#005

Goldman Davis Krumholz & Dillon, P.C.

Attorneys at Law
A Professional Corporation
Three University Plaza | Suite 410 | Hackensack, New Jersey 07601
Phone 201-488-2600 | Telecopier 201-488-5059
www.goldmandavis.com

Steven L. Davis
Evan L. Goldman +
Alan L. Krumholz (1956-2020)
Paula M. Dillon
Kristen W. Ragon *
Barry D. Wein
Kelly A. Smith *
* *(N.J. & N.Y. Bars)*
+ *(Certified by the Supreme Court of New Jersey as a Civil Trial Attorney)*

Jersey City Office
648 Newark Ave
Jersey City, New Jersey 07306
Phone 201-656-5232
Reply to Hackensack Office

January 5, 2022

Hon. Glen Grant
Acting Administrative Director of the Courts
Attention: Retainer Fee Arrangements in Fee-Shifting Cases
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Comments on Retainers in Fee Shifting Cases

Dear Judge Grant:

Happy New Year and I hope you are well and healthy. On behalf of NELA-NJ (National Employment Lawyers Association-New Jersey Affiliate) I am hereby enclosing for the review of the Advisory Committee on Professional Ethics ("Committee"), our comments on the recommendations made by the Committee.

As you know, the Supreme Court Decision in Balducci v. Cige, 240 N.J. 574 (2020) arose out of an employment case. Our organization has a vested interest in this issue as it pertains to all of our members and those others who practice employment law. These comments were drafted by an Ad Hoc Committee composed of experienced employment attorneys. We hope that these comments will be seriously considered by the Committee. Of course, if you or the Committee require any additional information or comments, please let us know.

We welcome the opportunity to be of any service to the Court and this Committee.

Respectfully submitted,

Evan L. Goldman

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION OF NEW JERSEY:

COMMENTS ON THE RECOMMENDATIONS BY THE ADVISORY COMMITTEE ON PROFESSIONAL ETHICS RELATING TO RETAINER FEE ARRANGMENTS IN STATUTORY FEE-SHIFTING CASES

INTRODUCTION

The New Jersey Chapter of the National Employment Lawyers Association (NELA-NJ) respectfully submits these comments in response to the recommendations made by the Advisory Committee on Professional Ethics ("ACPE" or the "Committee") on ethics issues "relating to retainer fee agreements in statutorily based discrimination cases." NELA-NJ is an organization of attorneys who focus their practice on representing employees in cases involving discrimination, retaliation, harassment, wage and hour claims and the like. Since its founding in 1987, NELA-NJ has played a vital role in shaping public policy regarding the rights of employees, both in the Courts, in administrative agencies, in legislative matters and in rule making proceedings.

The ACPE's recommendations arise out of this Court's decision in Balducci v. Cige, 240 N.J. 574 (2020). In rendering its opinion in Balducci, this Court decided to establish an ad hoc committee "to address the professional-responsibility issues discussed in this opinion." Id. at 607. Per this Court's direction, the ad hoc committee was formed and was prepared to make certain recommendations. However, for reasons that are unclear, before those recommendations could be made, the matter was referred to the ACPE, which has now made a number of recommendations for imposing specific requirements on retainers, specifically for attorneys representing plaintiffs in fee-shifting "discrimination" cases. It appears that none of the current members of the ACPE are in private practice regularly representing plaintiffs in fee-shifting cases.

While some of the ACPE's recommendations are unremarkable, NELA-NJ submits several of the ACPE's recommendations are vague, confusing, difficult to apply, could potentially cause

unintended harmful consequences, or are otherwise ill-advised. We explain in detail below why we object to some of the specific recommendations made by the ACPE.

Overall, we note three overarching problems with the ACPE's approach. First, fee-shifting can arise in a variety of contexts, not just employment cases, because there are several types of fee shifting statutes. Thus, for example, there are fee shifting provisions in the Law Against Discrimination, N.J.S.A. 10:5-1 et seq. ("LAD"), and the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq. ("CEPA"). But there are also a variety of fee-shifting provisions in other state statutes (such as the Consumer Fraud Act, N.J.S.A. 56:8-1 et seq.) as well as under federal law (such as the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988). See generally Pressler & Verniero, Current N.J. Court Rules, Comment R. 4:42-9 [2.8] (Gann 2022) (listing dozens of state and federal statutory authorizations for fee-shifting for particular claims).

The ACPE's recommendations make no attempt to tease out the potential distinctions between these various types of fee-shifting provisions. It is unclear whether the recommended requirements are to apply to all "statutory fee-shifting cases," or just employment cases, or just "discrimination cases," or some other subset. If the recommended requirements are going to apply to all fee-shifting cases, respectfully, this Court should clearly so state. If the recommended requirements are only going to apply to some fee-shifting cases, but not others, that should likewise be clarified and, equally important, this Court should articulate why the requirements are being imposed on only certain types of fee-shifting cases. Failing to clear this up will inevitably spawn litigation over whether certain retainers are valid or not. Even more important, leaving this up in

the air will leave both attorneys and their clients unclear when they are or are not required to comply with the newly fashioned rules.[1]

Second, the ACPE's recommendations fail to recognize that fee-shifting cases can arise in a number of contexts that may not be entirely congruent. The considerations governing a retainer agreement may be quite different, for example, in a case seeking exclusively injunctive relief, as opposed to a case seeking primarily money damages. While the ACPE's recommendations sometimes allude to these differences, they seem to adopt a "one size fits all" approach for retainers in fee-shifting cases. Perhaps that is the correct approach, but the ACPE's often simplistic recommendations do not appear to reflect any awareness of these considerations. Conversely, the ACPE's recommendations sometimes appear to draw distinctions where possibly none exist. For example, Recommendation No. 2 requires the attorney to provide the client with a "range of value" of the case at the outset of representation. Aside from whether such a requirement is ever feasible or realistic, it is unclear whether this applies to only fee-shifting cases, or to all contingency retainer agreements (even when there is no fee-shifting), or even to purely hourly retainers in commercial litigation.

