Preserving Fee-Shifting After Evans v. Jeff D.: Joint Attorney/Client Control of Settlements

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Congress has passed several statutes permitting courts to shift attorneys' fees for the benefit of prevailing parties in civil rights suits. However, one major purpose of these statutes, the encouragement of a civil rights plaintiffs' bar, is threatened by Evans v. Jeff D. In that case, the Supreme Court decided that the statutory right to fees is waivable by a prevailing plaintiff, even if such waiver effectively leaves the attorney with no compensation. In addition, the Court stated several rules governing the settlement of civil rights suits that effectively undermine those measures that previously protected those plaintiffs' attorneys' interests. This Comment proposes that civil rights plaintiffs' attorneys protect their interests by adopting a new form of attorney/client contract, in which the clients expressly give their attorney the power to control settlement of the fee claim if the plaintiffs prevail. Although this may appear to violate several traditional ethical principles concerning conflicts of interests, this Comment discusses how, in cases where fees may be shifted, properly drawn joint control contracts are in fact more ethical than attorney/client relationships under traditional agreements. Furthermore, this Comment argues that other measures to protect attorneys, particularly state ethical rules, are preempted by Jeff D., making contractual protections essential. Finally, this Comment discusses how, if their clients waive their attorneys' fees, joint control contracts give attorneys remedies not available under traditional agreements. By providing protections unavailable to plaintiffs' attorneys, joint control contracts may relieve the threat of fee waivers and help accomplish the congressional goal of promoting civil rights through the courts.

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INTRODUCTION

Although the “American Rule” regarding attorney’s fees requires that parties to a lawsuit pay their own attorneys’ fees, Congress has passed several statutes which permit the shifting of fees to the prevailing party, under limited circumstances. Perhaps the most important of these statutes are the Civil Rights Attorneys’ Fees Awards Act of 1976 (“Fees Act”) and various sections of the Civil Rights Act of 1964, such as section 2000(e)-5(k) of Title VII. These statutes have a special significance as part of an effort by Congress to promote civil rights by the creation of a corps of “private attorneys general,” whose representation of...
private plaintiffs for a fee would advance federal policies of equality under the law.5 In Congress' view, fee-shifting is necessary because many victims of civil rights violations would otherwise be unable to afford to bring suits to benefit from civil rights laws.6 Because Congress intended the standards by which courts were to apply these fee-shifting statutes to be identical, a uniform federal common law of civil rights fee-shifting has developed in interpretation of these statutes.7

However, the practice of settling cases where fee-shifting is permitted has exposed problems, unique to those cases and unanticipated by Congress, which threaten the effectiveness of fee-shifting as a mechanism for social change.8 The two primary problems are characterized as "sweetheart" and "sacrifice" offers.9 In a "sweetheart" offer, the defendant offers the opposing counsel a settlement which includes higher fees than reasonably expected, hoping that the attorney will encourage the plaintiffs to accept a settlement providing gives less relief on the merits than the plaintiffs might reasonably expect. Sweetheart offers thus


6. S. REP. No. 1011, 94th Cong., 2d Sess. 2 (1976) [hereinafter Senate Report] ("In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money to hire a lawyer."); House Report, supra note 5, at 3 ("The Committee also received evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so.").

7. Senate Report, supra note 6, at 4: "It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." In general, a prevailing plaintiff receives fees unless special circumstances make an award unjust; a prevailing defendant only receives fees if the plaintiff's suit was clearly frivolous, vexatious, or brought for harassment purposes. Id. at 4-5. The civil rights statutes to which the common law of statutory interpretation applies are hereinafter the "fees acts."

Because of the congressional intent that there be a single standard, courts apply standards developed under one fee-shifting statute to cases arising under others. See, e.g., Smith v. University of N.C., 632 F.2d 316, 350 (1980) (applying standards from a Fees Act case to a Title VII case).


9. See, e.g., Moore v. National Ass'n of Sec. Dealers, 762 F.2d 1093, 1117 (D. C. Cir. 1985) (Wright, J., dissenting); S. Goldstein, supra note 8, at 694; Wolfram, supra note 8, at 300-01.
threaten the quality of services which civil rights plaintiffs receive by undermining attorneys' loyalty to their clients. In a "sacrifice" offer, the defendant offers the plaintiffs a reasonable settlement but offers no or low attorneys' fees, in effect financing the plaintiffs' remedies by sacrificing their attorneys' reasonable interests. Many civil rights plaintiffs' attorneys feel threatened by sacrifice offers. Their clients are generally unable to pay their fees except through fee-shifting, leaving the attorneys with no good options. On the one hand, attorneys fear that their assertion of a fee interest to reduce or block a settlement which is otherwise satisfactory to the plaintiffs may be unethical, or may undermine their relationships with their clients. On the other hand, if attorneys are unable to protect their reasonable fee interests, they may be discouraged from taking the very cases which Congress intended to promote by the fee-shifting statutes. This chilling effect could substantially reduce the availability of attorneys in civil rights cases even if fees are in fact shifted in most cases.

Plaintiffs' attorneys and sympathetic academic commentators have often looked for protection to judicial constructions of the fees acts which limited the freedom of settlement in a civil rights suit. Before Evans v. Jeff D., two federal circuit courts had adopted such limiting constructions. In Prandini v. National Tea Co., the Third Circuit adopted a rule against simultaneous negotiation of attorneys' fees and relief on the merits, primarily to prevent sweetheart offers. The Ninth Circuit adopted a similar but somewhat more permissive rule in Mendoza


In addition to the obvious archetypal ethical problems, more subtle problems may arise as sweetheart and sacrifice offers become commonplace. For example, large government entities which have been the subject of numerous lawsuits or attorneys who specialize in civil rights defense may influence plaintiffs' attorneys to respond to offers of reasonable fees as if they were sweetheart offers merely by promoting a reputation of always demanding fee waivers. Id. at 645. In addition, such defendants may effectively select their opponents' counsels by rewarding disloyal plaintiffs' attorneys while making life difficult for zealous opponents. These more subtle problems are just some of the secondary effects of the primary problems described herein.

11. See, e.g., Kraus, supra note 8, at 635-39.


13. For the position of commentators and practitioners supporting a construction of the Fees Act requiring separate negotiations for relief on the merits and attorneys' fees, see, e.g., Ralston, et al., supra note 10; Gropper, supra note 10; Kraus, supra note 8; Levin, supra note 8; cf. Calhoun, supra note 8 (proposing a construction of the Fees Act requiring that fee awards be nonnegotiable).


15. 557 F.2d 1015 (3d Cir. 1977).
v. U.S.  Although other circuits recognized the ethical problems of fee-shifting, none adopted a rule similar to Prandini or Mendoza. Part I of this Comment discusses the law prior to Jeff D.

In Jeff D., the Supreme Court addressed both the propriety of fee waivers and the role of the courts in fee-shifting cases in which the plaintiffs prevailed through settlement but waived the right to shift their attorneys' fees. In rejecting the idea that a total prohibition on fee waivers was necessary to preserve the purposes of the fees acts, the Court left many questions unresolved. The Court indicated that it approved the fee waiver in Jeff D. because there was no evidence of misconduct by the defendant, and that it might consider restrictions on fee waivers in future cases where the proper evidence was presented. Nonetheless, Jeff D. increases the uncertainty which potential plaintiffs' attorneys face as to whether they will actually receive fees if they prevail in civil rights cases. Part II of this Comment discusses Jeff D. and its implications.

Commentators and courts have suggested various methods by which attorneys could protect their reasonable fee interests in fees acts cases, but each strategy has major flaws. Part III discusses the advantages and disadvantages of various proposals: litigation strategies, contractual protections short of contracts in which the plaintiff and the attorney have joint control of settlements, and state ethical codes which limit fee-shifting negotiations or settlements.

Because of the weaknesses of these other approaches, it is the thesis of this Comment that attorneys must and may protect their rights to a reasonable fee by defining their relationships with their clients in retainer agreements in which the plaintiffs expressly give their attorneys the power to control the settlement of the portion of the plaintiffs' case involving potentially shifted fees. The essential elements of the contract include two radical changes from the typical attorney-client relationships under the American rule: (1) a promise by the client to take no action to deprive the attorney of a reasonable fee if the plaintiff prevails; and (2) a mechanism under the attorney's control to prevent settlement of the case if the offered statutory fee award is not reasonable. The resulting practice would be joint control of settlements by plaintiffs and their attorneys, each effectively having a veto power over the settlement if the portion of

16. 623 F.2d 1338 (9th Cir. 1980).
18. Moore v. National Ass'n of Sec. Dealers., Inc., 762 F.2d 1093 (D.C. Cir. 1985) (rejecting a ban on simultaneous negotiations and fee waivers); Lazar v. Pierce, 757 F.2d 435 (1st Cir. 1985) (permitting a fee waiver in the circumstances); Gram v. Bank of Louisiana, 691 F.2d 728 (5th Cir. 1982) (stating in dictum that a plaintiff may waive the right to fees); Chicano Police Officers Ass'n v. Stover, 624 F.2d 127 (10th Cir. 1980) (rejecting a ban on fee waivers).
19. Jeff D., 475 U.S. at 737-38; see infra Part II, pp. 275-83.
the settlement which concerns their reasonable interests is not accepta-
bile. Under the doctrines of Jeff D., which strongly favor private resolu-
tion of disputes, joint control contracts may be the only protection for
plaintiffs’ attorneys and the only practical way to resolve the ethical
problems which currently plague fee-shifting cases, because they balance
the policy of private resolution with the promotion of civil rights through
fee-shifting. Part IV explains how properly limited joint control contracts
would promote the policies of both the fee-shifting statutes and the ethi-
cal codes, and suggests the forms that such contracts may take under the
ethical codes. Finally, even if such contracts cannot be specifically en-
forced, Part V suggests how they still may provide some protection for
plaintiffs’ attorneys as the bases of actions for tortious interference with
contract when civil rights defendants wrongfully refuse to make or ac-
cept offers which include reasonable attorneys’ fees.

I
THE LAW PRIOR TO JEFF D.

Before Jeff D., several circuit courts addressed the ethical problems
of fee-shifting cases, with varying results. Two circuits implied restric-
tions of the parties’ freedom of settlement into the fees acts. These re-
strictions applied in cases in which settlements included attorneys’ fees
where the risk of sweetheart offers was present. Other circuits, when
confronted with fee waivers—sacrifice offers—refused to adopt such
rules.

The Third Circuit was the first court to adopt a rule limiting the
parties’ freedom of settlement in a case arising under a fee-shifting stat-
ute. In 1977, the Third Circuit created a rule expressly prohibiting si-
multaneous negotiations under fee-shifting statutes. Prandini v. National
Tea Co. was a Rule 23 class action in which the plaintiffs alleged sex
discrimination in violation of Title VII. The parties asked the district
court to approve a settlement which included attorneys’ fees. Although
no party objected to the settlement, the district court, sua sponte, recal-
culated the plaintiffs’ attorneys’ fees and reduced them. One of the plain-
tiffs’ attorneys’ firms appealed the fee award.

