiation. These courts have characterized their task as one which attempts to reconcile the need to encourage settlements with the obligation to protect plaintiffs from unreasonable payments to lawyers.²⁵⁵ To put the task in these terms predetermines the outcome of the analysis. If settlement of fees is to be encouraged, non-negotiable fees, by definition, are unacceptable.

Courts might more willingly utilize the concept of fee non-negotiability were they to state their task in somewhat different terms: how to avoid the conflicts of interest inherent in giving an attorney a statutory fee interest in the case while at the same time ensuring that the objectives of section 1988 are not undermined. This formulation of the task does not balance the need to avoid conflicts of interest only against the policy of encouraging settlements which arises from the judiciary's desire to avoid increases in workload. Rather, it balances that need against a concern for the objectives of section 1988.

Some courts have given proper weight to the objectives of section 1988. In *Bitsounis v. Sheraton Hartford Corp.*,²⁵⁶ for example, the court discussed whether Rule 68 of the Federal Rules of Civil Procedure should be construed to require a plaintiff to pay defense attorney's fees whenever a rejected settlement offer turned out to be more advantageous to the plaintiff than the relief ultimately secured through judgment. The court acknowledged that this interpretation of Rule 68 "would probably advance the generally desirable end of

253. A court does not have to impose fee non-negotiability in every case. See, e.g., *Folsom v. Butte County Ass'n of Gov'ts*, 32 Cal. 3d 668, 681, 652 P.2d 437, 446, 186 Cal. Rptr. 589, 598 (1982) (*Norman* procedure cited with approval, but not required).

254. See, e.g., *Blum v. Stenson*, 52 U.S.L.W. 4377, 4381 n.19 (U.S. S.Ct. Mar. 21, 1984) ("Parties to civil rights litigation in particular should make a conscientious effort, when a fee award is made, to resolve any differences. . . . The Court . . . has a responsibility to encourage agreement."); and *White v. New Hampshire Dep't of Empl. Sec.*, 455 U.S. 445 (1982). In *White*, the petitioner argued that a short filing deadline would interfere with the settlement of fees. See the briefs filed by the petitioner and amicii NAACP Legal Defense and Education Fund and Lawyers' Committee for Civil Rights. In response, the Court held that the ten-day deadline of FED. R. CIV. P., 59(e) does not apply to fee requests.

255. See, e.g., *Godwin v. Schramm*, Nos. 83-5065, 83-5129, 83-5130, slip op. (3d Cir. Mar. 30, 1984); and *Prandini v. National Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1977).

256. 33 Fair Empl. Prac. Cas. 898 (D. Conn. 1983).

promoting settlements,"²⁵⁷ but nonetheless rejected it because it might also "effectively undermine . . . [the] fee-shifting scheme deliberately adopted to advance the fundamental and salutary objectives of the civil rights laws."²⁵⁸ The court's accommodation of procedures governing settlement offers on the merits and statutory fee awards is notable for its refusal to permit judicial policies of encouraging settlements to obscure the statutory objective of section 1988. If other courts were to include these objectives in their analysis, fee non-negotiability would emerge as a viable method of coping with the ethical problem created when attorneys are given a statutory fee interest in a case.²⁵⁹

As long as attorney's fees are negotiable items during settlement, a conflict of interest will exist between attorney and client which can be exploited to the detriment of ethical conduct and the intent of 42 U.S.C. section 1988. For this reason, proposals like the *Prandini* procedure, which stop short of precluding fee negotiability, are unsatisfactory devices for minimizing the conflict. Many of these proposals actually create as many difficulties as they are intended to solve.

There are also, of course, difficulties associated with fee non-negotiability. It eliminates the defendant's opportunity to exploit a conflict of interest between plaintiff and attorney and it removes most circumstances which generate a suspicion that a plaintiff's attorney has acted unethically in negotiating a settlement,²⁶⁰ but its successful use depends on the Supreme Court's willingness to set forth appropriate and clear guidelines for determining who is a prevailing party and for calculating a reasonable fee subsequent to settlement.²⁶¹ These difficulties are not, however, insurmountable.

257. *Id.* The court's discussion is dictum only, for the defendant had not requested an award of fees.

258. *Id.*

259. *Bitsounis* is not the only court which takes into account statutory objectives. See, e.g., *Chesny v. Marek*, 720 F.2d 474 (7th Cir. 1983) *cert. granted*, 52 U.S.L.W. 3770 (S. Ct. April 23, 1984); and *Lisa F. v. Snider*, 561 F. Supp. 724 (N.D. Ind. 1983). Other courts, however, frequently appear to give the judicial policy of encouraging settlement a weight at least equal to if not greater than that given to the statutory objectives of § 1988. See *supra* note 255.

260. See *supra* note 144 and accompanying text.

261. Courts will also have to reconcile the concept with the provisions of FED. R. Civ. P. 68, which has been construed by one court to permit defendants to make settlement offers which include a specified amount in attorney's fees. *Chesny v. Marek*, 720 F.2d 474 (7th Cir. 1983) *cert. granted*, 52 U.S.L.W. 3770 (S. Ct. April 23, 1984) (the court rejected an argument that such Rule 68 offers would create an intolerable conflict of interest). Another court has rejected the *Chesny* interpretation of Rule 68 because of the difficulties associated with

Although it is unlikely that section 1988 will be interpreted to preclude negotiability, courts themselves have the discretion to make fees non-negotiable. In appropriate circumstances, they should employ the concept of fee non-negotiability as an alternative to those devices currently used, both to minimize the attorney-client conflict and to further the objectives of section 1988.

lump sum offers covering both plaintiffs' damages and attorneys' fees. *Fulps v. City of Springfield, Tennessee*, 715 F.2d 1088, 1095 (6th Cir. 1983). Most courts, however, have only discussed the issue of whether a Rule 68 offer which includes a reference to "costs" includes attorney's fees as part of those costs. E.g., *Bitsounis v. Sheraton Hartford Corp.*, 33 Fair Empl. Prac. Cas. 898 (D. Conn. 1983); *Walters v. Heublein*, 485 F. Supp. 110 (N.D. Cal. 1979); and *Scheriff v. Beck*, 452 F. Supp. 1254 (D. Colo. 1978). Only Justice Powell, in his concurring opinion in *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), has suggested that Rule 68 ought to be construed so as to make fees potentially non-negotiable. He proposes that a Rule 68 offer must include fees as part of the costs in order to be a valid offer, *id.* at 363-64, but that the terms of the offer must give the plaintiff the option of having the court determine the amount of the fee. *Id.* at 365 n.4. Because Justice Powell preserves the negotiability of fees subsequent to settlement of the merits, at the plaintiff's option, his interpretation of Rule 68 parallels the *Prandini* bifurcated settlement procedure and has all of its attendant problems.