COERCIVE WAIVERS OF ATTORNEYS FEES: ETHICAL IMPLICATIONS GIVEN PUERTO RICO'S PROHIBITION ON ATTORNEYS' FEES IN LABOR CASES

ARTICLE

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I. Introduction

This article addresses the ethical issues that arise from the provision of Puerto Rico's law, which prohibits attorneys who represent employees in cases against their employers from charging any fees to their clients. While thought to be a protection against unscrupulous attorneys who would take away their clients' hard-earned wages, the law has resulted in an untenable situation for those employees, who increasingly find it harder and harder to obtain competent counsel. What was meant to protect employees has become a weapon for management-side attorneys, who increasingly place attorneys for employees in a situation in which their own interests conflict with those of their client. It has even generated the practice of some management-side attorneys to encourage plaintiffs' attorneys to violate Puerto Rico's law.

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While the Puerto Rico Supreme Court has indicated that employee-side attorneys violate their ethical duties when they charge their clients, it has yet to speak with respect to the practice of management-side employees who attempt to force their opponents to forego or drastically reduce their attorneys' fees. This article lays out the ethical dilemma faced by those who represent employees, as well as the ethical violations committed by attorneys who represent management in employment disputes. It urges the adoption of a strict rule condemning the practice of lump-sum negotiations of client settlements and attorneys' fees in the context of Puerto Rico's labor law claims, in light of the statutory proscription prohibiting plaintiff's counsel from charging their clients in such cases.

If the policies embodied in federal and Puerto Rico's labor law provisions are to be given their due, employees must have access to competent counsel. Notwithstanding the altruism of many employee-side practitioners and the many hours they devote to *pro bono* work, these attorneys need to be compensated for their efforts. As Associate Justice Brennan of the Supreme Court observed, "[it] does not denigrate the high ideals that motivate many civil rights practitioners to recognize that lawyers are in the business of practicing law, and that, like other business people, they are and must--be concerned with earning a living."[1]

If fee-waivers are demanded, it is "embarrassingly obvious" that this "[w]ill seriously impair the ability of civil rights plaintiffs to obtain legal assistance."[2] The practice, moreover, is in direct contravention to the law of Puerto Rico.

II. The American Rule and Contingency Fees

In Puerto Rico, attorneys' fees, in the overwhelming majority of cases, are governed by the so-called "American Rule", in which each party bears his/her own attorneys' fees.[3] As early as 1853, the rule began its incorporation into the statutory law of the United States through a law seeking to standardize the costs which were allowable in the federal courts. The Legislative History of the enactment highlights that:

> [t]he abuses that have grown up in the taxations of attorneys' fees which the losing party has been compelled to pay in civil suits . . . that in some cases . . . have been swelled to an amount exceedingly oppressive to suitors, and altogether disproportionate to the magnitude and importance of the causes in which they are taxed, or the labor bestowed.[4]

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[1] *Evans v. Jeff D.,* 475 U.S. 717, 758 (1986) (Brennan, J., dissenting).

[2] *Id.* at 759.

[3] The origin, history and purpose of the American Rule are discussed at length in 1975 in the United States Supreme Court decision in *Alyeska Pipeline Serv. Co. v. Wilderness Society. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.,* 421 U.S. 240, 247-57 (1975).

[4] *Id.* (quoting remarks of Senator Bradbury, 32d Cong.Globe App., 2d Sess., 207 (1853)).

To address this concern, the 1853 Act provided for certain minimal attorneys' fees to be taxed against the losing party. To ease the blow, however, the Act also allowed for attorneys to charge "reasonable compensation" to their clients.[5]

As the rule gained force, the contingency fee arrangement became the standard for many contracts between plaintiffs and their attorneys. These attorneys are free to charge their clients on a contingency basis in most instances. This does not present a conflict with the attorneys' ethical obligations.[6]

The proponents of such arrangements provide a very simple and convincing explanation for the practice. If attorneys charge on the basis of their success in the litigation, it places their monetary interests directly in line with those of their clients. There is a presumptive congruency in the fee/recovery calculus which helps to assure that the attorneys work in their clients' interests.[7] As observed recently in a case before the Puerto Rico Court of Appeals, "[c]ontingent fees are particular advantageous for the client who has a just and meritorious claim, [but who] would not otherwise have the means which would permit the payment of relatively high fees for excellent professional services."[8]

III. Fee-shifting statutes change the paradigm

In recent decades, the American Rule has been modified extensively with the legislative approval of fee-shifting statutes. Prominent in the federal arena are statutory provisions such as those in the 1964 Civil Rights Act commonly known as Title VII,[9] the Civil Rights Attorney's Fees Awards Act,[10] and the Equal Access to Justice Act,[11] pursuant to which successful plaintiffs can recover fees under a broad array of federal statutes, including the statutes addressing civil rights in employment. The justification for such fee-shifting is two-fold: (1) Many civil rights plaintiffs are impoverished and could not afford to contract the services of competent counsel; and (2) Attorneys who represent such clients are advancing important statutory protections and in reality, are acting as "private attorneys general" to assure that these provisions are enforced.[12]

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[5] *Id.* pag. 252 (quoting the Act of Feb. 26, 1853, 10 Stat.161.1).