On appeal, the Third Circuit tried to reconcile the benefits of en-
couraging settlements with the possibility of conflicts of interests which
may arise when attorneys simultaneously negotiate for their own fee in-
terests and their clients’ interests. In particular, the court was concerned

20. 557 F.2d 1015, 1021 (3d Cir. 1977).
21. FED. R. CIV. PROC. 23.
22. Federal Rule of Civil Procedure 23(e) requires that “[a] class action shall not be dismissed
or compromised without the approval of the court.”
23. Prandini, 557 F.2d at 1018.
with the potential for collusion between the defendant and the plaintiffs' counsel in negotiating the division of a lump-sum settlement to the detriment of the plaintiffs. The Third Circuit considered this a threat to both the judicial system's effectiveness and its appearance of propriety.\textsuperscript{24} To resolve these problems, the court interpreted the fees acts to require bifurcated settlement negotiations in cases where fee-shifting is permitted: negotiations for the plaintiffs' attorneys' fees may not occur until the district court has approved the settlement of the case-in-chief.\textsuperscript{25} Although this restriction might put an extra burden on the parties, the \textit{Prandini} court hoped to prevent the special ethical problems which may arise in simultaneous negotiations, while still ensuring a reasonable fee for the plaintiffs' attorney.\textsuperscript{26}

The Ninth Circuit also addressed the problems of sweetheart offers in \textit{Mendoza v. United States}.\textsuperscript{27} In that case, parents of black and Chicano students charged the Tucson School District with a variety of acts of intentional discrimination. The district court rendered judgment for the plaintiffs and ordered the District to prepare a desegregation plan. Attorneys for the original parties agreed to a desegregation plan, but a group of Chicano parents were not satisfied with the plan. These parents requested certification as a subclass in order to object to the settlement. In opposing the settlement, the parents argued that the plaintiffs' attorneys acted unethically by negotiating their fees simultaneously with the plaintiffs' relief on the merits.\textsuperscript{28} In response, the Ninth Circuit neither endorsed nor rejected simultaneous negotiations outright. Instead, it made simultaneous negotiations a basis for heightened judicial scrutiny of class action settlements. The court ruled that simultaneously negotiated settlements were permissible only if there were "circumstances present which appear to neutralize the potential for impropriety."\textsuperscript{29} In \textit{Mendoza}, the Ninth Circuit upheld the district court's approval of the settlement because the participation of the Justice Department and the statutory basis for fees were favorable circumstances which overcame the potential for impropriety in simultaneous negotiations.\textsuperscript{30}

Other circuit courts addressed the ethical problems of fee-shifting in

\begin{itemize}
\item \textsuperscript{24} \textit{Id.} at 1021.
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} \textit{Id.} The impact of \textit{Prandini} on sacrifice offers is not clear. In \textit{El Club del Barrio, Inc. v. United Community Organizations, Inc.}, 735 F.2d 98, 101 (1984), the Third Circuit did not read \textit{Prandini} to preclude discussions which resulted in fee waivers. Rather, it held that the losing party to a settlement bears the burden of proof that a settlement which does not discuss fees incorporates a fee waiver. Although the court recognized that fee waivers might be difficult to accomplish under \textit{Prandini}, it did not address the continued validity or scope of \textit{Prandini} because the issue had not been presented. \textit{Id.} at 101 n.3.
\item \textsuperscript{27} 623 F.2d 1338 (9th Cir. 1980).
\item \textsuperscript{28} \textit{Id.} at 1352.
\item \textsuperscript{29} \textit{Id.} at 1353.
\item \textsuperscript{30} \textit{Id.}
\end{itemize}
the context of fee waivers. None adopted a rule against either simultaneous negotiations or fee waivers. The Tenth Circuit approved fee waivers in principle. In its view, plaintiffs could give up their statutory rights to attorneys' fees in their settlements simply because Congress did not preclude the parties from negotiating that issue in settlements. The First Circuit recognized that sacrifice offers threatened the purposes of the fees acts, and that a plaintiffs' attorney had no ethical obligation to forego a fee. However, it upheld the district court's approval of a fee waiver where the plaintiffs' attorney had deceived the defendants about his plan to object to the settlement after its approval by the district court.

The strongest rejection of Prandini came from the District of Columbia Circuit, in Judge MacKinnon's opinion in Moore v. National Association of Securities Dealers, Inc. The underlying dispute in Moore was a class action race discrimination claim under Title VII. Although the defendant agreed to change its employment practices, it refused to admit discrimination against the named plaintiff or provide individual relief. After the named plaintiff agreed to waive her individual claim, the only remaining issue was attorneys' fees. The plaintiffs' attorney made a series of offers with decreasing fees, until he made an offer with no payment by defendant of fees or costs, which the defendant accepted. Although the district court was concerned that such a settlement was not equitable, it preliminarily approved the settlement pending notification of the class. Then the class representative, Moore, changed her mind and objected to the settlement as a class member. Nevertheless, the district court approved the settlement, because Moore had already agreed to it. Moore appealed, arguing that the district court should have imposed an award of fees and costs, because of the ethical problems of simultaneous negotiations.

The decision in Moore was the clearest statement of the issues arising in simultaneous negotiations after Prandini, until Jeff D. After a thorough review of precedents in other circuits and the policies behind those decisions, the Moore court held that neither offers of fee waivers by

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31. Although the Sixth Circuit did not address the propriety of fee waivers per se, it did adopt a rule under the Fees Act that settlements of a case as a whole precluded later actions for statutory fees. Jennings v. Metropolitan Gov't of Nashville, 715 F.2d 1111 (6th Cir. 1983).
34. Id. at 439.
35. 762 F.2d 1093 (D.C. Cir. 1985).
36. Id. at 1095.
37. Id. at 1097.
plaintiffs nor simultaneous negotiations were per se prohibited under the fees acts. However, the scope of the rule stated by the court was uncertain, because each member of the panel wrote a separate opinion. Judge Wald concurred in the decision, but had reservations about the basis on which it was decided. Judge Wright dissented, finding the settlement to be coerced. He proposed adoption of a Mendoza-like rule, permitting simultaneous negotiations only in certain circumstances, in order to prevent the appearance of impropriety and to protect the purposes of fee-shifting. However, discovering the precise meaning of Moore became unnecessary when Jeff D. was decided only a few months later.

II
THE RULES OF JEFF D.: PARTIES' FREEDOM OF SETTLEMENT

In light of the differing constructions of the fees acts by the various circuit courts, Evans v. Jeff D. was an important opportunity for the Supreme Court to clarify the law of statutory fee-shifting, even though the case involved an unusual attorney-client relationship. In Jeff D., the plaintiffs' attorney, acting as “next friend” of a class of emotionally and mentally handicapped children, brought a class action on their behalf. The action alleged violations of a variety of statutory and constitutional rights. In the joint capacity of both plaintiff’s representative and attorney, the attorney agreed to a settlement which incorporated a fee waiver, subject to the approval of the district court. However, he then challenged that fee waiver in the settlement as improper under the Fees Act, citing both the ethical problems of simultaneous negotiations and the threat that fee waivers pose to the purposes of the fee-shifting statutes. In a ruling which addressed issues under both Rule 23 and the Fees Act, the Supreme Court made several major policy statements concerning the common law of civil rights fee-shifting. The holding of the case was simple: the Supreme Court reinstated the district court’s order approving the settlement which the Ninth Circuit had overturned. However, in order to understand the rules and policies established by Jeff D., it is necessary to analyze the case in some detail.

A. The Facts

In many ways, Jeff D. was a typical public interest suit brought by a concerned attorney for the benefit of helpless victims of government ne-
In August 1980, L. Charles Johnson, an attorney at Idaho Legal Aid Society, Inc. ("Idaho Legal Aid"), filed suit against the governor of Idaho and other state officials responsible for the care of emotionally and mentally handicapped children who were wards of the state. Johnson brought the case on his own initiative, in reaction to conditions he saw in the institutions caring for those children. At his own request, Johnson was appointed "next friend" of the plaintiff class for the purpose of pursuing the case. He also acted as attorney through his Idaho Legal Aid office. Neither Johnson nor Idaho Legal Aid had a fee contract with the plaintiffs or any representative of them; Johnson's sole contract was with Idaho Legal Aid as an employee.

The complaint alleged that the educational services and mental health treatment provided to the plaintiff class by the State of Idaho were so deficient that the state was violating the children's rights under the United States and Idaho constitutions and several federal and state statutes. The case never came to trial, but was settled in two stages. The parties resolved their dispute over educational services in short order. They entered a stipulation regarding those claims in October 1981, agreeing on the terms of a settlement which included a waiver of costs and attorneys' fees incurred up to that date. They were unable to settle the mental health treatment issues until March 1983, one week before the scheduled trial date. At that time, the State offered relief substantially equivalent to that requested by the plaintiffs, but demanded a waiver of any claim by the class, as prevailing party under the Fees Act, to costs or attorneys' fees. Johnson accepted the offer because he felt that his attorney's duty of loyalty to the plaintiff class mandated acceptance. However, he conditioned that acceptance on approval of the fee waiver by the district court, in its review of the settlement under Federal Rule of Civil Procedure 23(e).

At the settlement hearing, Johnson moved for court's approval of the settlement, except for the provision on costs and attorneys' fees. He argued that the defendants exploited his ethical duty to seek the most favorable outcome for his clients by proposing a settlement that sacrificed his interests for the benefit of his clients. The district court rejected Johnson's position and approved the settlement, finding that Johnson's fee waiver was not a true ethical dilemma.

Johnson appealed the district court's approval of the settlement. On appeal, the Ninth Circuit issued preliminary injunctions enforcing the decree pending appeal, except for the fee waiver. The court reviewed

43. This summary of the facts of the case is based on the statement of facts in Jeff D., 475 U.S. at 719-23; Jeff D. v. Evans, 743 F.2d 648, 649-50 (9th Cir. 1984), rev'd, 475 U.S. 717; and Fitzhugh, To Win Your Case, Waive Your Fees, 71 A.B.A.J. 44 (Dec. 1985).
44. Jeff D. v. Evans, 743 F.2d at 652.
the purposes of the Fees Act—including the promotion of lawsuits by victims of civil rights violations—and the ethical problems which may arise under simultaneous negotiations, and found that the same problems arise under fee waivers as fee awards. Relying on the rule established in *Mendoza*, the court invalidated the fee waiver because there were no special circumstances to overcome the presumption against simultaneous negotiations. The Ninth Circuit remanded to the district court to make a determination of reasonable fees under the Fees Act.\(^4\) The Supreme Court granted a writ of certiorari to address the question of whether a district court must assess attorneys’ fees in favor of a prevailing plaintiff under the Fees Act when a settlement agreement provides that the defendant shall not pay plaintiffs’ attorney fees.\(^4\)