Third, and most importantly, we are troubled by the ACPE's implicit assumption that attorneys who represent plaintiffs in fee-shifting cases (and especially attorneys who bring "discrimination" claims) for some reason require special rules applicable only to them, but not the defense bar. We recognize the facts of Balducci were troubling, but as the amici explained in that case, the retainer agreement was an "outlier." Balducci, supra, 240 N.J. at 601. We are not aware

[1] One of the implicit conceits of the ACPE's recommendations is that they are required to rein in overreaching attorneys who are trying to take advantage of their hapless clients. But frequently the clients want certain provisions in retainers precisely to incentivize the attorneys to represent them, because they are unable to afford hiring competent counsel on an hourly basis.

of any evidence (such as, for example, a raft of complaints by employment discrimination plaintiffs that their attorneys are taking advantage of them) that there is a general problem that requires the plaintiff's employment bar to be put under the microscope. We submit that a number of the ACPE's recommendations, if they are adopted, should be imposed equally on the defense bar. For example, if a plaintiff's attorney is required, at the very outset of the case, to provide the client with an estimate of fees and costs and the "range of value of the case," then it is hard to understand why defense counsel should not be required to provide their clients with an estimate of fees and costs (including the fees and costs they might have to pay under the fee-shifting provisions) as well as a range for the clients' potential exposure for damages. Respectfully, given that defense counsel in employment litigation are usually paid by the hour regardless of the outcome, they have a much greater incentive to downplay the costs and potential exposure due to prolonging litigation.

We are grateful to the Court for consideration of our comments. We also suggest this matter may benefit from holding public hearings, where the Court could consider real world examples from attorneys and clients, and not just consider these questions in the abstract. Should the Court decide to hold such hearings, NELA-NJ would appreciate the opportunity to present testimony.

We are addressing below those recommendations of the ACPE that we believe are problematic.

ACPE's Recommendation No. 2

The Supreme Court Should Clarify The Committee's Recommendation That Attorneys In Fee-Shifting Employment Cases Be Required To Provide Estimated Fees And Costs And Range Of Case Value At The Initiation Of Representation.

As to the Committee's second recommendation, while we agree with the statement in its first paragraph that at the initiation of the litigation lawyers should attempt—"either in the written agreement or orally" to provide "meaningful guidance" to a client as to the fees and costs that may

be incurred in the case, we are concerned that the Committee has not made sufficiently clear, as did the Supreme Court in Balducci, that we as attorneys "are not clairvoyant and can offer only [our] best professional judgment." Id. at 602-03. As the Balducci Court recognized, the potential costs and fees to be incurred in any case are going to

> depend on various unknown factors, such as whether the discovery process extends over a period of years; whether discovery is labor intensive, involving numerous depositions and review of a multitude of documents; whether the case is settled (and if so, how quickly) or tried, and, if tried, the length of the trial; and whether there are appeals.

Id. at 602. Thus, while the Committee's recommendation does recognize that, "lawyers cannot estimate the value of the case or the amount of fees "with precision," we believe that the recommendation needs to make more explicit the "wide spectrum of . . . outcomes" that can occur in any case. See id. at 603.

As to the second paragraph in Recommendation No. 2, we agree with this paragraph's opening statement that there is an obligation to provide "meaningful advice" to a client about potential fees and costs even in cases where it is anticipated that those fees and costs will be paid by the adverse party, not the client. However, we take issue with several other statements in this paragraph given that they reflect a misunderstanding of contingent fee agreements and also include gratuitous comments not based on any facts or empirical research. In this regard, in the second sentence of this paragraph, there is the statement that in fee-shifting cases, the information provided by lawyers about anticipated fees and costs "is important" because those fees and costs "may *invade*. . . the client's recovery." (emphasis added). Given that in contingent fee cases, the lawyer's fee will necessarily come out of the client's recovery — that being the essence of a contingent fee — it is misleading to refer to such a contingency as an "invasion" into the client's recovery. Then, in the sentence that follows, we question the Committee's basis for stating that

"lawyers may feel that if their clients were aware of the potential amount of costs, they would not hire a lawyer for their case." Aside from our doubt that the Committee conducted any study of how plaintiffs' employment lawyers "may feel," this statement by the Committee should be stricken as it constitutes a gratuitous insult to plaintiff's employment lawyers.

ACPE's Recommendation No. 4:

The Supreme Court Should Reject The Committee's Proposal That Requires Attorneys To Have A "Frank Discussion" With Clients About Whether To Proceed Where Attorneys' Fees And Costs Might Exceed A Client's Recovery.

The Committee, in recommendation number four, seeks to impose an affirmative obligation upon plaintiffs' counsel in fee-shifting civil rights cases to have a "frank discussion with the[ir] client[s] about whether" to proceed with litigation once attorneys' fees and costs appear likely to exceed clients' recovery. The rationale underlying that recommendation is that, at that point, the plaintiff's lawyer is the only one with an "incentive to proceed" with the litigation given that the "the client has nothing to gain, financially, from continuing the suit." (Advisory Committee on Professional Ethics, Notice to the Bar Requesting Comments on Recommendations Relating to Retainer Fee Agreements in Statutory Fee-Shifting Cases ("Notice") p. 5). The recommendation is not only vague, but both the recommendation and its stated rationale appear to evince a misunderstanding concerning the mechanics of fee-shifting cases, a hostility toward the entire plaintiffs' employment bar on the basis of one isolated and rather unusual retainer agreement, and an attempt to thwart the legislative intent underlying fee-shifting in statutory employment cases. Moreover, a seemingly unintended consequence of this recommendation is that it will incentivize the defense bar to become even more aggressive in their litigation tactics to drive up the cost of litigation in the hope that plaintiffs will be prompted to abandon legitimate claims before juries reach determinations of liability.

Statutory employment claims are unlike civil tort matters in that the plaintiffs pursuing such claims are not solely attempting to remedy a private wrong but, rather, are seeking to further and protect important societal and public policy goals. Abbamont v. Piscataway Twp. Bd. Of Educ., 138 N.J. 405, 417-18, 431 (1994); Lehmann v. Toys R Us, Inc., 132 N.J. 587, 600 (1993). The pursuit of such lofty goals "cannot be valued solely in monetary terms." See Riverside v. Rivera, 477 U.S. 561, 568 (1986). That is because "[r]egardless of the form of relief" actually obtained, claimants who successfully pursue civil rights claims "often secure[] important social benefits that are not reflected in nominal or relatively small damages awards." Rivera, supra, 477 U.S. at 574. The legislature's recognition that "damages awards do not reflect fully the public benefit advanced by civil rights litigation" was the catalyst to put these types of cases on different footing than traditional tort cases by providing for the payment of attorneys' fees even in the absence of substantial monetary awards. Id. at 576. Indeed, these types of claims, unlike traditional tort claims, often require "substantial expenditures of time and effort but produce only small monetary recoveries." Id. at 577. Yet, most individuals who lose their jobs are generally unable to afford representation other than on a contingency basis. DePalma v. Building Inspection Underwriters, 350 N.J. Super. 195, 220 (App. Div. 2002).

