

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-330
Issued: April 1988

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: In an effort to compromise a class action, may the defense attorney make an offer of settlement conditioned on the plaintiffs' waiver of attorney fees?

Answer: Qualified yes.

References: Evans v. Jeff D., 106 S.Ct. 1531 (1986); N.Y.C. Ops. 80-94, 82-80; D.C. Op. 147 (1985); Va. Op. 536 (1983); N.M. Op. 1985-3 (1985); Ga. Op. 39 (1984).

OPINION

Several Bar Associations have addressed this issue, and have reached different conclusions. In addition, the United States Supreme Court recently addressed the issue in Evans v. Jeff D., 106 S.Ct. 1531 (1986). In that case, the Supreme Court held as a matter of substantive law that the Civil Rights Attorney Fee Act (42 U.S.C. sec. 1988) permits settlements of class actions conditioned on waiver of attorney fees, and that it was not an abuse of discretion for the District Judge to approve the settlement of a class action conditioned on a waiver of attorney fees when the settlement provided for broader relief than the class could reasonably have expected to achieve at trial and when there was no indication that the defendant was following some pattern or practice of seeking such waivers or was doing so to deter attorneys from representing civil rights plaintiffs. In reaching this conclusion, the Court did not purport to set ethical standards of practice for the profession. On the other hand, the Court suggested that its ruling on the policies of the federal law in question might undermine the rationale of those Bar opinions that condemned such conditional offers based on policies derived from the federal act.

Several influential Bar opinions have taken the position that settlement offers conditioned on fee waivers (1) violate public policy derived from the fee award statute, and (2) are unethical *per se* because they drive a wedge between the plaintiff class and the class counsel (by creating a conflict of interest between class counsel's personal interests and those of the class that will impair class counsel's ability to adequately represent the class). It is reasoned that the defense lawyer may not ethically present class counsel with such a conflict. *See, e.g.*, D.C. Op 147 (1985); N.Y.C. Ops. 80-94 and 82-80. With respect to the first point, the Supreme Court seems to have answered the question of substantive law

rather definitively, and in a way that conflicts with these opinions. With respect to the latter point, it is difficult to find any authority in the Code to support the view that defense counsel must sacrifice the legitimate interests of his or her client (and therefore render less than adequate representation) so that class counsel will not have to deal with a conflict. *Compare* Va. Op. 536 (1983); N.M. Op. 1985-3 (1985); Ga. Op. 39 (1984).

Suppose, for example, that the defendant (private or government entity) has made the determination that a suit against it is unlikely to succeed. Nevertheless, it may be in the best interests of the defendant to settle the matter. The defendant may, it seems to us, disagree about the worth of the inevitable claims for attorney fees. The proposition that a conditional offer, if made in good faith, always presents an irreconcilable conflict for plaintiff's counsel, and should be presumed to have been made for an improper purpose, strikes the members of the Committee as an overstatement. *See e.g.*, Tenn. Op. 85-F-96 (1985). We believe in cases of this type that such conditional offers may be made, and are not per se unethical. Whether or not a particular offer has been made for some improper purpose (a question of fact), or whether it violates some public policy inherent in a particular fee award statute (a question of law), are matters more properly committed to the supervising Court pursuant to Federal Rule 3(e).

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.