[6] *See López de Victoria v. Rodríguez,* 113 D.P.R. 265 (1982). Contingency contracts are not in conflict with the Canons of Ethics as long as the client prefers this arrangement and is informed of the consequences thereof. *See also* Rule 1.5 of the Model Rules of Professional Conduct of the American Bar Association.

[7] Of course, the fit is not always perfect. An attorney may prematurely promote settlement if he/she believes that further work will not advance the amount, which will ultimately be recovered, or if he/she is less risk-tolerant than the client.

[8] *Torres v. Pérez Marrero,* November 26, 2008 sentence, KLAN200700314 [Translation provided].

[9] 42 U.S.C. § 2000 e-3(b).

[10] 42 U.S.C. § 1988.

[11] 28 U.S.C. § 2412 *et seq.*

[12] S. Rep. No. 1011, 94th Cong., 2nd Sess. 2; H.R. Jud. Comm. Rep. No. 1558, 94th Conf., 2d Sess. 7.

As the Supreme Court noted in an early case concerning attorneys fees, "when the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the nation would have to rely in part upon private litigation as a means of securing broad compliance with the law."[13] In the event that a plaintiff obtains relief, he/she "[d]oes so not for himself [herself] alone but also as a private attorney general, vindicating a policy that Congress considered of the highest priority."[14] At the time of a subsequent amendment Senator Kennedy observed on the Senate floor:

> [l]ong experience has demonstrated . . . that Government enforcement alone cannot accomplish [compliance]. Private enforcement of these laws by those most directly affected must continue to receive full congressional support. Fee shifting provides a mechanism, which can give full effect to our civil rights law, at no added cost to the Government.[15]

Supreme Court Associate Justice Thomas Clark stated that the failure to award such fees in civil rights cases would be "[t]antamount to repealing the Act itself."[16]

Puerto Rico's legislature has routinely provided for such statutory fee shifting as a matter of substantive law in the employment arena. Attorneys who represent employees with respect to claims against their employers or former employers are entitled to fees for their services to be paid exclusively by the employer.[17] As it will be seen, Puerto Rico's law goes even further — expressly prohibiting attorneys from charging their clients any amounts directly in such cases.

Once the fee-shifting statutes come into play, the American Rule paradigm and its presumption of an alignment of monetary interests between attorney and clients receive some serious blows. An attorney who takes on a complicated civil rights matter, which involves low compensable damages, is often placed in to conflict with his/her client at the settlement stage, in which attorneys' fees may not be adequately compensated. He or she may unintentionally push the client to a trial so as to receive full compensation for his/her time and efforts. In a case in which there is a "Stalingrad defense",[18] who may be found negotiating a case in which the greatest amount of recovery is the fee to be paid to plaintiff's counsel.

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[13] *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 401 (1968) (*Per curiam*).
[14] *Id.* at 402.
[15] 122 Cong. Rec. 33313, 31472 (1976).
[16] *Hall v. Cole,* 412 U.S. 1, 13 (1973) (quoting *Cole v. Hall,* 462 F.2d 777, 780-81 (2nd Cir. 1972).
[17] This is true of employment statutes such as Law Against Discrimination in Employment of 1950, Act No. 100-1950, 29 L.P.R.A. §146 *et seq.,* which covers discrimination on the basis of age, race, color, sex, social or national origin, social condition, political affiliation, religious or political ideas, perceived victims of domestic violence, marriage, and most recently, sexual orientation or perception thereof. It is also true of Law 80, known as "mesada" claims. Law on Compensation for Unfair Dismissal, Act No. 80-1976, 29 L.P.R.A. §185(k).
[18] *Lipsett v. Blanco,* 975 F.3d 934 (1st Cir. 1992).

How much the attorney is to receive is a matter left to the courts. In the federal sphere, the operative norm is the "lodestar", a methodology which takes into account reasonable time spent on the case at the fair market value for the services provided.[19] This method has been adopted by the Puerto Rico Supreme Court,[20] which presumptively provides for fees in the amount of 15% for Law 80 cases and 25% for more complex civil rights matters, but recognizes that these presumptive amounts can, on occasion, be increased to take into account the true efforts and market value of the services provided for by counsel.[21] Although these rules have been in place in Puerto Rico for some two decades, the Court of First Instance has demonstrated a repeated reluctance in complying to comply with the mandate.[22]