**B. The Holding**

Before ruling on the fee-shifting issues, the Supreme Court reviewed the actions of the courts below in light of the district court’s power under Rule 23(e) to review the terms of settlements of class actions. While the district court had approved the whole settlement, the Ninth Circuit had approved part of the settlement and rejected part. The Ninth Circuit approved the part of the settlement which gave substantive relief to the plaintiffs, and reversed and remanded only that part of the settlement which related to costs and attorneys’ fees arising under the Fees Act. The Supreme Court first overturned the Ninth Circuit’s action on the basis of Rule 23. The Court stated a rule that “Rule 23 does not give the court the power, in advance of trial, to modify a proposed consent decree and order its acceptance over either party’s objection.”\(^4\) In the Court’s construction of Rule 23, the Ninth Circuit’s action was beyond its jurisdiction. Although a district court may play an active role in negotiations, even indicating the terms of settlement that it would approve, it must approve or reject the settlement as a whole. The Ninth Circuit’s action was improper because it effectively “require[d] the parties to accept a settlement to which they [had] not agreed. . . . Rule 23(e) does not give the court the power, in advance of trial, to modify a proposed consent decree and order its acceptance over either party’s objection.”\(^4\)

At this point, the Supreme Court could have remanded for acceptance or rejection of the settlement as a whole, without requiring the Ninth Circuit to change its Fees Act rule from the one established in *Mendoza*. Instead, the Court restated the issue of the case, in order to permit it to establish the proper standards of review of settlements which

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45. *Id.*
47. *Id.* at 726-27.
48. *Id.* at 726.
incorporated waivers of the right to attorneys' fees under the Fees Act. With respect to the Fees Act, the Court described the issue as "whether the district court had a duty to reject the proposed settlement because it included a waiver of statutorily authorized attorney's fees." 49

It is clear that the holding of the case was that the fee waiver was not improper here: "In this case, the District Court did not abuse its discretion in upholding a fee waiver which secured broad injunctive relief, relief greater than that which plaintiffs could reasonably have expected to achieve at trial." 50 However, it is not clear precisely what the rule of the case is. The ambiguity of the rule stated in Jeff D. concerns the importance of the fact-specific elements of the case. In concluding that this fee waiver was not improper, the Court emphasized the success of the plaintiff on the merits and the absence of evidence of misconduct by the defendant. 51 However, the Court's decision was based on broad policies that create uncertainty about the Court's response to unaddressed situations which may appear in the future.

The plaintiffs argued that the defendants' offer of a good settlement on the merits, conditioned on a waiver of attorneys' fees, forced the plaintiffs' attorney into an ethical dilemma. 52 The Court rejected this argument, because it saw the attorney as having at least one ethical choice: to not seek fees.

The plaintiffs also argued that such offers were coercive because they exploited the ethical duty of the plaintiffs' attorney to seek a settlement without regard for an award of fees; and that to prevent coercive offers, the Fees Act must be construed to forbid all settlements incorporating such waivers. However, after reviewing the text, congressional intent and practical necessities of the Fees Act, the Court refused to adopt a rule which prohibited all fee waivers. It held that not all fee waivers were improper, and that the fee waiver in this case was not improper in light of the facts of this case. 53 To understand the ambiguity of the rule of the case, it is necessary to review the Court's reasoning in detail.

The Court first reviewed the text and legislative history of the Fees Act and found "no support for the proposition that Congress intended to ban all fee waivers offered in connection with relief on the merits." 54 In authorizing the shifting of fees in civil rights cases, Congress merely gave plaintiffs another weapon to use when fighting civil rights violations. Nothing in the language of the Fees Act or its legislative history showed a congressional intent to forbid all fee waivers, even when the plaintiff

49. Id. at 727.
50. Id. at 742-43.
51. Id. at 740-41.
52. Id. at 727.
53. Id. at 727-28.
54. Id. at 730.
JOINT CONTROL OF SETTLEMENTS

exchanges his claim to fees "for some other relief to which he is indisputably not entitled." In other words, plaintiffs have great freedom to decide how to use their claims under civil rights statutes, even if it means sacrificing the interests of the attorneys who helped the plaintiffs to prevail. This must be viewed as an expression of a strong federal policy of freedom of the use of federal statutory fee-shifting rights, at least for civil rights plaintiffs.

The Court then reviewed the mechanics of fee-shifting cases, and stated important policies which undermine constructions of the fees acts which interfere with the settlement process. The Court found that a rule against fee waivers would undermine the federal policy that civil rights actions should not be treated differently from other actions for purposes of settlement, a policy first stated in Marek v. Chesny. The Court did not see this freedom of settlement as a one-sided concern. It found that fee waivers could be useful as a tool for plaintiffs, as demonstrated by the educational claims of Jeff D., where the plaintiffs did not object to a fee waiver after receiving the relief they had requested. The Court concluded that a general prohibition of fee waivers could impede the resolution of some of the very disputes that the fees acts were intended to resolve.

The Court also recognized that defendants have a legitimate interest in knowing their total costs at the time of settlement. If parties cannot settle the merits of a dispute and the related fees simultaneously, many defendants would consider the results too uncertain to accept.

Because of this concern, the Court rejected three proposed limitations on settlements as though they were interchangeable, namely complete prohibitions on simultaneous negotiations, such as Prandini; partial prohibitions on fee waivers and simultaneous negotiations, such as Mendoza; and prohibitions on fee waivers but not simultaneous negotiations, such as Justice Brennan suggested in his dissent in Jeff D. The Court said, for example:

Most defendants are unlikely to settle unless the costs of the predicted judgment, discounted by its probability, plus the transaction costs of further litigation, are greater than the cost of the settlement package. If fee

55. Id. at 731.
56. Id. at 732.
57. 473 U.S. 1 (1985) (Federal Rule of Civil Procedure 68, under which plaintiffs may lose their claim to the costs of trial if they ultimately receive no greater remedy as a judgment than was offered as a settlement, held applicable to civil rights cases).
59. Id. at 736.
60. The Court discussed the validity of Prandini in a footnote, id. at 738 n.30, in which it expressed the unanimous agreement of the Court that the rule of Prandini represented judicial overreaching. However, it did not clearly state that it considered Prandini overruled.
61. Id. at 748.
waivers cannot be negotiated, the settlement package must either contain an attorneys' fee component of potentially large and uncertain magnitude, or else the parties must agree to have the fee fixed by the court. However, it is not clear that the three types of rules would necessarily have the same impact. If certainty of cost is the only concern, it is not necessary that fee waivers be negotiated, merely that the settlement include all claims including fees.

Nevertheless, some uncertainty arises under all three proposed limitations on the fees acts. Under Prandini, uncertainty always arises because defendants must agree to part of a settlement without knowing the extra costs they face in the subsequent negotiations for attorneys' fees.

The Mendoza rule appears to avoid that problem, by permitting the parties to negotiate a complete settlement. Nevertheless, uncertainty may arise, particularly in cases affecting large numbers of plaintiffs like Mendoza, due to the complex basis on which attorneys' fees may be determined. Not only would a district court have to review every class action settlement involving a claim of civil rights fee-shifting for the overall fairness of the settlement, but also for the reasonableness of the fee in light of the uncertain concept of "special circumstances of the case." This creates an additional opportunity for an unhappy subclass to challenge an overall fair settlement.

Finally, a rule permitting simultaneous negotiations but requiring that settlements incorporate reasonable fees, as suggested in Justice Brennan's dissent, also appears to avoid the original uncertainty by permitting parties to reach a complete settlement, so long as "reasonable attorneys' fees" are included. Defendants could therefore resolve their uncertainty without sacrificing the interests of the plaintiffs' attorneys. Nevertheless, the Court rejected this proposal as incorporating the same uncertainty as Mendoza, because the Court saw a risk that the dissent's rule would open all settlements of all cases where fee-shifting is permitted to review for the reasonableness of the fees. Although there little risk of such reviews becoming commonplace when parties have reached agreements freely, the Court saw the mere potential for numerous reviews as a threat to the administration of the federal courts. In summary, Jeff D. must be seen as establishing three separate strong federal policies: party control of settlements in Rule 23 class actions, freedom of the use of statutory fee rights by civil rights plaintiffs, and certainty of settlements.

The last statement of the issue of Jeff D. was an analysis of whether

62. Id. at 734.
63. The Jeff D. court reviewed some of the factors courts use in determining statutory fees, id. at 736.
64. Mendoza v. United States, 623 F.2d 1338, 1353 (9th Cir. 1980).
66. Id.
the district court abused its discretion by approving a settlement which included a fee waiver. The Court reviewed a variety of factors which various parties and amici had suggested as bases for restricting fee waivers. There was no evidence that the defendant lacked a realistic defense, had a policy of requesting fee waivers in every case, or had any vindictive purpose in imposing a fee waiver on this particular attorney. Furthermore, the plaintiffs received an adequate quid pro quo in return for their claim to fees, namely more complete relief on the merits than they probably expected. However, the Court did not adopt limitations on fee waivers at this time, apparently reserving the question until evidence of abuses is presented. As a result, the scope of the rule of Jeff D. remains uncertain: Fee waivers are not per se forbidden by the fees acts, because they may serve strong federal policies. Nevertheless, since the Court did not preclude the possibility that the circumstances of future cases might reveal a basis for disapproving settlements which include fee waivers, fee waivers may become suspect under a future decision.

C. Plaintiffs' Civil Rights Practice After Jeff D.

Although the Supreme Court acknowledged that its decision might be seen as a threat to the fees acts if plaintiffs consistently waive their attorneys' expected fees, it considered this risk "remote." However, other judges and commentators see the elimination of protections for attorneys' interests as threatening the effectiveness of fee-shifting statutes and the underlying civil rights laws, regardless of what percentage of plaintiffs actually agree to fee waivers. This view is based in a practical analysis of fee-shifting. The effectiveness of fee-shifting as a mechanism for social change depends on appealing to the interests of attorneys as well as those of plaintiffs. An attorney's actual and perceived self-interest are therefore both integral to fee shifting. If attorneys perceive a threat to their self-interest because they have no assurance of receiving a fee if their client prevails, they will hesitate to take civil rights cases. This uncertainty could undermine the effectiveness of the fee-shifting statutes even if most defendants would pay reasonable fees and most plaintiffs

\[\text{Divided text at this point.}\]

67. Id. at 737-38.
68. Id. at 740-41.
69. Id. at 739; see also the statement of the question presented to the Jeff D. court in Ralston, et al., supra note 10 at 634; and Gropper, supra note 10 at 656-57.
70. 475 U.S. at 740.
71. Id. at 743 n.34.
72. See, e.g., id. at 748 (Brennan, J., dissenting); Moore, 762 F.2d at 1117 (Wright, J., dissenting) (quoting N.Y. Bar Ass'n, Committee on Professional Ethics, Op. 80-94, "Settlement Offers in Public Interest Litigation Conditioned on Waiver of Statutory Fees," p. 510); Calhoun, supra note 8, at 372; Kraus, supra note 8, at 635-39; Comment, Settlement Offers Conditioned on Waiver of Attorney's Fees: Policy, Legal and Ethical Considerations, 131 U. Pa. L.R. 793, 795 (1983).
73. Senate Report, supra note 6, at 3; see also Wolfram, supra note 8, at 295 (attorneys respond to economic interests like other human beings, as well as to other motivations).
would not waive them. The biggest problem created by this uncertainty is that its effects would be unmeasurable until the number of civil rights cases declines, undermining the effectiveness of civil rights laws.