The dual dilemma of investing a significant amount of time and effort in this type of litigation while facing the very real possibility of non-payment in the case of loss creates a disincentive to competent counsel's willingness to take on such cases. Id. That disincentive is amplified in cases where the only relief sought is equitable, declarative, or injunctive, as well as in cases where a verdict will fail to generate sufficient funds to cover counsel fees, such as in cases involving low wage earners whose economic damages are limited by their income or cases where plaintiffs largely mitigate their economic damages shortly after being terminated. Pinto v.

Spectrum Chem. & Lab. Prods., 200 N.J. 580, 593 (2010); Rendine v. Pantzer, 141 N.J. 292, 340 (1995). Absent the availability of fee-shifting, attorneys will likely choose the client willing to pay regardless of outcome when faced with a choice between representing such clients versus those whose agreement to pay is contingent upon a successful outcome. Rendine, supra, 141 N.J. at 330. To resolve this conundrum, the legislature provided for fee-shifting coupled with the possibility of fee enhancements in statutory employment claims to ensure the availability of "competent counsel to advance the public interest through private enforcement of statutory rights that the government alone cannot enforce." Pinto, supra, 200 N.J. at 593. To that end, fee-shifting is available to employees who obtain a judgment on their behalf as well as to those who obtain relief through a settlement or consent decree. Tarr v. Ciasulli, 181 N.J. 70, 86-87 (2004). Additionally, fee-shifting, as opposed to contingency arrangements, advances the policy that successful claimants are entitled to all damages available to them. Balducci v. Cige, 456 N.J. Super. 219, 236 (App. Div. 2018), aff'd, 240 N.J. 574 (2020). Accordingly, fee-shifting furthers the public policy underlying New Jersey's remedial employment statutes.

The above tenets make clear that the Committee's reliance on Chestone v. Chestone, 322 N.J. Super. 250 (App. Div. 1999), a matrimonial case, for establishing rules in statutory fee-shifting cases is misplaced if not entirely inappropriate. (Notice p. 5). The dispute in Chestone centered on the appeal and remand of the trial court's determination that the defendant (i) would remain the designated survivor annuitant on plaintiff's pension, (ii) was entitled to $12,000 in counsel fees related to the resolution of that singular issue. Chestone, supra, 322 N.J. Super. at 254. The plaintiff's appeal on the pension issue was successful and the case was remanded to the trial court for a hearing solely on the $12,000 award of counsel fees for the remand hearing. On remand, the court reduced the counsel fee award to $6,000; however, the defendant requested an

additional award of counsel fees related to the remand hearing. Although the amount initially in dispute on remand was $12,000, the trial court ultimately ordered plaintiff to pay defendant's counsel fees of $6,000 plus an additional $17,500 incurred during the remand hearing. Id. at 258.

On appeal a second time relating to the fee award, the Appellate Division recognized that the emotional nature of matrimonial cases tends to lead to rancor, which, if left unchecked, can dominate over reason causing attorneys' fees to needlessly increase. Id. at 259. In that context, the Appellate Division made clear that

> [t]he attorney, on the other hand, must be detached from emotion and acrimony. The responsibility of an attorney is to be more than an advocate. The attorney must also be a counsellor, to counsel and provide sound legal advice to his or her client unaffected by emotion or acrimony. When an attorney sees that protracted litigation will be economically unfeasible due to the issues or amount in dispute and can reasonably foresee that anticipated counsel fees are disproportionate to the amount in dispute, or exceed it, the attorney is obliged to communicate that fact to the client. The client is permitted to make an economically unwise decision. However, that decision should be an informed one after receiving sound legal advice from the attorney as to whether the continuation of the litigation, or that facet of the litigation, is economically wise. Although the client may choose to make an economically unwise decision, that decision may not be at the expense of the adversary.

Ibid. That type of emotionally charged, client-driven decision-making, while a characteristic of matrimonial cases, is not a characteristic of statutory employment cases. That, however, is only one of the differences between our statutory employment cases and matrimonial cases. Indeed, there are other significant distinctions between the two types of cases that make application of rules established in matrimonial cases inappropriate in plaintiffs' employment cases. For example, while awards of attorney fees in matrimonial cases are discretionary, fee awards are required under the LAD and CEPA. Id. at 258; N.J.S.A. 10:5-12.11(making clear that, in LAD cases, "[a] prevailing plaintiff shall be awarded reasonable attorney fees and costs"); N.J.S.A. 34:19-13(d)(providing that "[t]he court shall award a prevailing employee all appropriate relief, including

. . "[t]he payment of reasonable attorneys' fees and costs of the action" in a CEPA action). Additionally, while it appears appropriate to ensure proportionality between counsel fees and the relief sought in matrimonial cases, the Supreme Court of the United States has made clear that it is inappropriate to even take such proportionality into consideration in cases involving statutorily based employment claims. Rivera, supra, 477 U.S. at 578; Lastly, and most importantly, matrimonial actions, unlike statutory employment claims, do not further any important public policy and, thus, do not "secure[] important social benefits". Rivera, supra, 477 U.S. at 574. For these reasons, rules governing fee-shifting in matrimonial cases have no application to, and should not govern, litigation involving statutory employment claims.