There is, moreover, nothing inconsistent with a fee award in excess of the award received by the plaintiff. The courts have been firm in rejecting any rule of "proportionality" between the client's recovery and that of the attorney.[23] Such a rule would run counter to the purpose of fee-shifting statutes, in that it would discourage counsel from taking on important civil rights cases where the damages are relatively low. This is particularly so in given the complexity of employment discrimination cases. By its very nature, this kind of litigation is brought on behalf of plaintiffs with extremely limited means, and who are often unemployed. In such cases, moreover, the bulk of the information is solely within the possession of the often-recalcitrant employer. Further complications derive from the pro-employer bias of many judicial officers, particularly in the federal court,[24] and the ongoing development of procedural rules and substantive doctrines making such claims extremely difficult to litigate successfully.[25]

Despite the clear statutory provisions for attorneys fees to be paid by the employer, the defense bar often seeks to pit plaintiffs against their counsel by offering global settlements which severely underpay the attorneys who have often labored for years with no pay, while defense attorneys have charged their corporate clients for every minute of their time. Such offers unnecessarily set up a conflict between the attorney and his/her client. If a just settlement is given to the client, attorneys are often

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[19] *Id. See also Libertad v. Sánchez,* 134 F.Supp. 2d 218, 233 (D.P.R. 2001)*; Blum v. Stenson,* 465 U.S. 886 (1984); *Hensley v. Eckerhart,* 461 U.S. 424, (1983).

[20] *See* 29 L.P.R.A 185; *Belk v. Martínez,* 163 D.P.R. 196 (2004); *López Vicil v. ITT Intermedia, Inc.* 142 D.P.R. 857 (1997).

[21] *Id.*

[22] *See Belk*, 163 D.P.R. pag. 196; *Lanza v. EURO RSCG Puerto Rico,* March 30, 2010 Sentence, KLAN200901860.

[23] *City of Riverside v. Rivera,* 477 U.S. 561, 574 (1986).

[24] *See* Nancy Gertner, *Losers' Rules* at Civil Rights Litigation and Attorney Fees Annual Handbook vol. 29 (Thompson Reuters 2013) and also published at 122 Yale L.J. Online 109 (2012) in which the author, a former federal judge, documents the hostility and "one-sided heuristics" of these judicial officers in the context of employment discrimination claims.

[25] *Id. See also Ashcroft v. Iqbal,* 556 U.S. 662 (2009), a case which, although ostensibly addressing pleadings requirements, has vastly changed the substantive law on civil rights.

relegated to accept fees, which are but a fraction of the value of their time spent. On the other hand, any decent member of the plaintiff's bar would be hard put to impede a settlement on a client's behalf just so that he or she could get paid. It is certainly ironic that management-side counsels have been given this weapon in the context of statutes whose intent was to protect the rights of employees and advance important civil rights litigation in the field.

A divided Supreme Court of the United States addressed this concern over 25 years ago in *Evans v. Jeff D,*[26] a case involving the settlement of a civil rights class action concerning deficiencies in health care services and educational programs for children with emotional and mental impediments. After three years of litigation, and one week before the scheduled trial, the defendants proposed a settlement, which "[o]ffered [the plaintiffs] virtually all of the injunctive relief they had sought in their complaint."[27] The offer, however, came with a catch — the plaintiffs would have to waive all of their rights to attorneys' fees.

After the settlement was filed with the court, the lead attorney moved for leave to petition the court for attorneys' fees. He noted that if the court did not eliminate that portion of the settlement agreement:

> [a]n attorney like myself can be put in the position of either negotiating for his client or negotiating for his attorney's fees . . . I was forced, because of what I perceived to be a result favorable to the plaintiff class, a result that I didn't want to see jeopardized by a trial or by any other possible problems that might have occurred.[28]

The Court eventually resolved the controversy strictly on the basis of the Congressional statute, finding that Congress never intended to bar all waivers of attorneys' fees. The six-judge majority went even further, stating that "[a] general proscription against negotiated waiver of attorney's fees in exchange for a settlement on the merits would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement."[29]

Justice Brennan, speaking in a dissent joined by Justices Marshall and Blackmun, took note of the congressional concern about the "vast majority" of civil rights plaintiffs who could not secure competent counsel were it not for the fee-shifting provisions.[30] "[B]y awarding attorney's fees Congress sought to attract competent

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[26] *Evans,* 475 U.S. at 717.
[27] *Id.* at 722.
[28] *Id.* at 723.
[29] *Id.* at 732. In a number of pre *Jeff D.* cases, quite the opposite view was espoused. As expressed by the First Circuit in *Lazar v. Pierce,* 757 F.2d 435, 438 (1st Cir. 1985), the Congressional purpose was to compel "good conduct by encouraging enforcement through 'private attorneys general' willing and able to undertake action." In light of that purpose, to require plaintiff's counsel to forgo his [her] fee . . . or to attempt to negotiate an unreasonable fee, by playing upon counsel's concern for his client, is contrary to the very intendment of the Act."
[30] *Id.* at 748.