For attorneys considering serving as "private attorneys general," Jeff D. presents several problems. First of all, plaintiffs' attorneys do not know if they may rely on judicial constructions of the fees acts to protect their interests. Jeff D. has effectively eliminated prior judicial constructions of the fees acts which artificially structure the settlements of civil rights suit, such as the Prandini rule. For example, the Third Circuit, because of the unanimity of the Jeff D. Court's objections to bans on simultaneous negotiations, has already declared Prandini to be overruled. 74 Therefore, for plaintiffs' attorneys, there is currently no legal bar under federal law to prevent clients from settling a case and accepting a fee waiver. However, the policies discussed in Jeff D. would also apply to any other constructions of the fees acts which limit either the parties' freedom or certainty of settlement as a matter of law. In fact, if success on the merits is a factor which makes a fee waiver permissible as a quid pro quo for the plaintiffs' statutory fee rights, then attorneys will hurt their own interests by getting greater relief on the merits than they could reasonably expect at trial. Although the Court's approval of the fee waiver in Jeff D. was predicated on the lack of evidence of misconduct which might be the basis of limiting constructions later in later decisions, the Court's refusal to adopt rules against even abusive uses of fee waivers makes it difficult to predict the form of future rules to protect plaintiffs' attorneys, and even whether such rules will ever be adopted. For attorneys concerned about their income, reliance on such future decisions is a poor basis on which to take cases now. 75

Second, attorneys have both standing and proof problems if they try to use any factors adopted in future cases to object to a settlement. Jeff D. makes it clear that the right to attorneys' fees belong solely to the plaintiff. 76 Two federal circuit courts have already read Jeff D. as denying attorneys any right to sue for a fee independently of their clients. 77 In Jeff D., the attorney was able to object to the fee waiver in the settlement because he was acting as both client and attorney; however, it is not clear in which capacity he was acting when he objected to the settlement. 78 In more commonplace cases, attorneys will be unable to com-

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75. See, e.g., Willard v. City of Los Angeles, 803 F.2d 526 (9th Cir. 1986) (refusing to adopt any limitations on fee waivers).
77. Soliman v. Ebasco Servs., Inc., 822 F.2d 320, 328 (2d Cir. 1987); Willard, 803 F.2d at 527; see also Freeman v. B&B Assocs., 790 F.2d 145 (D.C. Cir. 1986) (attorneys have no independent right to claim fees under the Truth-In-Lending Act).
78. When Johnson approved the settlement during negotiations, he did so because of his attorney's ethical duty of loyalty to his clients. Jeff D., 475 U.S. at 723-24. However, when he argued
plain about fee waivers accepted by their clients.

Even if an attorney could object to a settlement which incorporates a fee waiver with the client's approval, factors such as the defendant's vindictiveness would be difficult to prove. In order to overturn a settlement which incorporated a fee waiver, an attorney would have to develop a second body of evidence unrelated to the original case. For example, evidence of a defendant's pattern and practice of requiring fee waivers would not normally be the subject of discovery in a Title VII suit, which usually concerns proof of discrimination in employment matters, and is therefore oriented to finding job-related facts. If a plaintiff objects to the expense of developing this second body of evidence, the attorney has no right to insist that it be done.79

For the fee-shifting statutes to effectively create a corps of private attorneys general, attorneys must find other forms of protection for their reasonable fee interests. Such protection must overcome the uncertainty created by Jeff D. and assure attorneys that they will be compensated for their services. Review of a variety of other proposed protective mechanisms will show that only joint attorney/client control of settlements will be both effective and ethical.

III
DIFFICULTIES WITH PROTECTIONS OTHER THAN JOINT CONTROL CONTRACTS

Since attorneys may not rely on rules like Prandini and Mendoza to protect their fee interests, the question remains whether there are any protections which attorneys may ethically use. Writers and courts have suggested various mechanisms to protect the attorneys' right to fees. These methods have been characterized as litigation strategies,80 protective contracts short of express attorney control,81 and reliance on state ethical laws.82 As of the time this Comment was written, only one com-

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79. Under the American Bar Association Model Rules of Professional Conduct, expense is a subject over which the client has control. Although the lawyer is responsible for tactical issues, she should "defer to the client regarding such questions as the expense to be incurred." AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 20 (L. Occhino ed. 1984) [hereinafter ANNOTATED MODEL RULES] (Comment to Rule 1.2, Scope of Representation); see also Soliman, 822 F.2d at 323.

80. See, e.g., Calhoun, supra note 8, at 368-70; S. Goldstein, supra note 8, at 698; Levin, supra note 8, at 521.

81. See, e.g., Calhoun, supra note 8, at 353-56; S. Goldstein, supra note 8, at 699-700.

82. See, e.g., S. Goldstein, supra note 8, at 701; Kraus, supra note 8, at 631-33; Levin, supra
mentator has endorsed any form of joint control contract.\textsuperscript{83} Before discussing joint control contracts, this Comment will first discuss why other proposals will not effectively protect attorneys' reasonable fee interests.

\textbf{A. Litigation Strategies}

Litigation strategies are easily defeated by opposing counsel and are potentially unethical. For example, one writer proposed that plaintiffs try to reach settlements concerning those claims about which the parties have no dispute, and then petition the court for interim fees.\textsuperscript{84} However, defense attorneys will be hesitant to agree to interim settlements which do not clearly resolve the issue of fees, once they understand their clients may face further liabilities.\textsuperscript{85} If defendants were hesitant to raise the issue of fees in interim settlement talks before \textit{Jeff D.}, it is clear that there is no reason for them to hesitate now. In addition, it may be unethical for plaintiffs' attorneys to pursue interim settlements to protect their fees, if it is not in the clients' best interests to use that trial strategy.\textsuperscript{86} Finally, courts may interpret efforts to deceive an opponent into a settlement which does not discuss fees, in order to claim fees later, as a special circumstance under which the court may refuse to grant fees, as the First Circuit did in \textit{Lazar v. Pierce},\textsuperscript{87} and the Tenth Circuit suggested it would do in \textit{Chicano Police Officers Association}.\textsuperscript{88}

\textbf{B. Contractual Protections Short of Joint Control}

Other writers have proposed that attorneys protect their right to fees

\textsuperscript{83} S. Goldstein, \textit{supra} note 8, at 701. Several commentators have even suggested that all attorney vetoes would be contrary to the ethical codes. Calhoun, \textit{supra} note 8, at 354; Gropper, \textit{supra} note 10, at 661-62; Levin, \textit{supra} note 8, at 520 n.53. However, it is the position of this Comment that such contracts are ethical. \textit{See infra} Part IV.C, pp. 295-98.

\textsuperscript{84} Calhoun, \textit{supra} note 8, at 368-69.

\textsuperscript{85} \textit{See}, e.g., \textit{Chicano Police Officers Ass'n v. Stover}, 624 F.2d 127, 132 (10th Cir. 1980) (on remand, the trial court should interpret the intent of the parties as to whether the settlement was intended to cover possible fee claims); \textit{El Club del Barrio, Inc. v. United Community Orgs., Inc.}, 735 F.2d 98, 101 (3d Cir. 1984) (the party losing the underlying litigation has the burden of proving that a settlement which does not mention fees was intended to foreclose a separate action).

\textsuperscript{86} If a strategy to protect the attorneys' fees is not in the best interest of the client, an attorney would be violating ethical rules such as Model Rule 1.7(b):

A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests, unless:

1) the lawyer reasonably believes the representation will not be adversely affected; and
2) the client consents after consultation . . .

\textit{Annotated Model Rules, supra} note 79, at 72-73. Under that rule, if the attorney's strategy is objectively adversely affecting the clients' case, the attorney has a duty not to pursue it even if the client consents. The problems of conflict of interest are discussed in depth \textit{infra} Parts IV.B and IV.C, pp. 292-98.

\textsuperscript{87} 757 F.2d 435, 439 (1st Cir. 1985).

\textsuperscript{88} 624 F.2d at 132.
through improved client counseling and fee contracts, though not including express attorney control of the fees issue at settlement. However, counseling measures alone are not secure enough to give most attorneys the confidence to take civil rights cases, and may pose ethical problems. Such proposals are at bottom a form of attorney reliance on client good will, achieved by educating the client about conflicts which are likely to arise in settlement. At the beginning of their attorney-client relationship, most clients probably do intend to protect their attorneys' interests, and counseling may increase the probability that clients will protect their attorneys' interests at settlement time. However, good will is now an unreliable basis to take cases, because \textit{Jeff D.} gives clients the power to ignore mere good will. Client behavior is simply too difficult to predict when, years after a case begins, clients ultimately face the choice of either accepting a settlement with a fee waiver or risking delay of a settlement or even withdrawal of an offer, in order to protect their attorneys' right to a fee.

Where such proposals go beyond depending on client good will, the greatest ethical danger is that the retainer agreement will incorporate an attorney veto in disguise and that attorneys will take control of the fees issue away from the clients without full disclosure and express consent. For example, one commentator has suggested that clients waive the right to accept a settlement which the plaintiffs' attorneys believe incorporates an unreasonably low fee offer, subject to court review of the fee offer for reasonableness.

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89. S. Goldstein, \textit{supra} note 8, at 699 (attorneys should require clients to treat discussions of settlement of the merits and of fees as separate issues); Calhoun, \textit{supra} note 8, at 353-54 (recommending full disclosure of the attorneys' interests and conflict of interest); Levin, \textit{supra} note 8, at 520 (arguing for retainer agreements for legal service practice, even if only as unenforceable leverage with a client who changes her mind about promises to protect the attorneys' interest).

Several state bar association opinions also suggest reliance on counseling without an attorney veto, but do not resolve the problem of assuring that any fees actually get shifted. For example, Michigan suggests counseling, but if that does not work, the attorney must withdraw. Michigan Bar Opinion C-235, 1 \textsc{Lawyers' Manual on Professional Conduct, Current Reports} (ABA/BNA) 853 (1985). However, withdrawal deprives the plaintiffs of their primary attorneys' services at the most important juncture in a case, settlement. Tennessee suggests permitting an attorney to negotiate for fees, but reserving ultimate control to the client. Tennessee Opinion 85-F-96(a), 2 \textsc{Lawyers' Manual on Professional Conduct, Current Reports} (ABA/BNA) 396 (1986). However, clients do not have any competence to judge the propriety of a fee award, if they do intend to insure that their attorneys receive a reasonable fee. Furthermore, this reaffirms the power of clients to waive their statutory right to fees after a case is nearly concluded, recreating the uncertainty that \textit{Jeff D.} created. Accordingly, negotiation with ultimate control in the client is also an unsatisfactory solution.

90. \textit{Cf.} Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1177 (5th Cir. 1978) (attorneys' exhaustion after years of litigating a case may increase the risk of unethical behavior).