Further, the suggestion that attorneys' fees and costs may "invade" upon clients' recoveries seems at odds with the policies underlying the need for fee-shifting in statutory employment cases. When a contingency fee arrangement is entered into, it furthers the public policy of this State by opening "the courthouse door to the poor and those with modest incomes" whose rights have been violated but who are unable to pay an attorney on an hourly-rate basis. Balducci, supra, 240 N.J. 574. While contingent-fee arrangements may sometimes incentivize attorneys by resulting in the payment of fees "in excess of what would have been earned by an hourly-rate computation," id. at 597, such arrangements also routinely result in the payment of fees far lower than what would have been earned through an hourly fee arrangement, thereby creating an impediment or disincentive to taking such cases. See Rivera, supra, 477 U.S. at 577. Indeed, it is precisely because of that impediment and/or disincentive, and the importance of overcoming it to ensure that courthouse doors remain open to all whose civil rights have been violated, that fee-shifting and fee enhancements were established. Id. at 576-78. Accordingly, the suggestion that attorneys' fees and costs "invade" a litigant's recovery is not only simply wrong, but also reveals an attitude

outwardly hostile toward the plaintiffs' employment bar. In fact, in the end, when a defendant makes a settlement offer that does not fully cover both the client's losses and the attorneys' fees and costs, reputable plaintiffs' attorneys compromise their fees if presented with a reasonable settlement offer that inures to the client's benefit. In that case, the payment ultimately received by either the plaintiff or attorney does not "invade" or "infringe" upon the other's payment because each is compromising to effectuate a settlement that is acceptable to both attorney and client. If plaintiffs' counsel is unwilling to compromise and the settlement offer would not adequately compensate both the plaintiff and the plaintiff's counsel, the plaintiff's solution is simply to refuse the offer, by which decision plaintiff's counsel must abide. R.P.C. 1.2(a). In that scenario, the matter will proceed to trial and both the attorney and the plaintiff undertake a risk of loss and counsel undertakes a risk of total non-payment versus the possibility of success in which case the plaintiff will likely recover the full value of its claim as determined by a jury and plaintiff's counsel will submit a fee application by which the defendant will be liable for the payment of fees, costs, and, even possibly, a fee enhancement.

It is also worth noting that the ACPE's recommendations single out the plaintiffs' employment bar by imposing a requirement that they have a "frank discussion" with their clients intended to discourage continued litigation, which seek to further important public interests, whereas a similar or corollary obligation is not imposed on those defending against such claims. Nowhere does the Committee suggest, or even imply, that defense attorneys are obligated to advise their clients of the full potential of their liability, inclusive of defense attorneys' fees and costs; the full potential of the plaintiff's recovery given outcomes in similar cases; and plaintiff's counsel's fees and costs. Similarly, the Committee neither suggests nor implies that defense attorneys are obligated to advise their clients that the fees and costs incurred by their clients may either far

exceed or be dwarfed by a successful plaintiff's recovery. To that end, the Committee does not suggest obligating defense attorneys to guess as to a particular plaintiff's "recovery" as it demands that the plaintiffs' employment bar do. This differential treatment appears either illogical or openly hostile to the plaintiffs' bar given that defendants often invest significant sums in fighting employment litigation that result in large damages' awards.

While recommendation number four focuses on plaintiffs' counsel's obligations during litigation, it is important to understand the context by which most plaintiff employment cases proceed to trial. Most reputable plaintiffs' employment attorneys first attempt to informally resolve employment disputes through pre-litigation negotiations and only resort to litigation when a reasonable settlement cannot be reached. Moreover, pursuant to New Jersey Court Rule 1:40-1, employment cases are referred to mediation shortly after the Answer is filed. Either during pre-litigation attempts to negotiate or by the time cases are referred to mediation, the attorneys' fees and costs rarely, if ever, exceed clients' damages to that point. In contrast, fees and costs increase exponentially the more protracted and hard-fought litigation becomes. Most cases in which attorneys' fees and costs become significant result from the parties' inability to earlier resolve the case, which is often a result of defendants' no-pay positions or nuisance value offers. See Rendine, supra, 141 N.J. at 345. Other factors resulting in increased attorneys' fees and costs include issues such as the factual and/or legal complexity of the case, over which plaintiff's counsel has no control, as well as aggressive defense tactics, which often include obstreperous discovery methods necessitating repeated motion practice, serving to delay litigation and dispositive motion practice when there is no chance of success given the significant number of disputed factual issues. See Saffos v. Avaya Inc., 419 N.J. Super. 244, 274 (App. Div. 2011); Balducci, supra, 240 N.J. at 602.

It is simply incorrect to state that "the client has nothing to gain, financially from continuing with the suit; only the lawyer has the incentive to proceed" at the point at which attorneys' fees and costs may exceed the plaintiff's damages or recovery. (Notice p. 5). Indeed, nothing could be further from the truth. In fact, if the litigation continues and a verdict is rendered on the plaintiff's behalf, "the client," if successful, will "gain" a judgment, which typically includes monetary relief, and plaintiff's counsel will make an application for fees, which will be awarded separate and apart from the amount of the judgment. As such, plaintiffs, confident in their ability to succeed at trial, always have more to gain by continuing to litigate rather than walking away. Such plaintiffs also typically have more to gain by continuing to pursue litigation instead of settling, given that a settlement will result in a split of the settlement payment, whereas a successful litigant's attorneys' fees and costs will be awarded in addition to any judgment rendered on behalf of the plaintiff. In contrast, a plaintiff who walks away at the point at which fees and costs may exceed his or her potential recovery, as the Committee suggests, will receive nothing and will lose any monetary investments he or she made to that point in the litigation. Thus, walking away from litigation can actually place a plaintiff pursuing a civil rights case in a worse position than simply continuing to litigate and either later settling or successfully trying the case to verdict. Also, plaintiffs' attorneys whose clients walk away from litigation, stand to lose their investment of time (i.e., attorney's fees) and/or costs they invested into the case, which can be significant. Those attorneys can hardly afford to suffer such losses after investing significant time and money into a case. Indeed, incentivizing clients to walk away from civil rights claims at that point will undermine the salutary purposes underlying our civil rights statutes and fee-shifting. It will do so by simultaneously causing plaintiffs to abandon legitimate civil rights claims and lose the money invested in their cases, if any, thereby chilling legitimate future claims and also by causing plaintiffs' employment

attorneys, who do convince their clients to prematurely end their lawsuits to suffer substantial financial hardships, likely prompting an exodus from the profession. Yet, the Committee's recommendations seem to miss these points entirely. It is also worth noting that walking away from litigation after significant fees and costs have been incurred is not risk-free for any plaintiff. That is because ending litigation at the point will likely prompt defendants to seek reimbursement of their fees and costs in defending against such claims taking the position that the claims were brought in bad faith. See N.J.S.A. 10:5-27.1. That very real possibility does not seem to be contemplated by the Committee.