counsel to represent victims of civil rights violations."[31] The Court's decision has the undesirable effect of allowing a simultaneous negotiation of attorneys' fees and the merits. It also fails to give effect to the Congressional purpose of providing for "reasonable attorneys' fees."[32] By allowing defendants to demand fee waivers in exchange for settlement, the Court promoted a situation in which attorneys would be increasingly reluctant to take on these cases. "[I]t does not require a sociological study to see that permitting fee waivers will make it more difficult for civil rights plaintiffs to obtain legal assistance. It requires only common sense."[33]

Importantly, the *Jeff D.* majority assiduously avoided the elephant in the room — the ethical issues associated with such demands for fee-waivers.[34] Not so the dissent, which noted the obligation attorneys have to communicate all settlement offers to their clients. While the fee technically belongs to the plaintiff, "[a]nd thus technically the decision to waive entails a sacrifice only by the plaintiff, [a]s a practical matter . . . waiver affects only the lawyer."[35] Since most civil rights plaintiffs do not have the means to pay for legal services in the private market, their attorneys often are left holding the bag. As it will be seen below, in Puerto Rico, the situation is even more dramatic, given the statutory prohibition, which impedes attorneys from charging their clients in employment cases.

To be sure, there are some cases in which the demand for a waiver of fees (or the simultaneous negotiation of fees and the merits) does no harm to the alignment of interests between the client and his/her attorney. In most jurisdictions, clients are free to contract with their attorneys for contingency arrangements or for fees based on time spent. Theoretically, the clients would make the waiver, and then they would pay the attorney from his/her own funds.

This provision for compensation for the attorney efforts, however, may be illusory in those cases in which recovery for the client is small and the attorney's efforts were great. Some non-profits, moreover, may be prohibited by their tax-exempt status from seeking payments from clients. Organizations, which receive grants pursuant to the *Legal Services Corporation Act* are prohibited by law from representing clients who are able to pay for such services.[36]

In Puerto Rico, the notion that coercive fee-waivers do not disrupt the alignment of interests between attorneys and their clients simply does not apply in the context of labor law. Unlike other jurisdictions, which allow for private contracting of fees for legal services in such cases, Puerto Rico actually *prohibits* the practice. Nonetheless, it is not uncommon for management-side attorneys to insist on settling cases upon a

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[31] *Id.* at 751 (Brennan, J., dissenting).

[32] *Id.* at 753.

[33] *Id.* at 755.

[34] *Id.* at 729 ("The defect, if any, in the negotiated fee waiver must be traced not to the rules of ethics, but to the Fees Act.").

[35] *Id*. at 756.

[36] 42 U.S.C. § 2996(b)(1); 45 C.F.R. § 1609.

waiver of the payment of fees by the company. They use a number of arguments to assert their right to do so — the company wants to pay one "global" settlement; the restriction does not apply; the company had offered the displaced worker a settlement package at the time of his/her dismissal; everybody does it, so why don't you just charge your clients for your time?

These justifications by management-side attorneys are unavailing. The law in Puerto Rico is clear — whether the payment is in settlement of an extra-judicial claim or a lawsuit, whether the issues involve discrimination or wages or Law 80, whether it is public or private employment, whether it is a statutory or contract claim, the employee's attorney is absolutely forbidden from charging his/her client.[37] While the wisdom of those provisions may legitimately be open to dispute, the aforementioned practice engaged in by a number of management-side attorneys should not be. Such attorneys, in violation of their ethical obligations, are creating a wedge between the employees' attorneys and their clients. In so doing, they are promoting the violation of the law by their adversaries and are engaging in serious violations of their own ethical obligations.

IV. Puerto Rico's statutory prohibition

Act No. 402 of May 12, 1950, as amended,[38] prohibits attorneys who represent employees in contentious matters involving their current or former employers from charging the client directly for their services. The Legislature of Puerto Rico saw fit to distinguish this set of claims from all others, in which contingency and other fee arrangements are permitted, because such contracts are "in detriment to industrial peace."[39] The Legislature declared this measure as public policy in protection of workers; allowing attorneys to charge for their services in this field would be tantamount to reducing the value of the employee's services to the employer by the amount they pay to their attorneys.[40] In 1980, the protection was extended to any type of claim against the employer, establishing that the prohibition against attorneys charging fees extends not only to claims regarding services rendered, but to all claims of any nature against the employer. It applies to claims arising under both federal and Puerto Rico's laws.[41]

The claims to which the prohibition applies are broad. They include those arising under individual employment contracts and collective bargaining agreements.[42]

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[37] Act. Num. 402-1950, 32 L.P.R.A. §§ 3114 *et seq.*

[38] *Id.*

[39] *In re Rivera,* 169 D.P.R. 237, 268 (2006).

[40] 32 L.P.R.A. § 3114.

[41] Act No. 90-1980.

[42] 32 L.P.R.A. § 3114. In the case of collective bargaining, however, labor organizations are allowed to pay for such services, but they are explicitly prohibited from contracting: for the payment of attorney's fees on the basis of a percentage obtained through collective bargaining.