91. S. Goldstein, \textit{supra} note 8, at 701. To accomplish this goal, Goldstein proposes that attorneys insist on clients agreeing to the following clause in their retainer agreement:

\begin{quote}
If a settlement offer made by the defendant is contingent upon counsel foregoing what he or she believes to be a federal statutory right to a reasonable fee award, I (the client) agree that prior to responding to the offer, counsel may seek the opinion of the court regarding
\end{quote}
However, while this proposal gives an attorney some protection, it differs from both an express attorney veto, on the one hand, and a resolution of the fee issue at trial, on the other, in several important ways. First, although this proposal substantially reduces the uncertainty for plaintiffs' attorneys which exists under current practice, it does not eliminate that uncertainty. Defendants are likely to make offers on the low side of reasonableness in every case, anticipating that the attorney has agreed to be bound by an offer if the fees fall anywhere within the reasonable range. If the plaintiffs' attorney objects to the offer, a court could only enforce the attorney's veto when the defendant's offer was clearly unreasonable. The court would probably uphold the offered fee amount, even though the plaintiffs' attorney considers it unreasonable. If plaintiffs' attorneys could veto settlements incorporating unreasonable fee awards, they would be more likely to get a fee award on the high side where it was justifiable, because the defendant would face a risk of a greater award on both the merits and the fees at a full trial.

Second, this proposal does not guard against sweetheart offers. If the defendant's fee offer is unreasonably high, the plaintiffs may find their attorneys' loyalty weakened. The plaintiffs will have no protection against attorney disloyalty because the attorney will have no interest in bringing the fees issue to the court's attention. If the purpose of this proposal is to give attorneys more control of the fees in settlements, then an attorney veto should be expressly adopted, so that a balancing mechanism could be included to protect clients as well as attorneys.92

Third, this proposal would create serious problems for the courts. Must a court have a hearing on the reasonableness of a fee award whenever a settlement offer is made? This might even require mini-hearings on the merits of the case, to decide issues such as the difficulty and contingency of a case. Should the defendant be permitted to appear at the hearing? Arguably not, since the issue of reasonableness would be as much a matter of contract as of law. But if not, would the defendant be deprived of the right to settle without due process? The greatest risk of such a proposal is the potential for vast numbers of hearings on reasonableness, a risk which the Jeff D. Court found objectionable in the dissent's proposed rule of requiring reasonable fees in all cases.93 The problems which arise under this proposal illustrate how the current allocation of decisionmaking power in the plaintiffs' attorney/client relation-

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ship is ineffective at protecting the attorneys' rights, and how the traditional analysis of ethical problems under fee-shifting statutes leads only to inadequate solutions.

C. State Ethical Codes or Opinions Limiting Fee-Shifting Negotiations or Settlements

State codes of ethics or state ethics committee rulings are clearly the most important set of limitations on simultaneous negotiations or fee waivers. However, even in the few jurisdictions where these rules exist, they are of little value to attorneys. First, they may not effectively protect attorneys' interests, and second, they contravene important federal policies. In fact, these rules are not common. The Jeff D. Court reported that only three jurisdictions had such rules and one state had rejected them. Other states' bar associations and courts have since issued opinions, with mixed results. Where such rules are not in effect, attorneys are unlikely to take civil rights cases based on the hope that such rules will be adopted later. Attorneys need to know, before they take a case, that they will receive their statutory fees if their clients prevail.

Even where such ethical rules exist, it is not clear that the various rules adopted by local bar associations effectively ensure the attorneys' receipt of a fee. For example, in Moore, the settlement negotiations were conducted under a rule which barred defense attorneys from making offers with fee waivers. Nevertheless, the plaintiffs' attorney felt compelled to make a series of offers with decreasing fees until the settlement included no fees because it was obvious that the defendant would only settle with a fee waiver.

Similar problems could arise under bifurcated negotiations man-

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96. State bar opinions which have banned fee waivers include Maryland Opinion 85-74, LAWYERS' MANUAL OF PROFESSIONAL CONDUCT, ETHICS OPINIONS (ABA/BNA) 801:4358 (1985); and Connecticut Informal Opinion 85-19, supra note 91. Other states have refused to limit attorneys' conduct at settlement talks. See, e.g., Virginia Bar Opinion 536, supra note 78; Tennessee Bar Opinion 85-F-96(a), supra note 89; and New Mexico Bar Opinion 1985-3, 1 LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) 828-29 (1985).

97. For a good discussion of why state ethical rules are likely to be ineffective at controlling misconduct by either plaintiffs' or defense counsel, see Wolfram, supra note 8, at 307-11.


99. Moore, 762 F.2d at 1115 (Wright, J., dissenting).
dated by state rules. If parties were bound to observe the terms of the settlement on the merits before they had agreed to a settlement of attorneys' fees, clients might have no interest in continuing a lawsuit just to collect their attorneys' fees. This would be especially true where the object of the lawsuit was exclusively equitable relief for indigent plaintiffs. Once the equitable relief was settled, the plaintiffs could deny their attorneys any compensation by agreeing to waive fees. Even if the plaintiffs were willing to support their attorneys' interests, there would be no way to compel a defendant to agree to pay fees. Under *Jeff D.*, attorneys' fees are a material term of a settlement. Without an agreement by both parties to submit the fee dispute to the court, the court would have no power to impose a single term of a settlement. Instead, the court would have to try the whole case just to resolve the fees issue or have the parties reach a compromise settlement. This choice was presented to the district court by the Second Circuit in a case where a rule prohibiting simultaneous negotiations was in effect, *Huertas v. East River Housing Corp.* Therefore, a rule prohibiting simultaneous negotiations would only work if there was also a rule requiring that all settlements include reasonable attorneys' fees, which is exactly what the *Jeff D.* Court rejected.

Most importantly, the application of state laws requiring bifurcated negotiations in cases where fee-shifting is permitted under federal law may be preempted by *Jeff D.* As a matter of federal law, plaintiffs now have a right to freely settle their federal claims under the fees acts. The states are forbidden to interfere with this right under the supremacy clause of the Constitution. While the *Jeff D.* Court did not expressly find that state ethical codes prohibiting simultaneous negotiations or fee waivers were preempted, it did hint that it would if presented with the issue. The Court stated that it believed that "[e]ven state bar opinions holding it unethical for defendants to request fee waivers in exchange for relief on the merits are ultimately bottomed on [the Fees Act]." Since the Court had just held that federal judicial constructions of the Fees Act prohibiting simultaneous negotiations or fee waivers in all cases ran contrary to important policies of those acts, state rules imposing similar limitations are equally improper. The federal policies regulating settlement

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100. One commentator has described how *Prandini* failed to resolve the problem of fee waivers. Since its rule was intended to prevent overreaching by attorneys in division of a lump sum, it has not been interpreted to bar fee waivers at the discussions of settlements of the merits. *El Club del Barrio*, 735 F.2d at 100 (silence of settlement on fees does not equal a waiver, but does not assure the plaintiff a right to a separate action for fees). The writer concludes that bifurcated settlements may lead to increased litigation. Calhoun, *supra* note 8, at 364-66. Another has described how difficult *Prandini* would be to enforce. Wolfram, *supra* note 8, at 312.

101. 813 F.2d 580 (2d Cir. 1987) (settlement on the merits overturned by the court when the parties failed to reach agreement on attorneys' fees).

102. U.S. CONST. art. VI, cl. 2.

103. *Jeff D.*, 475 U.S. at 729 n.15.
negotiations in federal civil rights cases, as expressed in *Jeff D.*, require freedom of negotiation. Since the vast majority of cases are settled, a state ethical rule limiting the parties' ability to freely settle federal claims may interfere with civil rights suits as much as a rule preventing the plaintiffs from bringing them.

Although attorneys' ethical codes are traditionally subject to state control, such codes have been denied effect when they conflict with federal civil rights laws. For example, in *NAACP v. Button*, a state ethical code provision against attorney use of case solicitors was denied effect, as interfering with the client's first amendment rights, when it was applied to organizations promoting civil rights cases. Similarly, in *In re Primus*, rules against solicitation were denied effect when a civil rights attorney was offering to take cases for free.

Preemption is equally appropriate here. State ethical rules which forbid or restrict either simultaneous negotiations or fee waivers in federal civil rights cases interfere with civil rights suits, by undermining policies of freedom of negotiation and certainty of settlement which the *Jeff D.* Court has declared to be a necessary part of the Fees Act. It is irrelevant that this interference with federal law occurs by means of ethics rules. The result is the same: plaintiffs are deprived of litigation tools which are integral parts of their federal rights in the first place.

In effect, *Jeff D.* defined a bargaining relationship between parties to a federal civil rights lawsuit. The relationship between these parties is similar to that of parties negotiating a collective bargaining agreement under the National Labor Relations Act ("NLRA"). The NLRA creates a federal right of a union and an employer to bargain for a collective bargaining agreement, but does not impose the terms of that agreement. While states are free to regulate labor matters of local concern, they may not interfere with the power of federal authorities over the federally regulated union-employer relationship. Field preemption, often called *Machinists* preemption, exists where Congress intended to oc-

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104. 371 U.S. 415, 433 (1963) (Virginia rule of attorney ethics denied effect when applied to NAACP Legal Defense Fund to prevent it from assisting persons wishing to bring civil rights suits).
107. NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952) (The NLRA does not compel any agreement, nor permit the National Labor Relations Board ("NLRB") to determine the terms of an agreement, but simply brings the parties together with a duty to bargain in good faith.).
108. San Diego Bldg. Trades v. Garmon, 359 U.S. 236, 242 (1959) (only the NLRB can decide what conduct is protected by, or prohibited by, the NLRA, or give remedies for violations).
109. Lodge 76, Machinists v. Wisconsin Employment Relations Comm., 427 U.S. 132 (1976) (state order to union to cease concerted refusal to work overtime denied effect as interference with the power of the federal government to regulate the balance of power between unions and employers under the NLRA). But see Brown v. Hotel & Restaurant Employees Local 54, 468 U.S. 491 (1984) (allowing state regulation of qualifications of union officials based on state power to combat public evils of crime, corruption and racketeering and found not incompatible with national labor policy).
cupy the field and define the balance of power under which the parties negotiate their agreements.\textsuperscript{110} Under field preemption, states may not interfere with collective bargaining relationships even where federal law has no specific regulations. Under this principle, state laws have been denied effect where they prohibited a concerted refusal to work overtime which was not specifically prohibited under federal law,\textsuperscript{111} where they prohibited secondary boycott activity not prohibited under federal law,\textsuperscript{112} and where they interfered too closely in an unresolved bargaining situation.\textsuperscript{113}

Preemption under \textit{Jeff D.} is closely analogous to \textit{Machinists} preemption under the NLRA. It is clear that there are now policies defining the relationship between parties to federal civil rights suits, policies which depend in great part on a lack of regulation. State ethical codes limiting the power of parties to a federal civil rights lawsuit to either control their negotiations or settle their case interfere with federally created rights, by regulating elements of a civil rights suit that federal law requires to be unregulated.

Courts have already started to recognize \textit{Jeff D.} preemption in practice. \textit{Huertas v. East River Housing Corp.}\textsuperscript{114} illustrates how \textit{Jeff D.} has preempted \textit{Prandini}-like state ethical rules requiring bifurcated negotiations: even if negotiations for the plaintiffs' relief on the merits are conducted before those for the fee award, the settlement on the merits may not be enforced by the court if there is an outstanding issue such as attorneys' fees, and the court may not decide the fee award alone.\textsuperscript{115} Ethical rules prohibiting fee waivers also interfere with the settlement process and are at equal risk of being preempted. Although the full preemptive effects of \textit{Jeff D.} are very complicated, one effect of \textit{Jeff D.} is likely to be that an attorney could not be disciplined for conducting simultaneous negotiations, or for negotiating a settlement which incorporates a fee waiver, since it is a federal right for the plaintiff to exchange relief under the fees acts for relief on the merits.\textsuperscript{116}

The preemptive effects of \textit{Jeff D.} make it clear that state ethical rules are unreliable protection for civil rights plaintiffs' attorneys' interests

\textsuperscript{110} "A second line of preemption of analysis has been developed in cases focusing upon the crucial inquiry whether Congress intended the conduct involved to be unregulated . . ." \textit{Machinists}, 427 U.S. at 140.

