

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 98-05

Approved April 17, 1998

Issue: Is it unethical for a defense attorney to offer a "full satisfaction" settlement, conditioned upon plaintiff's waiving a claim for attorneys' fees against a defendant?

Opinion: It is not unethical for a defense attorney to present an offer of settlement conditioned on waiver of attorneys' fees. The defense attorney in such a case has an obligation to represent the defendant zealously within the limits of the law. (fn1) Moreover, it is the defendant and not the defense attorney who controls settlement offers. The defense attorney in such a case is bound to convey settlement proposals, and to accept settlement offers, as dictated by the client. (fn2)

This answer, however, does not fully address possible ethical issues raised in a situation in which a client is a plaintiff pursuing a claim under which the plaintiff may be able to recover attorneys' fees for pursuing the cause of action. Such a circumstance could arise, for example, in many civil rights and employment discrimination actions.

Practitioners representing plaintiffs in such circumstances should be aware of a potential conflict of interest between the plaintiff's attorney and the client if the plaintiff receives a settlement offer that is conditioned on a waiver or dismissal of the claim for attorneys' fees. This conflict of interest can arise where the plaintiff's attorney has pursued the case in anticipation of recovering attorneys' fees from the defendant at the conclusion of the proceedings. (fn3)

Plaintiffs' attorneys in such circumstances should be aware that this potential for a conflict of interest can be resolved by full disclosure in advance of this potential problem and the execution of an appropriate attorney-client fee agreement addressing this eventuality. So long as an attorney complies with the requirements of Rule 1.5 regarding fees, (fn4) the establishment of fees between lawyer and client and the method by which those fees are to be collected are matters of business and contract between the attorney and the client.

Attorneys representing plaintiffs in such cases are advised, however, to review carefully the language of Rule 1.2 (fn5) regarding the scope of representation of clients—specifically the requirement that a lawyer must abide by a client's decision to accept or reject an offer of settlement of a legal matter.

It is not the purpose of this opinion to advise attorneys of all the possible ways to address the issue raised here; it is merely to alert practitioners to this issue. However, it is possible to address the problem by recognizing the issue early in the representation and agreeing with the client in advance concerning how the client will pay the attorney's fee if attorneys' fees are not recovered from the defendant. This might be accomplished by an agreement that the attorney would normally be paid on a contingent-fee basis, but alternately on an hourly fee basis if there is no recovery of attorneys' fees from the defendant.

It is important to note also what a practitioner *cannot* do to resolve this problem. It would be unethical for an attorney to contract in advance with a client that the client may not accept or that the attorney may veto a particular offer in settlement of a case. An attorney must convey all offers of settlement to a client, and the client must always have final say whether or not it will be accepted. (fn6) This ultimate client authority cannot be contracted away.

In summary, defendants' attorneys are not ethically prohibited from presenting settlement offers that include a provision precluding plaintiff's recovery of attorneys' fees. (fn7) There are appropriate means by which plaintiffs' attorneys can foresee the possibility of such occurrences and deal with them by carefully constructed fee agreements with their clients.

Footnotes

1. Utah Rules of Professional Conduct 1.1.
2. Utah Rules of Professional Conduct 1.2.
3. *See* Utah Rules of Professional Conduct 1.7(b).
4. For example, the fee must be reasonable and not illegal or clearly excessive.
5. Utah Rules of Professional Conduct 1.2 provides, in pertinent part:
 - (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of

a matter. . . .

(d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

6. *See* Utah Rules of Professional Conduct 1.2(a).

7. *See Evans v. Jeff D.*, 475 U.S. 717 (1986).

Rule Cited:

1.2