They apply to both private and public employers, including public corporations.[43] They apply to labor law claims against Municipalities.[44] The protection applies to all such claims, whether they arise from a contractual obligation or are based on a statutory provision.[45] Attorneys are forbidden from charging their employee/clients any amounts for fees, whether the case is brought before the federal court or the courts of Puerto Rico.[46] If the matter is before an arbitral forum, the same restriction applies.[47] Attorneys in all such cases are prohibited from charging "retainer fees" or from collecting a contingency based on a percentage of the amount awarded to the client at trial or in settlement.[48]

An attorney who requires an employee to pay for his/her services in such cases does so at extreme peril. The law clearly states that such contracts are null and void, as they are deemed contrary to public policy.[49] If an attorney actually receives any fees from his/her client, the attorney can be sued by the client and ordered to reimburse not only the fees paid but also an additional equal amount as liquidated damages.[50] The Puerto Rico Secretary of Labor and Human Resources is authorized to present the claim against the attorney on behalf of the employee.[51]

Despite the view of some management-side attorneys to the contrary, the prohibition also extends to "extrajudicial" claims. While Articles 1 and 2 of Act No. 402,[52] if read in isolation, could be understood to encompass extra-judicial settlements only after a lawsuit is presented, the remainder of the statute makes it clear that this is not the case. The section of the law which declares such fee contracts to be null and void speaks in no uncertain terms: "All contracts, covenants, or agreements in which

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[43] *Id.* § 3115.

[44] *Pérez Fernández v. Municipio,* 155 D.P.R. 83 (2001). The Supreme Court of Puerto Rico has determined, however, that the obligation of the Municipality to pay the employee's attorneys fees does not extend to claims pursuant to the Merit System. *Ortiz v. Municipio*, 153 D.P.R. 744 (2001).

[45] 32 L.P.R.A. § 3116.

[46] *In Re Rivera,* 169 D.P.R. at 237.

[47] *Colón Molinary v. Aut. de Acueductos,* 103 D.P.R. 143 (1974) ("The public policies which inspires the legislation regarding attorney's fees and our decisions which in effect make equal an arbitral award and a judicial adjudication lead us to conclude that generally, the imposition of attorneys fees is appropriate in cases in which the worker has to go to that substitute forum to validate his/her rights") (Translation provided).

[48] *In Re Rivera,* 169 D.P.R. at 237.

[49] 32 L.P.R.A. § 3116.

[50] *Id.* § 3117. *See In Re Rivera,* 169 D.P.R. at 237. The attorney may well also be in violation of Canon 24 of the Canons of Ethics, 4 L.P.R.A. Ap. IX. C. 24, regarding the propriety of contracts for attorney's fees. Although the ethical rules refer to such factors as the amount involved in the litigation, the potential benefit to the client, contingencies and the competency of the attorney in function of the complexity of the litigation, *Ramírez, Segal & Látimer v. Rojo Rigual,* 123 D.P.R. 161 (1989), it would be difficult for an attorney to justify entering into a contract providing for the payment of fees in violation of applicable law and determined by the Legislature to be against public policy.

[51] *Id*.

[52] *Id.* §§ 3114- 3115.

workers or employees agree directly or indirectly to pay fees to their attorneys in judicial or extrajudicial cases of claims against their employees . . . shall be void and contrary to the public peace."[53]

The issue often arises in the context of dismissals for which the employer is offering a payment in exchange for a Release of Responsibility. The Older Worker's Benefit Protection Act,[54] that applies to all terminations involving employees who are over forty years old, requires the employer to inform the terminated employee of his/her right to consult with an attorney before signing such agreements. As a matter of practice, such language is almost always included in proposed separation agreements.

The services offered by the employees' attorneys are often quite valuable. An attorney of the dismissed employee can advise the worker regarding a number of matters, some economic and others of non-economic nature. The attorney can negotiate for a higher payment. He or she can examine the applicable documentation and assure that the proposed payment is consistent with contract provisions or is in conformity with proper Act No. 80 "mesada" calculations. Vesting of stock options can be addressed. Medical plan extension can be negotiated. Hold harmless clauses regarding potential future lawsuits by other employees can also be discussed and included. Tax treatment of certain payments can be a matter of significant difference to the fired worker.

The attorney can also work out specific language on non-economic matters, which will inure to the benefit of the employee. Employment references can be addressed. Future employment with the company is also a matter of discussion. Bilateral waivers and non-disparagement can be matters of significance. Proposed non-competition clauses can be re-negotiated or eliminated.

All of this work on behalf of the employee will be based on the attorney's knowledge, experience and expertise. These are valuable services which, according to the Puerto Rico Supreme Court, entitle the attorney to a reasonable compensation.[55] The only question remaining is who should pay for these services. This is where management-side and workers-side attorneys part ways, with the latter insisting on complying with the law prohibiting them from charging their clients in such cases and the former promoting violations of the law and creating irresolvable conflicts between the employees and the attorneys who represent them. This has all too frequently been the experience of the author who on several occasions has either waived her fees altogether or taken a drastic reduction thereof in order to protect and defend the interests of her clients.