It is also important to understand that it can be difficult, if not impossible, to ascertain what a successful plaintiff's recovery may be in a statutory employment lawsuit. As a general rule, while a successful litigant's economic damages can be calculated, they may be reduced or increased by future facts not known to either the plaintiff or counsel at any given point in time. For example, a plaintiff, who has been unemployed for a lengthy time, may suddenly fully mitigate his or her damages by securing replacement work. If that occurs before trial, the plaintiff's potential recovery for both back and front pay damages will be limited. In contrast, a plaintiff who has secured replacement work may subsequently become unemployed through no fault of his or her own, such as the result of a lay-off or restructuring, in which case that plaintiff's economic damages may increase significantly. See N.L.R.B. v. Ryder Sys., Inc., 983 F.2d 705, 713 (6th Cir. 1993)(holding that "a discharge from interim employment will toll back pay liability only if the employee's misconduct was 'gross' or 'egregious'"); N.L.R.B. v. P*I*E* Nationwide, Inc., 923 F.2d 506, 513 (7th Cir. 1991) ("a discharge from employment, without more, does not reduce a back pay award"); Sims v. Mme. Paulette Dry Cleaners, 638 F. Supp. 224, 229 (S.D.N.Y 1986) (upholding back pay where employee was discharged for incorrectly pressing a fancy gown

but did not "willfully engage[ ] in conduct in order to be fired"). Either of those very real possibilities, which can occur at any point in litigation even very late in the process, can significantly alter the amount of the "client's recovery." It is for that reason that attempting to accurately predict a client's recovery can be difficult, if not impossible.

To make matters more complicated, it is incredibly difficult to value cases given the near impossibility of predicting the economic value of emotional distress claims in statutory employment cases. See Balducci, supra, 240 N.J. at 602-03. In fact, such awards tend to vary widely with awards ranging from zero to fairly low amounts to as high as $875,000. Cuevas v. Wentworth, Grp., 226 N.J. 480 (2016)(emotional distress awards of $800,000 and $600,00 in racial discrimination, hostile work environment, and retaliation claims brought under the LAD where one plaintiff testified that he felt "'beaten down,' 'despondent', and a loss of self-confidence", became edgy resulting in his divorce, and became worried about his financial security and reputation and the other testified that the conduct he suffered was "'extremely degrading,' affected his 'psyche,' and ruined his 'self-confidence."); Rendine, supra, 141 N.J. 292 (emotional distress damages' award of $105,000 and $125,000 to each of two plaintiffs as a result of testimony concerning their "inconvenience and economic loss, physical and emotional stress, anxiety in searching for reemployment, uncertainty, career and family disruption and other adjustment problems" without corroborating expert or lay person evidence); Saffos, supra, 419 N.J. Super. 244 (jury award of $250,000 in emotional distress damages in a case where the plaintiff suffered no physical harm and did not obtain psychiatric or psychological treatment); Klawitter v. Trenton, 395 N.J. Super. 302 (App. Div. 2007)(emotional distress award of $79,538 in case where a patrol detective asserting a failure to promote claim on the basis of race discrimination as a result of her uncorroborated testimony that she was "crushed and . . . devastated" by failure to promote);

Lockley v. Turner, 344 N.J. Super. 1 (App. Div. 2001)(affirming emotional distress award of $750,000 as "high" but "not shocking" in case where the plaintiff testified about the emotional distress he suffered when he was subjected to obscene and vulgar public insults about his sexuality as well as repeated expressions about his sexual preferences (or lack thereof) and physical endowments); Spragg v. Shore Care, 293 N.J. Super. 33 (App. Div. 1996)(jury awarded emotional distress damages of $42,500 where the plaintiff testified that (i) he had trouble paying his bills but had been in debt and unemployed before working for defendant, (ii) he lived alone and did not have a family to support, and (iii) his greatest loss during the three month-long resulting period of unemployment was that he had to trade in one old car for another); Mehlman v. Mobil Oil, 291 N.J. Super. 98 (App. Div. 1996)(jury award emotional distress damages of $875,000 to a single plaintiff in an age discrimination case in which the plaintiff testified about his feelings of shock, confusion, anxiousness, worry, shame, sickness, embarrassment, and isolation and compared losing his job to "losing a child"); Catalane v. Gillian Instrument Corp., 271 N.J. Super. 476 (App. Div. 1994)(jury awarded $250,000 in emotional distress damages in a CEPA and LAD age discrimination case in which the plaintiff testified about the emotional stress suffered and anxiety caused by lack of information, uncertainty, planning, difficulty, career, family and social disruption, and adjustment problems arising from the wrongful conduct to which he was subjected); Levinson v. Prentice-Hall, Inc., 868 F. 2d 558 (3d Cir. 1989)(award of $100,000 in emotional distress damages in LAD harassment and failure to promote claim where the plaintiff testified about the occasional ridicule to which he was subjected because of his disability); Abrams v. Lightolier, Inc., 841 F. Supp. 584 (D.N.J. 1994)(emotional distress damages of $100,000 awarded based on plaintiff's testimony that (i) it was "very upsetting" to be accused of bribery,

(ii) it was "very unnerving, unpleasant and distressing" to be told that he was physically not up to the job, and (iii) the "entire thing" made him "very, very, very upset").