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} Local 20, Teamsters v. Morton, 377 U.S. 252, 259-60 (1963) (state prohibition of secondary boycotts deprived the union of a "weapon of self-help" which Congress intended the union to have).

\textsuperscript{113} Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 614 (1986) (city refusal to renew taxi franchise license until company agrees to new terms with union declared improper interference in collective bargaining process).

\textsuperscript{114} 813 F.2d 580 (2d Cir. 1987).

\textsuperscript{115} \textit{Id.} at 582.

\textsuperscript{116} \textit{Jeff D.}, 475 U.S. at 752.
under the fees acts. The mere threat of preemption may dissuade attorneys from taking fee-shifting cases even where there are apparently protective state ethical rules. Although some ethical rules may address the manner in which parties settle cases, none can deprive plaintiffs of their federal right to waive their attorneys' fees. Therefore, if the congressional purposes behind the fees acts are to be preserved, plaintiffs' attorneys must find an alternative way to reduce their own uncertainty about receiving a fee when their clients prevail. The next Part of this Comment explains how attorneys can use new forms of attorney-client contracts to accomplish this goal without sacrificing basic ethical policies.

IV
JOINT CONTROL CONTRACTS AS THE BASIS FOR PLAINTIFFS' ATTORNEY-CLIENT RELATIONSHIPS

A. Basic Elements of Joint Control Contracts

The primary value of joint control contracts is the protection they afford to plaintiffs' attorneys in cases where fees may be shifted. The distinguishing elements of a joint control contract are the plaintiffs' assignment of the right to the statutory fee award if they prevail, a promise by the plaintiffs to take no action which will deprive the attorneys of a reasonable fee if the plaintiffs prevail, and a mechanism to enforce that promise. The exact nature of the enforcement mechanism can vary, but must give the attorney substantial control of the case if it is to be effective. A typical mechanism would be a contract provision assigning to the plaintiffs' attorney the power to veto any settlement not containing a fee which is reasonable under the prevailing law of fee-shifting awards at trial, in reliance on the attorneys' reasonable interpretation of fee award standards described in the retainer agreement.117

This type of retainer agreement would reduce the occurrence of sacrifice offers, without undermining the finality of settlements. When the parties to a lawsuit reach final settlement negotiations, the defendant can either offer a lump sum or structure its offer to include a fee award. Then the plaintiffs and their attorneys can evaluate their legitimate interests in the settlement independently. If a defendant insists on a fee waiver, it will know in advance that the attorney can compel the case to go to trial. This should result in fewer sacrifice offers, without depriving defendants of their legitimate role in settlement talks.

117. An attorney veto is not the only mechanism which could protect legitimate attorney interests. Attorneys could also agree to waive their vetoes if an adequate substitute protection were accepted by the defendant. If the defendant agreed to have the fee award determined by a third party, such as an arbitrator or a court, the attorney would have as much certainty as a determination of fees at a trial. However, for purposes of this Comment, such proposals raise the same issues as true attorney vetoes because they require the plaintiffs to give up part of their power to control the decision to settlement for the benefit of their attorneys, at the attorneys' request.
The advantage of practicing law under express joint control contracts is that the plaintiff-attorney relationship can be structured to include essential elements for the benefit of the clients as well as for the attorneys.\textsuperscript{118} For example, there must be a clear description of how the attorneys intend to calculate their fees. There is a wide variation of possible fee awards under the fee-shifting statutes, because of various multipliers for difficulty and contingency, varying hourly rates and possible reductions for achieving only partial success.\textsuperscript{119} If the attorney intends to apply such multipliers, the retainer agreement should describe which factors the attorney may claim and under what circumstances they will be applied. Although there are still possibilities for attorney overreaching, this Comment will show how a properly limited shift of power to plaintiffs' attorneys will reduce ethical problems while advancing the purposes of the fee-shifting statutes,\textsuperscript{120} and how properly drawn contracts will give plaintiffs' attorneys independent remedies.\textsuperscript{121}

### B. Policies Favoring Joint Control Contracts

Both the fee-shifting statutes and the ethical codes provide important policy reasons for using express joint control contracts as the basis for attorney/client relationships under fee-shifting statutes. The most important reason is that joint control contracts would encourage attorneys to take fee-shifting cases, the primary purpose of the fee-shifting statutes.\textsuperscript{122} Attorneys taking cases under such agreements would know that, if their clients prevail, they would receive the fee for which they had contracted.\textsuperscript{123} This form of contract would therefore reduce the perception of danger to their self-interest as much as it would reduce the actual risk, thereby counteracting the potential chilling effect of\textit{ Jeff D}.

One result of attorneys asserting their interests is that some plaintiffs may appear to receive less relief on the merits than they could if they traded on their attorneys' legitimate expectations. For example, it is very unlikely that plaintiffs will receive that additional relief "to which they are unquestionably not entitled,"\textsuperscript{124} which the \textit{Jeff D}.

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118. For a discussion of responsibilities of the attorney in drafting joint control agreements, see \textit{infra} Part IV.B, pp. 292-95.


120. \textit{See infra} Section IV.C, pp. 295-98.

121. \textit{See infra} Part V, pp. 301-03.

122. "The purpose and effect of [the Fees Act] are simple—it is designed to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866." \textit{Senate Report, supra} note 6, at 2; \textit{see also House Report, supra} note 5, at 1.

123. "Whether those attorney's fees that are awarded end up in the lawyer's or the client's hands depends, of course on the private fee arrangement entered into when representation is undertaken." \textit{Soliman, 822 F.2d} at 322-23.

was possible under the Fees Act. However, the value to society of allowing attorneys to protect their reasonable fee interests should not be measured solely by the incremental losses to plaintiffs who would abuse fee-shifting, but also by the number of plaintiffs who can hire attorneys on the open market, as Congress intended when it made attorneys' self-interest a part of the mechanism for advancing civil rights. These additional plaintiffs will be able to bargain successfully for attorneys' services because they can give those attorneys reliable assurances that they will be paid if the plaintiffs prevail. Therefore, it does not seem untenable for an attorney to delay a settlement until defendants agree to pay those fees which Congress intended as an important mechanism to advance civil rights. If the assurances that fee-shifting plaintiffs have to give seem to favor attorney self-interest too overtly—as it might seem when settlement is delayed until an unwilling defendant finally agrees to pay fees—it is only because the indigent clients for whose benefit the civil rights fees acts were passed cannot provide other assurances typical of more traditional fee-for-service contracts. In short, an attorney's assertion of a right to a fee during settlement talks should not be considered unethical per se if that right was part of the bargain with the client under fee-shifting statutes.

Furthermore, joint control contracts should not be considered a violation of the rules established in Jeff D. Although plaintiffs lose the power to negotiate fee waivers with defendants in most cases, they exchange that power for the benefit of attorneys' services. On the other hand, when plaintiffs lose the right to exchange a fee award for relief on the merits as a matter of law, as occurred when Mendoza was applied by the Ninth Circuit in Jeff D., the plaintiffs lose control of a part of their case without receiving any direct benefit. For example, under rules prohibiting fee waivers, plaintiffs represented by pro bono counsel cannot benefit from the charitable act of their attorney by exchanging the statutory right to fees for additional relief on the merits. In contrast, where plaintiffs cannot find pro bono counsel and contract for attorneys' services by assigning control of the fee award to their attorney, plaintiffs will have exchanged part of a federal right in order to further the broader purposes for which Congress created that right. In other words, voluntary joint control agreements partially hinder one policy, freedom of settlement, in return for advancing another, the promotion of civil rights through fee-shifting, without sacrificing a third, certainty of settlements. This is a better balance than per se prohibitions against simul-

125. "The application of [established] standards will insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls for attorneys." House Report, supra note 5, at 9.
127. There is some indication in Jeff D. that the Court considered assigning the right to fees to
taneous negotiations or fee waivers, which undermine freedom of negotiations and certainty of settlements without clearly advancing civil rights.

Joint control contracts also promote important ethical concerns between parties to lawsuits and between plaintiffs and their attorneys. Between parties to a lawsuit, the practice of law under properly limited joint control contracts would substantially reduce the occurrence of the whole range of ethical problems discussed earlier. As many proponents of judicial constructions limiting parties' freedom have emphasized, it is the negotiability of attorneys' fees among the plaintiffs, defendants and plaintiffs' attorneys that endangers the plaintiffs' relationship with their attorneys. As long as attorneys' fees are negotiable, defendants have some control over plaintiffs' attorneys' fees until the case goes to trial. For indigent plaintiffs, and possibly in many other cases, there is a risk that the defendants will have more power than the plaintiffs to define the plaintiffs' attorneys' fee, because the plaintiffs lack the resources to provide a reasonable fee independently. This imbalance of power creates the basis for both sweetheart and sacrifice offers, and their concomitant dangers: that the plaintiffs' attorneys may be influenced by defendants, or that the market for plaintiffs' attorneys will disappear. However, if the plaintiffs' attorneys' right to a fee is controlled primarily by the contract between the attorneys and their clients—as it is in other retainer agreements—then the risks to both the attorneys and the plaintiffs will be reduced. Although no contract can fully shift the power to set the attorney's fee to an indigent plaintiff, joint control contracts would at least take some power from the defendant.

Express joint control contracts would also discourage misconduct within the plaintiffs' attorney-client relationship. Under current practice, lawyers who face a threat of fee waivers have an incentive to deceive their clients about the value of the settlement on the merits, while lawyers who believe the fee offer is good have an incentive to persuade the client to

the attorney to be proper under the fees acts. The Court state that "[the Fees Act] did not prevent the party from waiving this eligibility [for fees] anymore than it legislated against assignment of this right to an attorney, such as effectively occurred here." Jeff D., 475 U.S. at 730-31. The First Circuit has also suggested that attorney control of the decision to settle the fee award conforms to the requirements of the fees acts:

For counsel to insist on a reasonable fee, while, conceivably, in the particular case detrimental to the client's successful settlement, is nevertheless in accordance with the overall purpose of the Act, not an ethical no-no... While the Act supplies counsel without charge to the plaintiff, this does not mean counsel with an ethical obligation to forego a fee. Lazar v. Pierce, 757 F.2d 435, 439 (1st Cir. 1985). Although these statements do not demonstrate explicit approval of joint control contracts, they do suggest that such contracts are not forbidden per se by the fees acts.