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[53] *Id.* § 3116.

[54] The Older Workers Benefit Protection Act of 1990, amending Section 11 of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*.

[55] *See Ramírez Segal v. Rojo Rigual,* 123 D.P.R. 161 (1989); Article 1473 of the Civil Code, 31 L.P.R.A. § 1473.

Management-side attorneys often insist that the law does not apply in the context of such negotiated agreements. They even go so far as to urge the employee's attorney to violate the law because "everyone does it." These attorneys often reject the notion that the Act No. 402 proscriptions apply in those cases in which the employer has made an initial offer and the employee signs a release without the need for litigation. This explanation holds no water. The employee is unquestionably making a "claim" and he or she has employed the services of an attorney with respect thereto.

As noted above, the proscription in Act No. 402 refers to both judicial and "extra-judicial" claims. In the situation described above, the parties are unquestionably dealing with an "extra-judicial claim" for which no attorneys' fees can be charged to the employee as a matter of both ethics and applicable statute.[56]

The Puerto Rico Supreme Court has observed that the Civil Code does not provide a "precise" or "technical" definition for the word "claim".[57] Nonetheless, if the claimant requires the opposing party "to adopt the required behavior," this is considered a claim. The claim must be directed to the opposing party and demonstrate the "unequivocal manifestation of the person who, threatened with the loss of a right, expresses his/her intention to not lose it."[58] The fact that such a claim results from an initial offering by the employer does not eliminate its nature as an "extrajudicial claim".

The very language employers typically include in such agreements, belies the management-side attorneys position that the law does not apply in such circumstances because the employee has not presented an "extra-judicial claim". Management-side attorneys have taken great pains to assure that Releases signed by workers in the context of such terminations include a wide variety of potential "claims" against the employers.[59] The Release clause in the typical separation agreement often runs several pages, encompassing any potential claim the employee may have. Men are signing releases of Pregnancy Discrimination claims. Younger workers are signing releases of age-related claims. People who could not conceivably be characterized as whistle-blowers are nonetheless signing away their rights to file actions on that basis. It is difficult to fathom how these same management-side attorneys can in good faith assert that Act No. 402 does not apply because the employee is not making an extrajudicial claim.[60]

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[56] *In re Rivera,* 169 D.P.R. at 237.

[57] *Díaz de Diana v. A.J.A.S. Ins. Co,* 110 D.P.R. 471, 476 (1980).

[58] *Id.* at 477 (quoting *Feliciano v. A.A.A.,* 93 D.P.R. 655, 660 (1966)).

[59] The validity of such provisions is also questionable. For example, if the payment is in lieu of the "mesada" and is calculated pursuant to the statutory provisions of Act No. 80, the employer is statutorily forbidden from demanding the waiver of other causes of actions just in order to receive a "mesada" to which the employee is entitled. 29 L.P.R.A. § 185(i).

[60] Under Puerto Rico law, an "extrajudicial compromise" can be entered into "before the commencement of an action." It also does not require the court's intervention. See, *Neca Mortg.Corp. v. A& W Developers S.E.* 137 D.P.R. 860 (1995) (Translation provided). The Supreme Court of Puerto Rico recognizes such settlements if they resolve "uncertain legal relationships" on the basis of "reciprocal concessions." *Citibank v. Dependable Ins.Co.,* 121 D.P.R. 503 (1988).

In such cases, the proper way to proceed is to create a strict separation between the negotiation on behalf of the worker and that related to the attorneys' fees. Attorneys for employers have an obligation to inform their clients that "global" negotiation of fees and employee compensation is not allowed. The employer must first determine its points of agreement with the discharged worker. If the parties thereafter are unable to reach an agreement on fees, the matter should be submitted to the court, as specifically contemplated in the law.[61] To make the waiver of attorneys' fees a condition of settlement is to do violence to the law.

The coercive fee-waiver practices of many management-side attorneys should not only be discouraged, they should be condemned as violations to the Canons of Ethics. By their actions, these management-side attorneys are promoting conflicts between the employees and their attorneys, and in some cases, violations of the law and public policy. The effect of their efforts will further diminish the pool of attorneys that are able and competent to take on employee representation under such circumstances.