Emotional distress awards supported by expert testimony are equally difficult to accurately predict given how widely they vary thereby making it difficult to guess as to both the potential value of any given emotional distress claim as well as the client's ultimate recovery if successful. Donelson v. DuPont Chambers Works, 2011 WL 5299583 (App. Div., Nov. 7, 2011)(award of no damages for emotional distress suffered by a plaintiff despite plaintiff's testimony coupled with corroborating testimony by his treating psychiatrist concerning the plaintiff's feelings of anger, sadness, hopelessness, worthlessness, embarrassment, and feeling like his life was at an end); Guslavage v. Elizabeth, 2009 WL 51125017 (App. Div., Dec. 30, 2009)(emotional distress award of $600,00 to a police officer in a LAD case who testified that he suffered from headaches, had trouble sleeping, was shunned, felt isolated and apprehensive, stopped vacationing and socializing with people, and stopped having sex with his fiancé as a result of the defendants' conduct and presented corroborating testimony from his treating psychiatrist); Quinlan v. Curtiss-Wright Corp., Docket No. L-8976-03 (Law Div., June 15, 2007)(emotional distress award of $405,444 in LAD case where the plaintiff presented evidence through both her own testimony and that of an expert psychiatrist about the panic attacks, depression, and a sense of loss and betrayal from which she suffered after being denied a promotion because of her gender and terminated because she complained of gender discrimination); Blakey v. Continental Airlines, Inc., 992 F. Supp. 731, 735-36 (D.N.J. 1998)(emotional distress award of $500,000 to a female pilot alleging sexual harassment in a LAD case in which she testified that she was "upset" "embarrassed" and "humiliated" by the harassment and presented corroborating testimony of a forensic witness). The above cases illustrate the near impossibility of determining clients' potential emotional distress

damages' award in any given case, and thus, the related difficulty in realizing when the fees and costs, in any given case, "are likely to invade or exceed the client's recovery." (Notice p. 5). This is a point that our Supreme Court in Balducci recognized, but that the Committee appears to have either ignored or missed. Balducci, 240 N.J. at 602-03; Notice pp. 5-6.

Another oddity in the practical implications of the fourth recommendation is that it establishes a misguided distinction between the treatment of attorneys pursuing claims in which monetary damages are sought versus those in which the primary relief sought is equitable, declarative or injunctive. Indeed, the Committee appears to recognize this as it makes clear that recommendation number four, if adopted, would obligate plaintiffs' employment attorneys "to have a frank discussion with the client about whether the client wants to continue litigation" when "the suit is for damages only". (Notice p. 5). Thus, while fees and costs are recoverable upon the successful conclusion of any statutory employment litigation – whether the relief sought is equitable or monetary – only those lawyers pursuing monetary damages claims are obligated to have such "frank discussions." Yet, the important public policy of this State is furthered regardless of whether the relief sought in statutory employment cases is equitable, declarative, injunctive, or purely monetary. If the Committee's purported justification for its recommendation – its concern for plaintiffs' attorneys "who may still need" a now "disinterested" client to participate in the litigation process (Notice p. 5) – was legitimate, its concern would apply with equal force to those attorneys representing plaintiffs seeking primarily monetary relief versus those whose clients seek primarily non-monetary relief. The Committee's recommendation, however, clearly targets only those lawyers pursuing claims for largely monetary relief, and thus, if implemented, it will undermine the public policy of this State for a select class of aggrieved employees – i.e., those

who seek monetary compensation for the harms they suffered at the hands of employers who act in derogation of our State's employment statutes and public policy.

Lastly, perhaps the most obvious way in which recommendation number four, if implemented, will undermine the public policy of our State is by analogy to the issue of proportionality between damages and fees. Notably, our courts have recognized that a rule of proportionality between damages awards and attorneys' fees would undermine our public policies by rendering it "difficult, if not impossible, for individuals with meritorious civil rights claims" of a low monetary value to obtain legal redress. Rivera, supra, 477 U.S. at 578; Szczepanski v. Newcomb Med. Ctr., Inc., 141 N.J. 346, 366 (1995). Yet, recommendation number four essentially provides that an obligation to discourage a plaintiff from continuing with litigation arises once "fees and costs" appear to exceed plaintiff's counsel's best guess as to his or her client's potential recovery. (Notice p. 5). In essence, the Committee is suggesting that proportionality should be taken into consideration in fee-shifting cases. Yet, just as there is nothing that evinces a statutory intent to limit the fees in any way by the amount recovered by the plaintiff, there is nothing to evince a legislative intent to discourage plaintiffs from pursuing legitimate civil rights cases simply because, for whatever reason, fees and costs may exceed a client's potential recovery. That is particularly true in light of the judicial recognition that statutory employment claims often require significant "expenditures of time and effort" while producing "only small monetary recoveries." Rivera, supra, 477 U.S. at 577.

ACPE's Recommendation No. 7:

The Supreme Court Should Reject The Committee's Proposal That Would Permit Defendants To Condition Settlement On The Waiver Of Attorney's Fees In Fee-Shifting Cases

The Committee's seventh recommendation is that retainer agreements in fee-shifting cases may not prohibit settlement of a case conditioned on the waiver of statutory fees. NELA-NJ strongly opposes this recommendation. Clients, of course, retain the ultimate power regarding whether and how to settle a case. However, allowing a defendant to condition a settlement on the waiver of statutory fees would improperly interfere with the relationship between the plaintiff and her attorney, and would undermine the public policy of attracting competent counsel in discrimination, whistleblowing and similar cases involving statutory fee-shifting. Contrary to the Committee's suggestion, there is no logical distinction on this issue between private counsel and public interest attorneys. NELA-NJ recommends that all attorneys handling fee-shifting cases should be permitted to include in their retainer agreements a provision that prohibits the waiver of fees, and that further provides that any monetary settlement proposal shall be treated as a single lump sum payment, to be apportioned according to the terms of the retainer agreement. Further, NELA-NJ recommends that the Court prohibit defense attorneys in fee-shifting cases from making settlement proposals conditioned on the waiver of statutory fees.

In explaining its position, the Committee correctly notes R.P.C. 1.2(a) provides that a lawyer "shall abide by a client's decision whether to settle the matter." However, the Committee extends this to reason that a retainer agreement may not include a provision prohibiting the waiver of statutory fees. Respectfully, the Committee misconceives the import of this issue. The question is not whether clients should retain the right to decide whether and how to settle cases. Clearly,

they should. Rather, the question is whether defendants should be permitted to condition a settlement proposal on the waiver of statutory fees.

The waiver of statutory fees in civil rights cases first came to prominence in Evans v. Jeff D., 475 U.S. 717 (1985), which concerned the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Evans was a case brought under 42 U.S.C. § 1983, on behalf of a class of mentally and emotionally handicapped children who were in the custody of the State of Idaho. The plaintiffs alleged various deficiencies in the care and treatment of these children by the State. Id. at 720-21. The attorney who brought the case, on behalf of a class of some 2000 children, id. at 720 n.1, described the circumstances as follows:

> I was shocked and appalled by what I saw. . . . I saw children as young as 11 years old institutionalized with adult mental patients, including some child molesters. There was absolutely no treatment or education of any kind. Maybe I had lived a sheltered life but I thought the conditions I found there didn't exist anywhere except in a Charles Dickens novel." ". . . I just wanted the children taken away from the adults.