128. Calhoun, supra note 8, at 348, 370-81; see also S. Goldstein, supra note 8, at 694 (describing the ethical dilemma facing plaintiffs' attorneys from the practitioner's viewpoint).
Joint Control of Settlements

When attorneys can pursue their interests independently of relief on the merits, they will be under less pressure to influence the plaintiffs' decisions concerning the plaintiffs' legitimate interests. Although the danger of attorney-overreaching is still present, it can be controlled adequately by a properly limited contractual relationship. The next Section will discuss models of how such contracts should be limited.

C. Ethical Limitations of Joint Control Contracts

In the division of a lump sum settlement, and perhaps in all settlements, the assertion of a fee interest by an attorney under a joint control contract may lead to a conflict with the clients' interests. A conflict may exist if the attorney's assertion of a fee interest would reduce or delay the plaintiffs' award or relief. Nevertheless, a review of conflict-of-interest provisions of the Model Rules of Professional Conduct shows that joint control contracts in fee-shifting cases can be structured to meet the standards of waivable conflicts of interest; thus, joint control contracts are not forbidden by ethical codes. Obviously, no provision of the Model Rules addresses the precise problems of joint control contracts. However, two sections of Model Rule 1.8 are appropriate models for limitations on attorneys under joint control contracts because of the similarity of the conflicts created by joint control contracts with those of the recognized waivable conflicts of interests that those provisions govern.

One section of the Model Rules which may be both a governing rule of joint control contracts and a guide to structuring them is Model Rule 1.8(f), which covers third-party payment of fees. Under Rule 1.8(f), an attorney may accept fees from a third party—in fee-shifting cases, the defendant—only if the client consents and there is no interference with the attorney's independence and commitment to the client. Under fee-shifting, the threat to the attorney's independence is due more to the uncertainty of receiving fees than to the source of fees. In fact, the attorney's representation is more likely to be independent and zealous when

129. Wolfram, supra note 8, at 304.
130. MODEL RULES OF PROFESSIONAL CONDUCT (1983). This Comment relies on the Model Rules for discussion of ethical laws because they represent the most recent effort of the legal community to develop a uniform framework for ethical standards. See Chairman's Introduction, ANNOTATED MODEL RULES, supra note 79, at 5.
131. Model Rule 1.8(f) states:
   (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
   (1) the client consents after consultation;
   (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
   (3) information relating to the representation is protected as required under Rule 1.6.
ANNOTATED MODEL RULES, supra note 79, at 88.
the defendant has less power than the plaintiffs' attorney in defining the fee. For example, if plaintiffs' attorneys know that a particular defendant has a fee ceiling, they might structure their cases to avoid incurring more fees than that limit. Under current practice, they have an incentive to do so without informing their clients, because the clients might object. However, if plaintiffs' attorneys know that they will be able to seek fees beyond the defendant's guidelines without being undercut by their clients later, they will be freer to use their best judgment for the benefit of their clients and can more easily resist the influence of the defendant.

Perhaps the best model of proper agreements suggested by the Model Rules is Rule 1.8(a), covering attorneys' adverse pecuniary or security interests. An attorney's right to a fee is similar to an adverse pecuniary or security interest when it creates a financial incentive for an attorney to act in a manner that would reduce a client's share of a lump sum or impair injunctive relief. As a model of the restrictions applicable to joint control contracts, this Rule would protect clients without prohibiting such contracts. Under Model Rule 1.8(a), an attorney's acquisition of a pecuniary interest adverse to a client creates an increased fiduciary duty to the client. Such a conflict is waivable if: (1) the transaction is in fact fair and reasonable; (2) the relationship is fully disclosed in writing such that the client understands it; (3) the client is free to seek the advice of independent counsel; and (4) the client consents in writing. Although this Rule puts a serious burden on attorneys, the burden is not unreasonable. Each provision suggests different elements of a proper retainer agreement.

The transaction would be fair if the attorneys assert only a fair and reasonable fee demand, and the plaintiffs are thereby able to procure counsel. A fee demand conforming to prevailing local standards of fee awards under the fee-shifting acts would presumably be fair, although the burden of proof should rest with the attorney if challenged.

The disclosure of potential conflicts should be comprehensive, for the attorney's sake as well as the client's. All elements of the attorney-client relationship should be discussed, including the probable course of the lawsuit and the impact of the attorney veto, so that clients will not be surprised to find their power to settle restricted. The disclosure should

132. Model Rule 1.8(a) states:

(a) A lawyer shall not enter into a business transaction or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to the client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

Id.
probably include an explanation of possible sources of pro bono representation, if any are likely to be available, so that a client will not assign the right to fees to the attorney if that assignment is not necessary. The scope of necessary disclosure is a problem which can only be resolved through experience, because the impact of attorney control is not clear in all cases.

The use of written explanations and consent forms is not likely to be controversial. Written forms will be probably equally important to clients and to attorneys. For clients, they will be a continuing guide to what to expect in a case. For attorneys, they will be the best defense against charges of overreaching.

The most difficult questions arise as to how and when clients may seek the advice of independent counsel in the transaction. An independent review of the retainer agreement at the initiation of a relationship might include a review of the attorneys' hourly rate and intended method of calculating fees, including any intended multipliers for difficulty and contingency. This will provide an initial check on attorney overreaching and give clients more confidence in the attorneys' demands when they are presented. However, independent reviews of the progress of a case to confirm the accrual of fee totals would also be helpful to keep a client informed about what fee demands the attorney would reasonably present if settlement negotiations were to occur unexpectedly. For example, a case which appears difficult at the beginning may become simple if the defendant cooperates, making a large multiplier inappropriate. It may not even be necessary to have actual reviews of the agreement or progress reports, because even preparation for reviews will discourage ethical abuses.

An alternative limitation is to agree in advance to arbitration of the fee by a local bar association program. This would be useful whether the attorney rejected or accepted offers. If the attorney rejected an offer, the client could invoke the arbitration clause to confirm that the attorneys' veto was reasonable. If the attorney accepted an offer, the clients could nevertheless have the fee award reviewed for overreaching, with any excess fees going to the clients in addition to the other relief in the settlement.

It is beyond the scope of this Comment to define in complete detail what a standard joint control contract should contain. However, the preceding discussion illustrates how Model Rule 1.8(a) can serve as the basis

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133. In this context, Goldstein’s proposal to have a court review and reinforce an attorney’s veto becomes just a particular type of third party review. In fact, to this writer, a court seems to be an inappropriate party to review an express joint control contract. The third party would be most akin to an arbitrator—interpreting and applying the intent of the parties. In class actions, for example, the arbitrator could review the fee demand as a contract matter, before the settlement goes to the court for a Rule 23(e) review, so that the legal and contract issues could be kept distinct.
for fee-shifting agreements. Contracts drawn to meet the requirements of that Rule will fulfill the goals of both the fee-shifting acts and the ethical rules by addressing the legitimate needs of both attorneys and clients in fee-shifting cases while furthering civil rights.

D. Direct Rules Against Attorney Control

The most serious obstacles to joint control contracts are state ethical rules or decisions declaring that contracts which give an attorney power to control a settlement decision are void as against public policy. In the Model Rules, this policy is expressed in Rule 1.2, which covers the scope of representation. Rule 1.2(a) imposes a duty on attorneys to respect their clients' wishes concerning the objectives of, and means of pursuing, cases. The Comment explains this Rule as reserving to clients an unlimited right to terminate an attorney's services and an unrestricted power to settle. However, these rules are intended to prevent problems which are substantially different from those arising in fee-shifting cases. The problems discussed in the Legal Background of the Annotated Rules relate to preserving the client's power as principal, in an agency relationship with the attorney. With respect to the power to settle, the Comment says that "[i]n the context of litigation, a lawyer has no inherent authority to settle or compromise a client's claim... although a client may grant the lawyer the express authority to settle." Thus the attorney may have the power to settle or refuse to settle a case as a matter of express agency power for the client's benefit, but may not demand the right to control the final outcome of the case on any other basis.

Properly drawn joint control contracts need not deprive clients of the role of principal, with respect to those matters that are of concern to the client. Rather, joint control contracts merely delegate to the attorney the power to decide one issue, the attorneys fees, in conjunction with a promise that there will be fees. As a delegated power, attorney control of fees and costs in joint control contracts in fee-shifting cases does not lead to an improper shift in power in attorney/client relationships, for several reasons.

First of all, clients must delegate the task of determining a reasonable fee under the fee-shifting statutes to someone. Clients are not com-

134. Model Rule 1.2(a) states:
(a) A lawyer shall abide by a client's decisions concerning the objective of the representation, ... and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by the client's decision whether to accept an offer of settlement of a matter ....
ANNOTATED MODEL RULES, supra note 79, at 20.
135. "[A]n employment contract that forbids the client from settling his or her own case, without the lawyer's consent, is against public policy and impermissible under Model Rule 1.2(a)." Id., Legal Background to Rule 1.2, at 24.
136. Id.
petent to determine a reasonable fee, because of all the potential variables. Delegation of the task of determining a reasonable fee to the plaintiffs' attorneys is fundamentally just another act of client reliance on their attorneys' legal expertise. In a joint control contract, a client has merely delegated this power to the attorney at the beginning of their relationship.

Second, advance delegation of control of the fee issue to the attorney would not give the attorney control of the matters essential to the client. Clients would still have the power to control their own relief in settlements and thereby protect their own interests. In addition, the power to terminate a case before settlement can be reserved to clients, without giving them the power to sacrifice their attorneys' interests after a favorable settlement on the merits.

Third, while clients may not be able to protect themselves against attorney overreaching, there are ways to protect clients without sacrificing their attorneys' interests. As discussed earlier, plaintiffs' attorneys could agree to permit an informed third party like a court or arbitrator to review fee offers. More importantly, all fee demands are still dependent on the defendant's acceptance. If a plaintiffs' attorney makes unreasonable fee demands, the attorney would be violating provisions of the ethical codes regulating fees. The attorney therefore would be at risk of facing disciplinary charges from both the client and the defendant. Since there are persons who can detect and protest individual ethical violations as they occur, there is no need for an inflexible general rule to prevent them.

Finally, the nature of statutory fee-shifting itself creates another protection inherent in joint control contracts. A joint control contract can only protect an attorney's right to a reasonable fee because that is all that the fees acts permit the parties to shift. If an attorney insists on an unreasonably high fee, higher than prevailing standards under the fee-shifting statutes, that would be a breach of the attorney/client contract. If the breach is serious and threatens the client's interests, the client could terminate the agreement and retake control of the decision to settle. This gives clients additional power over their attorneys which makes inflexible rules against attorney control unnecessary.

Other differences between attorney control of fees under statutory fee-shifting and attorney control under other contingency contracts will also discourage plaintiffs' attorney overreaching. An attorney veto under an ordinary contingency contract, for the purpose of assuring a particular fee, would inevitably intrude into matters exclusively of concern to the clients. In order for an attorney to receive a predetermined fee, the client would have to promise not to settle for less than a total settlement

137. See, e.g., Model Rule 1.5(a): "A lawyer's fee shall be reasonable...." Id. at 47.
large enough to make the agreed percentage equal the fixed amount. This would expose the clients to the risk of having to sacrifice their interests for the sake of their attorneys, when it appeared that the attorney had agreed to share the client's risk. Under fee-shifting statutes, such increased risk is unnecessary because the attorneys' fees are determined under legal standards.