V. Coercive waivers and attorney ethics

Prior to the U.S. Supreme Court decision in *Jeff D.,*[62] a number of state bar associations in the United States had weighed in on the ethics of fee-waiver demands. In 1981, the Bar Association of New York City found the practice to be unethical, because of its "[d]eleterious effect on civil rights statutes," and that it places defense counsel in a "[u]niquely favorable position," since they are able to demand a "[b]enefit which the plaintiff's attorney cannot resist as a matter of ethics and which the plaintiff will not resist due to a lack of interest."[63] Because the settlement process resulted in the erosion of important civil rights statutes, such conduct violates the attorney's duty not to engage in "[c]onduct that is prejudicial to the administration of justice."[64] Maryland also called such practices into question, deeming fee-waiver demands unethical because they "[d]ilute [the attorney's] loyalty to his[her] client."[65] The ethics committee of the District of Columbia also condemned the practice.[66]

Most of these cases, however, did not address the issue of simultaneous negotiation of fees and the underlying claim. An exception is the Bar of the City of New York,

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[61] 32 L.P.R.A. § 3115 (In cases in which the claim is settled out of court . . . if they cannot reach an agreement of the fees to be paid by the respondent employer to the attorney of the complainant worker or employ, shall submit their det ermination to the court which had jurisdiction in the case.").

[62] *Evans*, 475 U.S. at 717.

[63] Association of the Bar of the City of New York, Comm. On Professional and Judicial Ethics, Op. No. 80-94 (1981), withdrawn Formal Opinion 1987-4.

[64] *Id.* at 510 (quoting Model Code of Professional Responsibility DR 1-102(A)(5) (1981)).

[65] Maryland State Bar Ass'n, Comm. on Ethics, Final Op. 85-74 (April 17, 1985), at 2 (quoting Model Code of Professional Responsibility EC 5-1 (1981).

[66] District of Columbia Legal Ethics Committee, Op. No. 147, reprinted in 113 Daily Washington Law Reporter 389, 394 (1985), cited in *Evans*, 475 U.S. pag.729 note 15.

which considered the issue and determined the practice to be unethical, as an "obvious corollary" of the prohibition of coercive fee waivers.[67] The Grievance Commission of the Maine State Bar has also concluded that a plaintiff's attorney must "[a]bstain from any fee discussions with a defendant until after the underlying case has been at least tentatively resolved."[68] Lump sum payments, of course, present a host of other issues, including the appropriate division of the amounts recovered by the client and the attorney.

Unfortunately, the *Jeff D.* opinion put a monkey wrench into the development of solid ethical-conduct analysis on this question. Although the *Jeff D.* majority plainly stated that it was not ruling on the ethical question, but rather on a question of statutory interpretation, many subsequent commentators and bar associations have tended to consolidate the two issues.[69] An example is found in a 2008 opinion of the California Standing Committee on Professional Responsibility and Conduct,[70] in which the practice of fee-waiver settlement demands was allowed. The attorney who receives such a demand must "[i]nform the client of a fee-waiver settlement offer and consummate the settlement in accordance with the client's wishes even if it reduces the likelihood of recovering some or all of his or her fees."[71] Although the decision was ostensibly based on the California ethics rules, it relied heavily on the high court's decision in *Jeff D.*[72] This misplaced reliance flies in the face of the observation made by Justice Brennan in the *Jeff D.* dissent, that "[t]he Court's decision in no way limits the power of state and local bar associations to regulate the ethical conduct of lawyers,"[73] a statement which was undisputed by the majority in that case.

In contrast, other post-*Jeff D.* decisions have highlighted the ethical pitfalls involved in such practices. A prime example is the 1995 decision of the Supreme Court of Arizona in *In re Fee.*[74] Although the ethical rulings in that case turned on issues relating to the attorneys' lack of candor with the court in the context of a settlement conference, the Arizona Supreme Court took the opportunity to discuss the practice of attorneys " '[d]riving a wedge' between lawyer and client in negotiations."[75] Practices by defense counsel in the context of settlement offers which "[a]re often intended to

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[67] Association of the Bar of the City of New York City, *supra* n. 63, at 511.

[68] Grievance Commission of the Board of Overseers of the Bar of Maine, Op. 17 (Jan. 15, 1981).

[69] *See* Ashley Compton, *Current Developments 2008-2009: Shifting the Blame: The Dilemma of Fee-Shifting Statutes and Fee-Waiver Settlements*, 22 Geo. J. Leg. Ethics 761, 772-774 (2009).

[70] State Bar Association of California Standing Committee on Professional Responsibility and Conduct Proposed Formal Opinion 98-0001. See, eg., Los Angeles Bar Association Formal opinion No. 445 (Sept. 28, 2987), finding that the use of fee waivers in civil rights cases was unethical.

[71] *Id.*

[72] *Evans*, 475 U.S. at 717.

[73] *Id.* at 765 (Brennan, J., dissenting).

[74] *In re Fee,* 182 Ariz. 597 (Ariz. 1995).

