



CLAIMING AND COLLECTING ATTORNEYS' FEES: AN INTRODUCTION

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COMMUNICATING WITH CLIENTS

- **Attorneys' Fees Provision Needs To Be Included in Modified Retainer Agreements.**
 - Right to request attorneys' fees belongs to the client.
 - Client is not obligated to pay any fee to LSC-funded program (though may be obligated to pay costs).
 - Client can waive any right to fee.

- **Evans v. Jeff D. 475 U.S. 717 (1986) complicates situation by deciding that :**
 - Simultaneous negotiation of fees and merits is permissible in civil rights cases. Attorney owes only a duty to client.
 - There is no *per se* prohibition against defendants making settlement offers that condition favorable merits relief on waiver of statutory fees (or courts approving such agreements).
 - Issue of whether a particular offer or agreement, seeking a fee waiver, is acceptable is determined on a case by case basis, looking at whether merits relief offered constitutes an adequate quid pro quo for waiver.

- **So you need a retainer agreement in which the client acknowledges:**
 - Availability of attorneys' fees and costs from the other side;
 - Agreement to allow you to make such a request, both post-judgment and in settlement negotiations, and to keep any monies awarded or agreed to (by the client) as attorneys' fees; and
 - The importance of fees to program operations.
 - Enforceability not the issue; communication is the issue!

SETTLEMENT NEGOTIATIONS

- **Two tensions in settlement:**
 - Buckhannon Board & Home v. Virginia Department of Health and Human Resources, 532 U.S. 598 (2001) (Private settlements do not confer prevailing party status, elimination of catalyst theory as basis for fee award. Also, if case is mooted, such that there is no settlement or judgment, then no basis for fee award.).
 - Evans v. Jeff D. 475 U.S. 717 (1986) (Simultaneous negotiation of fees and merits permissible. Conditioning merits relief on fee waiver or reduced fees permissible.).
 - *Remember, the fee meter is running while you are negotiating settlement. Use the threat skillfully.*

- **Two issues in settlement:**

- 1. Fee must not exceed reasonable hourly rate times reasonable hours on the case.
- 2. Fee must not come from client's recovery, but must be in addition to client's recovery

- **Counsel's options:**
 - **Discuss fee issue with client early and often,** including any Buckhannon or Jeff D. issues:
 - Client's right to allow you to seek a fee; your desire not to see fee waived;
 - **Client's desired outcome from the case;**
 - Costs expended upfront to date; fee incurred to date based on reasonable hourly rates and contemporaneously-maintained records
 - **Set out ground rules with the other side before settlement talks start:** fees are part of the settlement, the settlement will be contingent on court approval, and you won't negotiate fees until the merits are completely and irrevocably resolved (the latter subject to discussion with client above).

- **Don't play games.** If settlement agreement is silent on fees, fees may be construed to have been waived. Split in the circuits, but unless you know your circuit has affirmatively held that fees are not waived (9th, 3rd, and DC), don't invite further litigation.
- **Get your settlement before the court.** Settlements in class action have to be approved by the court under Rule 23(e). Even if you only have a putative class, you can seek certification of the putative class with approval of the agreement.
- **If possible, seek to have the court approve and endorse any agreement** in order to protect fee claim as well as substantive relief. Unless agreement is made a court order (or dismissal is conditioned upon compliance with the agreement with court retaining jurisdiction to enforce) there is *no prevailing party status and no ability to enforce*. See Kokkonen v. Guardian Life Ins. Of America, 511 U.S. 375 (1994)