

Which Comes First, the Compensation or the Fees?



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Attorneys representing California public agencies in civil rights and “public interest” cases increasingly face a stumbling block in their efforts to negotiate settlements. Counsel for plaintiffs refuse to negotiate their demand for attorneys fees until after the parties resolve plaintiffs’ demands for substantive remedies, claiming that they are ethically bound to split negotiations in this way. It appears, however, that demands for such “serial negotiations” raise ethical concerns at least as grave as those presented by simultaneous negotiations, and counsel’s insistence may be more tactical than ethical.

When plaintiffs sue California public agencies alleging civil rights violations and/or similar claims, they invariably claim a right to recover attorneys fees in addition to whatever substantive remedies they seek. Usually, this claim is based on California’s “Private Attorney General Statute,” which allows courts to award fees to litigants who vindicate rights important to the public interest. Federal statutes also create a right to recover fees in many civil rights cases.

In most cases, the potential right to fees is a crucial component of settlement negotiations. For plaintiffs, the recovery of fees is an important part of their claim; it may even be the primary motivation to bring suit

in the worst cases. For public agencies, the prospect of a big fee award may be more onerous than the substantive relief requested. Accordingly, the primary value of settlement for a city or county — in some cases the only value — is to buy peace and shut off a prospective claim for fees.

Despite this shared interest in fee resolution, more and more plaintiffs’ counsel refuse to discuss their fee demand until the parties have at least tentatively settled the substantive relief demanded, claiming an ethical obligation to negotiate settlement in this serial manner. Counsel will explain — usually without citing authority — that a conflict would arise from simultaneous negotiation if the defendant attempts to lever substantive relief against fee recovery, trading greater fee offers for lower substantive demands, or vice versa.

Some cases have expressed a concern that a conflict may arise when the payment of fees depletes the agency’s ability or willingness to provide substantive relief. (See e.g., *Ramirez v. Sturdevant*, 21 Cal.App.4th 904 (1994)). This potential for conflict arises because, under the terms of most plaintiffs’ attorney retention agreements — generally pro bono and contingency fee agreements — any award of fees belongs to the attorney, not to the client. Thus, counsel has a personal interest in fee recovery not shared by the client.

This personal interest rises to a conflict when counsel for a defendant seeks to lower the plaintiff’s substantive relief in exchange for a larger payment of fees, or conversely agrees to accede to more of the plaintiff’s demand if the attorney agrees to lower or waive her fee claim. While acknowledging this potential for conflict, the cases expressly reject a blanket prohibition against concurrent negotiation of substantive relief and fees. Instead, they hold that the existence of a conflict should be determined on a case-by-case basis. Thus, there is simply no legal

requirement for serial negotiations.

In the absence of such a requirement, it appears likely that plaintiffs’ counsel demand serial negotiations for tactical, rather than ethical reasons. Counsel may believe that focusing on substantive relief, and delaying negotiation of fees — treating fees as a literally secondary consideration — gives the appearance of moral legitimacy to their claims. Counsel may also believe that a public agency will unconsciously commit itself to settlement during protracted negotiations over substantive relief and will accordingly be less likely to walk away in response to an outrageous fee demand.

Whatever their reasons, however, serial negotiations do not serve an ethical purpose. Instead, they may exacerbate the appearance of conflict between the client’s interest in relief and the attorney’s interest in fees. If the parties pursue serial negotiations, there is a point at which the attorney’s fee claim is in direct conflict with her client’s entire litigation objective. In successful serial negotiations, there is a point at which the parties have tentatively resolved all plaintiff’s substantive demands, conditioned on resolution of the fee claim in the second, bifurcated stage. At this point, the plaintiff has what she seeks, and her only interest is getting the settlement finalized. At that stage, any demand for fees has the potential to interfere with that final agreement and with the plaintiff obtaining the negotiated relief she seeks. Arguably, plaintiff’s counsel at this stage has an ethical obligation to accept any offer of fees, or no fees at all in order to ensure her client’s interest. This is admittedly hyperbolic, but it illustrates the problem.

Nor is it a viable solution to require final, binding settlement of substantive relief before negotiating fees — rather than tentative settlement, subject to resolution of the fee claim. Public agencies generally will not agree to be bound to the substantive settle-

ment without regard to final settlement of the fee claim. As noted, avoiding exorbitant, post-trial fee awards is one of the primary reasons public agencies settle civil rights claims. In most cases, an agency has little or no motivation to even negotiate, let alone accept, a settlement that binds the agency, but leaves it vulnerable to an uncertain fee claim. As a result, this is not a viable solution to the ethical concerns expressed in Ramirez and similar cases.

Instead, it appears the ethical concern can

be better addressed with an agreement to negotiate substantive relief separate from fees, never trading one for the other, but negotiating all aspects concurrently. This solution meets the ethical concerns expressed by the case law: ensuring that counsel's interest in fees is never placed in direct conflict with plaintiff's interest in relief. (It must be assumed that plaintiff's counsel can be trusted to enforce this "no horse-trading" agreement as assiduously as she would otherwise enforce serial negotiations.) Concurrent settle-

ment negotiations also more accurately mirror the parties' interests in the negotiation by acknowledging that fees are an important component of settlement for both parties. In turn, concurrent negotiations allow the parties to more accurately portray, evaluate and develop their respective positions and strategies, and either move quickly and efficiently to settlement or to the determination that negotiations are futile.

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