[75] *Id.* at 601.

place attorneys in the uncomfortable position where they may be caught between their own need to be compensated for legal services and what might otherwise be in their clients' best interests"[76] are highly questionably. In the context of settlement negotiations, the court "[u]rge[d] judges to carefully scrutinize attempts to employ this practice."[77]

In Puerto Rico, coercive fee-waiver requirements fly in the face of the important public policy behind the statutory labor-law protections, The Legislature has established the protection of the rights of workers as an important part of that public policy.[78] Given the importance of these protections, the law proscribes the payment of attorneys' fees from any amount owed to the client. The law is unequivocally in demanding that the employer is the party to make all such payments. In the event of a dispute on fees, the matter should be taken to the courts.

The coercive settlement practices engaged in by some management-side attorneys are in direct contravention to the previously mentioned public policy. The long-range effect of such practices, moreover, will be to make it increasingly difficult for employees to find attorneys willing to take on cases of this nature.

The above-described practices also violate the attorneys' ethical obligations. Canon 1 of the Canons of Ethics establishes the " fundamental obligation" of attorneys in Puerto Rico to work towards assuring that every person has access to competent and diligent representation.[79] Canon 21 requires complete loyalty to the client, and specifically contemplates the attorney's obligation to divulge any interest he or she might have which might impact upon his or her advice and counsel.[80] All attorneys also have the obligation to transmit any offer of settlement made by the opposing party, as required by Canon 19.[81]

When management-side attorneys attempt to provoke fee-waivers on the part of employees, this unquestionably runs afoul of these ethical provisions. The ethical concerns expressed by the bars of New York,[82] Maryland and the District of Columbia pale in comparison to the reality of practice in Puerto Rico, in which workers' attorneys are strictly forbidden from charging any amounts to their clients. By demanding fee waivers as part of the settlement of employee disputes, management-side attorneys are placing their opponents in an untenable position. They are creating

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[76] *Id.* at 602.

[77] *Id.*

[78] *Rosario Toledo v. Kikuet,* 151 D.P.R. 634, 644 (2000). The Supreme Court mandates "liberal" interpretation of such legislation for the benefit of employees. *Id.*

[79] 4 L.P.R.A. Ap. IX. C. 1.

[80] *Id.* C. 21.

[81] *Id.* C. 19.

[82] *See e.g.,* the amicus brief submitted by the Committee on Legal Assistance of the Association of Bar of New York in *Jeff D.,* 1984 U.S. Briefs 1288 (Defendants' counsel who make settlement offers designed to create a conflict of interest between opposing counsel the client plaintiff act in a manner inconsistent with their duty to the profession.).

conflicts between attorneys who represent employees and their clients. In engaging in such practices, management-side attorneys also fail to represent their own clients with the zealousness and candor required of attorneys in Puerto Rico.

The duty of candor owed by attorneys to their clients' applies not only to the employee side of the equation, but also to the employer's side. While it is beyond question that the attorney for the discharged worker has an obligation to divulge all settlement offers to the client, the management-side attorney also has the obligation to inform his/her client about the fact that the law requires the employer to pay the attorney's fees of opposing counsel. Those who represent management in such disputes are well aware of the provisions of local law. To fail to inform their clients of this responsibility is to fail in the attorneys' obligation for zealous representation of the client and to divulge all pertinent facts to the client so that the employer can make an informed decision.[83]

If the current practice of demanding a lump-sum payment for attorneys fees and the client settlement creates ethical difficulties, the additional tactic employed by some management attorneys to even suggest that their employee-side counterparts charge their own clients because "everybody does it" is even more egregious. As officers of the court, attorneys are bound to uphold the law. Conduct counseling other attorneys to flagrantly violate the law deserves the strongest condemnation.

VI. Conclusion

In the context of civil rights cases in the United States, the jury is still out with respect to the ethical implications of coercive fee waivers. In the context of employment cases in Puerto Rico, however, there should be no room for doubt. The statutory provisions prohibiting attorneys from charging their employee/clients in labor cases lead inexorably to the conclusion that management-side attorneys who demand fee waivers in exchange for settlements are acting in a manner, which is not only unethical, but also contrary to public policy.

For better or worse, the Legislature of Puerto Rico has determined that requiring employers to pay workers' attorneys fees furthers the public policy in favor of protecting the rights of employees. The practice of demanding fee waivers in exchange for settlements frustrates this oft-stated public policy. The concomitant practice of insisting that attorneys for employees violate the law and charge their clients directly is unconscionable. Such actions must be addressed in the context of the ethical rules governing the profession.

It does not take a rocket scientist to understand the conflicts created by such practices. When such demands are made, a conflict of interest arises between the employee and his/her attorney created, ironically, by the actions of opposing counsel. This works to the detriment of both the employee and his/her chosen counsel. In the

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[83] 4 L.P.R.A. Ap. IX. C. 19.

long run, such coercive actions will also serve to reduce the ever-declining pool of attorneys who are willing to take on the representation of employees in Puerto Rico.

Employees deserve not only to litigate such claims, but also to negotiate extra-judicial settlements regarding such matters. The kind of coercive practices described in this article unquestionably run afoul of the ethical standards of the profession. Attorneys who engage in such practices should be held accountable for these violations.