Josh Fitzhugh, Supreme Court Profile: To Win Your Case, Waive Your Fees, 71 A.B.A. J. 44, 45 (1985). Relatively soon after suit was filed, the parties reached a partial settlement regarding the provision of educational services, and the District Court promptly entered an Order approving the partial settlement. Evans v. Jeff D., 475 U.S. at 721-22. However, negotiations regarding the treatment claims of the children broke down, and so the parties engaged in approximately two years of litigation, involving motion practice, discovery, summary judgment and class certification. Id. at 722.

One week before trial, the State made plaintiffs' counsel an offer he could not refuse. The State offered to enter into a settlement that would provide the class of mentally and emotionally handicapped children all of the injunctive relief sought. However, this offer was conditioned on

plaintiffs' counsel agreeing to waive all statutory fees and costs. Id.[2] Plaintiff's counsel, understandably, felt ethically obliged to accept the proposal, to protect the safety and well-being of his clients, but the parties agreed to condition the waiver on approval by the District Court. Id. The District Court approved the fee waiver, but the Ninth Circuit reversed, and held that the fee waiver was improper. Id. at 723-25.

In the United States Supreme Court, two issues were presented. First, the Court considered whether there should be a per se rule barring the simultaneous negotiation of merits settlements and statutory attorneys' fees. On this point, the Court was unanimous, holding there should be no ban on the simultaneous negotiation of the merits of a claim and attorneys' fees. Id. 475 U.S. at 738 n. 30, 764-65 (Brennan, J., dissenting).[3]

The Court split, however, on the second issue, namely, whether defendants should be permitted to condition a settlement offer on the waiver of statutory fees and costs, as the State of Idaho had done. This was an issue that had generated a great deal of attention from the bench and bar, because it was estimated at the time that "half of all civil rights cases involve[d] a request to waive fees." Fitzhugh, supra, 71 A.B.A. J. at 47. The American Bar Association had taken the position that "such settlement offers frustrate the purposes of attorney's fees legislation and discourage attorneys from representing civil rights plaintiffs." Id. at 46.

---

[2] The total amount of fees and costs at issue apparently was about $50,000. Josh Fitzhugh, supra , 71 A.B.A. J. at 45.

[3] This Court initially departed from Evans in the consumer fraud context, and held that "public interest counsel" should not simultaneously negotiate the merits and attorneys' fees under the New Jersey Consumer Fraud Act, N.J.S.A. 58:8-1 et seq. ("CFA"). Coleman v. Fiore Bros., Inc., 113 N.J. 594, 596 (1989). However, in Pinto, , this Court overturned this holding in Coleman, and held that the simultaneous negotiation of the merits and attorneys' fees is permitted in all statutory fee-shifting cases. Pinto, supra, 200 N.J. 580. NELA-NJ does not challenge the holding in Pinto and does not object to the simultaneous negotiation of the merits and attorneys' fees in statutory fee-shifting cases.

In Evans, a majority of the Court, however, concluded conditioning settlement on the basis of a statutory fee waiver was permitted under the federal Fees Act. Evans, supra, 475 U.S. at 729. The Court reasoned there was no explicit language in the Fees Act that prohibited fee waivers. Id. at 730. Further, the Court argued prohibiting fee waivers would "impede vindication of civil rights," by "reducing the attractiveness of settlement" to defendants. Id. at 732.

Justice Brennan (joined by Justices Marshall and Blackmun) dissented. He focused on the critical importance of providing resources for the enforcement of civil rights laws. "Ultimately, enforcement of the law is what really counts." Evans , supra, 475 U.S. at 743 (Brennan, J., dissenting). First, Justice Brennan explained, the legislative history of the Fees Act demonstrated the entire purpose of statutory fee-shifting provisions was to attract competent counsel to represent individuals whose statutory rights have been violated.

> Congress provided fee awards to ensure that there would be lawyers available to plaintiffs who could not otherwise afford counsel, so that these plaintiffs could fulfill their role in the federal enforcement scheme as "private attorneys general," vindicating the public interest.
>
> . . .
>
> If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.
>
> . . .
>
> [Previously, the] unavailability of fee shifting made it impossible for legal aid services "already short of resources," to bring many lawsuits, and, without much possibility of compensation, private attorneys were refusing to take civil rights cases.
>
> . . .
>
> If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

. . .

> As a review of the legislative history makes clear, then, by awarding attorney's fees Congress sought to attract competent counsel to represent victims of civil rights violations.

Id. at 745, 746, 748, 750, 751 (Brennan, J., dissenting). Justice Brennan then set forth why allowing defendants to condition settlement on the waiver of statutory fees would undermine the legislative goal of attracting competent counsel for victims of civil rights violations.

> It seems obvious that allowing defendants in civil rights cases to condition settlement of the merits on a waiver of statutory attorney's fees will diminish lawyers' expectations of receiving fees and decrease the willingness of lawyers to accept civil rights cases.
>
> . . . [N]umerous courts and commentators have recognized that permitting fee waivers creates disincentives for lawyers to take civil rights cases and thus makes it more difficult for civil rights plaintiffs to obtain legal assistance. . . .
>
> [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. . . . Because "a vast majority of the victims of civil rights violations" have no resources to pay attorney's fees, . . . lawyers cannot hope to recover fees from the plaintiff and must depend entirely on the Fees Act for compensation.

Id. at 754, 755, 756 (Brennan, J., dissenting).

Justice Brennan further pointed out that once allowed, fee waivers could become commonplace, thus undermining the ability of civil rights plaintiffs to obtain legal assistance.

> Defense counsel . . . are in a uniquely favorable position when they condition settlement on the waiver of the statutory fee: They make a demand for a benefit that the plaintiff's lawyer cannot resist as a matter of ethics and one in which the plaintiff has no interest and therefore will not resist." . . .
>
> Of course, from the lawyer's standpoint, things could scarcely have turned out worse. He or she invested considerable time and effort in the case, won, and has exactly nothing to show for it. Is the Court really serious in suggesting that it takes a study to prove that this lawyer will be reluctant when, the following week, another civil rights plaintiff enters his office and asks for representation? . . .