In addition, under current contingency practice, attorneys have an interest in going to trial, because they get a large proportion of an increase in the plaintiff's damages if the judgment is higher than the relief offered in the settlement. In contrast, under fee-shifting, attorneys gain no substantial benefit from going to trial. At the time of settlement, the attorney's statutory rights would be accrued and relatively fixed, based on the hours worked and the other agreed factors. There would be no substantial increase in fees for going to trial, other than the hours at trial, which the attorney could earn as easily working on other cases. In fact, a plaintiffs' attorney is more likely to settle for reasonable fees than risk losing everything at trial if the plaintiff does not prevail. At that point, plaintiffs can protect their interests by retaining control of decisions to settle the relief on the merits, to assure that their relief was adequate. In class actions, there would be the additional protection of a review of the settlement by the court.

It is clear that joint control contracts can work to the benefit of both attorneys and clients, without sacrificing the policies behind either the ethical codes of the fees acts. As long as joint control contracts meet the standards of the ethical codes for analogous conflicts and the attorney conducts the case in good faith, plaintiffs will still be able to exercise the control that rules against attorney control were intended to protect. In individual cases where an attorney does not conduct a case in good faith, and demands or even receives an unreasonable fee, the client has measures to take for self-protection. Ethical codes should recognize that joint control of settlements is permissible under proper limitations, rather than impose overly simple limitations which may interfere with the ability of potential clients to hire attorneys.\(^{138}\)

If states refuse to reform express restrictions on the power of plaintiffs to bargain freely for legal services, these restrictions should also be

\(^{138}\) Ethical rules which instruct attorneys on how to respond to offers are similarly inappropriate. Several bar associations have expressed opinions that an attorney who has received an offer which includes a fee waiver must accept it. See, e.g., Michigan Bar Opinion C-235, supra note 89; Gropper, supra note 10, at 661. However, these opinions confuse the roles of attorney and client, which the Supreme Court clarified in Jeff D. Without joint control contracts, attorneys should have no power to decide whether to accept or reject an offer in any case; that decision belongs exclusively to the clients. It is clearly not the position of this Comment that attorneys have a right to veto a settlement as a matter of professional authority merely because fees may be shifted. It is the client's informed consent to permit an attorney veto which makes the attorney's action proper, as the exercise of a power conferred by the client.
considered preempted as much as rules requiring bifurcated negotiations. The Jeff D. Court found that Congress intended that plaintiffs should have great freedom to use their Fees Act rights to combat violations of civil rights.\textsuperscript{139} However, a state ethical rule preventing clients from assigning control of fees to their attorneys may prevent plaintiffs from acquiring an attorney’s services, which is the fundamental purpose of fee-shifting acts. In effect, the states would again be interfering with a bargaining right which Congress has regulated: the right of plaintiffs—most importantly indigent ones—to bargain for attorneys’ services by \textit{effectively} promising that the defendant will pay the plaintiffs’ fees if the plaintiff prevails. In the civil rights area, state ethical laws which interfere with the ability of victims of civil rights violations to procure counsel have already been recognized as threat to federal policies. For example, this threat was an important part of the reason for denying effect to the state ethical codes against solicitation in \textit{NAACP v. Button}.\textsuperscript{140}

Federal law would not necessarily conflict with all rules regulating joint control contracts. For example, a state could put the burden of proof on the attorney to show that the contract was reasonable and that the attorney applied it reasonably under prevailing local standards for fee-shifting awards at trial. But state laws \textit{prohibiting} such contracts would not serve their intended purpose, namely protecting clients. They would merely inhibit plaintiffs from bringing federal suits. In summary, while there may be provisions of ethical codes or other ethics laws which appear to bar joint control contracts, their application to fee-shifting statutes is inappropriate and unnecessary. Properly drawn joint control contracts are ethical, when modeled after appropriate provisions of the ethical rules, and should be recognized as such, so that attorneys will be willing to take the civil rights cases which Congress hoped to promote by permitting fee-shifting.

\section{V
Attorneys’ Remedies for Breaches of Joint Control Contracts

In order for fee-shifting to serve the purposes Congress intended, attorneys need protection against fee waivers before they take cases. If joint control contracts are specifically enforceable, they provide the additional protection attorneys need, because plaintiffs’ attorneys could get injunctions against settlements which do not include fees. However, if joint control contracts are not specifically enforceable, attorneys need a

\textsuperscript{139} “[Congress] neither bestowed fee awards upon attorneys nor rendered them nonwaivable nor nonnegotiable; instead, it added them to the arsenal of remedies available to combat violations of civil rights....” \textit{Jeff D.}, 475 U.S. at 731-32.

\textsuperscript{140} 371 U.S. 415, 436 (1963) (“[The] mere existence [of the regulation against solicitation] could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens.”).
new remedy. Traditional remedies, such as attorneys' liens, are of little value when the plaintiffs are judgment-proof, and particularly when the plaintiffs sought exclusively injunctive relief.

One possible legal action by which plaintiffs' attorneys could shift their clients' fees after a settlement incorporating a fee waiver, is a suit for tortious interference with the original plaintiffs' attorney/client contract. Depending on the nature of the defendant's conduct, a cause of action for tortious interference could arise when a plaintiff directly violates a retainer agreement by settling on the merits without providing for a reasonable fee for an attorney. Such an action could also be brought when a plaintiff terminates a joint control contract and finds other attorneys to handle only the settlement, and then settles without receiving a fee award adequate to cover the first attorneys' accrued reasonable fees.\(^4\) Tortious interference actions might also arise in a class action, if a fee waiver or low fees were approved by the court based on support of several class representatives, when other subclasses' attorneys' clients had promised not to waive any of their attorneys' fees. While not every fee waiver would lead to a successful action for tortious interference, at least the plaintiffs' attorneys would have an independent right of action, subject to their own control. They would have the power to control the case for their own benefit, and take discovery of the facts related to the fees alone, at their own expense. A review of the elements of the tort will show when and how an action might be brought by attorneys.

The Restatement describes the elements of tortious interference with contract as the following:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for pecuniary loss resulting to the other from the failure of the third person to perform the contract.\(^1\)

To be liable under this section, the malfeasor must have knowledge of the contract, have the intent to cause the third party to break the contract, and actually cause the breach.\(^1\) In cases where fee-shifting is permitted, a defendant could be liable to the plaintiffs' attorney if the defendant knew of the terms of a contract in which the plaintiff agreed to take no action to prevent the attorney from receiving a reasonable fee, but in-

\(^{141}\) LaFrance, supra note 8, at 339-40, dismissed the possibility of an action for tortious interference when a plaintiffs' counsel sought the advice of another attorney, who advised the plaintiffs' attorney to tell their clients to get the advice of another independent counsel. LaFrance contended that the third attorney should tell the plaintiffs to settle without fees. However, in the case he was discussing, "there never was a contract." Id. Under the proposal of this Comment, however, there would be a contract which addressed exactly the issue which the plaintiffs' attorney could not resolve alone.

\(^{142}\) RESTATEMENT (SECOND) OF TORTS § 766 (1979).

\(^{143}\) Id. at 11-12.
sisted on a fee waiver anyway, and if the defendant's actions or statements unjustifiably caused the plaintiffs to breach that agreement.

In actions for tortious interference, the factors which the Jeff D. Court discussed as possible limitations on the validity of fee waivers—vindictiveness to the particular attorneys, a pattern and practice of demanding fee waivers, and the lack of a realistic defense on the merits—assume new importance as balancing factors for the defense of justification for inducing the breach. The Restatement describes the defense of justification as a matter of balancing the private loss against some social good served by the breach. In fee-shifting cases, there is not only a private loss to the plaintiffs' attorneys, but also a social loss in that the effectiveness of the fee-shifting statutes becomes threatened. These negative factors would be balanced against the justifications of the individual case, such as a good faith motivation of the defendant and overreaching or deception by the plaintiffs' attorneys. However, evidence of vindictiveness or of a pattern and practice of demanding fee waivers could undermine the credibility of a defendant's stated motivations for demanding a fee waiver, and could increase the weight that a court gives to the social harm of the fee waiver in a particular case.

Having a second forum for the fees issue resolves the problems of how attorneys would get standing to object to a fee waiver and how attorneys could ethically seek their own interests without threatening their clients' remedies. The standing problem is resolved because the plaintiffs' attorney is able to plead the personal harm of a breach of contract. Ethical problems are reduced because the attorney has no incentive to spend clients' money developing the second body of evidence related solely to the attorneys' own interests. Further, attorneys would have less incentive to structure the clients' case for the attorneys' own benefit. Perhaps most importantly, defendants would be discouraged from demanding fee waivers because acceptance of a fee waiver by plaintiffs would not terminate litigation over the plaintiffs' attorneys' fees. This short discussion is not intended as a thorough review of how tortious interference cases would be pleaded or proved, but merely suggests how defining attorney/client relationships under fee-shifting statutes by means of joint control contracts would resolve some remedial problems facing plaintiffs' attorneys today.

144. Id. at 27 (§ 767(e)). The Comment to that section states: "The social interest . . . may frequently require the sacrifice of the claims of the individuals to freedom from interference with their pursuit of gain." Comment to Clause (e), id. at 35. In light of the congressional policies that statutory fee-shifting was intended to serve in civil rights cases, it seems reasonable to require a fairly strong justification for a fee waiver.
CONCLUSION

This Comment calls for a radical redefinition of the attorney/client relationship in cases where fee-shifting is permitted. This change is inevitable under civil rights fee-shifting statutes. Congress has permitted courts to require that certain malfeasors bear the cost of their victims' attorneys. Plaintiffs who bargain for attorneys' services, by agreeing to take measures to assure that their attorneys will get paid if they prevail, would be only using that congressionally-granted right to get legal services on an open market, as Congress intended. Under civil rights fee-shifting statutes, therefore, an attorney's efforts to contract for power to assure a reasonable fee is proper, because Congress made attorney self-interest a part of the judicial mechanism to enforce civil rights laws.

Some writers have argued that it is improper for an attorney to bar a settlement otherwise acceptable to her clients. However, an attorney veto is truly unethical only if the plaintiffs are not informed of the impact of attorney control of the fee award and do not consent in advance, and if the result of the case is not in fact fair. Traditional attorney/client contracts are more likely to lead to unethical behavior because attorneys will try to exercise control indirectly. Otherwise, the traditional relationship fails to protect the attorney sufficiently to solve the variety of ethical problems now threatening the fee-shifting statutes. Although the adoption of joint control contracts by plaintiffs may reintroduce some of the inflexibility of settlement that the Court disapproved in Jeff D., the plaintiffs' assignment of a right to their attorneys is worthwhile when it promotes the primary goal of fee-shifting statutes—enabling victims of civil rights violations to bring suits. When defense attorneys understand that joint control contracts make fees an inevitable cost of settlement of civil rights cases, they will instruct their clients to include these costs in their settlements. In light of the Supreme Court's rejection of limiting constructions of the Fees Act in Jeff D., joint control contracts may be the last hope to protect the fee-shifting statutes and the underlying civil rights laws from policies designed to balance the rights of victim-plaintiffs with the "needs" of malfeasing-defendants.