> And, of course, once fee waivers are permitted, defendants will seek them as a matter of course, since this is a logical way to minimize liability. Indeed, defense counsel would be remiss ***not*** to demand that the plaintiff waive statutory attorney's fees. . . . Thus, in the future, we must expect settlement offers routinely to contain demands for waivers of statutory fees.
>
> The cumulative effect this practice will have on the civil rights bar is evident. 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. The conclusion that permitting fee waivers will seriously impair the ability of civil rights plaintiffs to obtain legal assistance is embarrassingly obvious.

Id. 475 U.S. at 757-59 (Brennan, J., dissenting) (emphasis in original).

Consistent with the reasoning of Justice Brennan's dissenting opinion in Evans, this Court has always taken the view that statutory fee-shifting provisions are essential to enable plaintiffs with meritorious claims to attract competent counsel. In explaining our State's legislative policy regarding fee-shifting, this Court expressly drew the analogy to the Civil Rights Attorney's Fees Awards Act of 1976:

> The sponsor of 42 U.S.C. § 1988, the Civil Rights Attorney's Fee Awards Act of 1976, . . . stated:
>
> The problem of unequal access to the courts in order to vindicate congressional policies and enforce the law is not simply a problem for lawyers and courts. Encouraging adequate representation is essential if the laws of this Nation are to be enforced. Congress passes a great deal of lofty legislation promising equal rights for all.
>
> Although some of these laws can be enforced by the Justice Department or other Federal agencies, most of the responsibility for enforcement has to rest upon private citizens, who must go to court to prove a violation of law. . . . But without the availability of counsel fees, these rights exist only on paper. Private citizens must be given not only the rights to go to court, but also the legal resources. If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers. . . .
>
> Such acts are designed as well to promote respect for the underlying law and to deter potential violators of such laws.

> Our State policy is similar. As one judge stated, the purpose of such fee awards is to ensure effective access to the judicial process for persons with civil rights grievances who have little or no money with which to hire a lawyer. Fee awards are also intended to provide an incentive to competent lawyers to undertake Civil Rights litigation.

Coleman, supra, 113 N.J. at 597 (citations omitted). Over the years, this Court has reiterated again and again this understanding of the legislative purpose behind statutory fee-shifting provisions. See, e.g., Rendine, supra, 141 N.J. at 322-23; Riding v. Towne Mills Craft Centre, 166 N.J. 222, 230 (2001); Best v. C&M Door Controls, Inc., 200 N.J. 348, 354-55 (2009); Walker, supra, 209 N.J. at 129-30.

Consequently, it is not terribly surprising that when confronted with the question of statutory fee waivers in cases involving "public interest counsel," this Court followed the reasoning of Justice Brennan's dissent in Evans, namely, while simultaneous negotiation of merits and attorney's fees is permitted, conditioning settlement on the waiver of statutory fees is prohibited. Pinto, supra, 200 N.J. 580, was an employment case brought under the CEPA and the LAD. The two plaintiffs, co-workers, primarily alleged they were fired in retaliation for complaining about dangerous working conditions in a chemical plant. Id. at 585-86. The appeal presented two questions for this Court regarding fee-shifting cases: (1) whether to follow the Court's prior holding in Coleman that prohibited the simultaneous negotiation of the merits and attorneys' fees; and (2) whether defense counsel could condition a settlement offer on the waiver of statutory fees. This Court allowed the simultaneous negotiation of the merits and attorney's fees (thus to that extent overturning Coleman), but held that "'defense counsel may not insist on the waiver . . . of statutory fees as a condition of . . . settlement of the merits claim.'" Pinto, supra, 200 N.J. at 585.

In banning the waiver of statutory fees for "public interest counsel" as a condition of settlement, this Court adopted Justice Brennan's analysis set forth in his dissent in Evans:

> Fee-shifting provisions "are designed to attract competent counsel" to advance the public interest through private enforcement of statutory rights that the government alone cannot enforce. . . . Those undertaking such cases serve as "private attorneys general," vindicating the rights of defrauded consumers, the victims of discrimination, and whistleblowers who suffer retaliation for exposing wrongdoing.
>
> . . .
>
> Plaintiffs' attorneys who are compelled to forfeit their hard-earned fees as a condition of settlement will be less inclined to take on the next case, and the cascading effect of that mindset will make it difficult to attract competent counsel to enforce the CFA, LAD, CEPA, and other fee-shifting statutes. . . .
>
> We thus adopt the approach suggested by Justice Brennan in his dissent in Jeff D. and bar defendants from demanding fee waivers as a condition of settlement in fee-shifting cases involving public-interest law firms.

Id. at 594, 599, 600.

The Advisory Committee on Professional Ethics acknowledges this Court's decision in Pinto, but claims this Court held defense counsel may demand a waiver of statutory attorney's fees as a condition of settlement when the plaintiff is represented by lawyers in private practice (as opposed to "public interest counsel"). But this Court made no such statement. Instead, this Court simply noted the issue was not before it. "The same logic may apply to private-practice counsel and her client but the case before us involves only a public-interest law firm." Id. at 599 n.8.[4]

[4] Justice Brennan's dissent in Evans did not make any distinction between attorneys in "private practice" and "public interest counsel." See, e.g., Evans, supra, 475 U.S. at 758 (Brennan, J., dissenting) (noting that civil rights practitioners, like other lawyers, "are in the business of practicing law, and . . . like other business people, they are and must be concerned with earning a living"). Justice Brennan emphasized "[i]t is especially important to keep in mind the fragile nature of the civil rights bar," which included both lawyers in private practice and legal aid organizations. Id. at 755 n.7 (Brennan, J., dissenting). Significantly, the attorney for the class of mentally and emotionally handicapped children in Evans initially worked for the Idaho Legal Aid Society, but in the midst of the litigation switched to working in private practice. Id. at 721 & n.2.

More importantly, this Court repeatedly emphasized there was no meaningful difference between a "private attorney" and "public interest counsel" when faced with a demand to waive statutory fees.

> Coleman drew a distinction between public-interest and private counsel in CFA cases, finding that public-interest counsel faced unique conflict issues. However, the potential conflict between clients and their public-interest attorneys in fee-shifting cases is little different than the common dilemma facing private attorneys in both fee-shifting and other cases. The potential conflict may arise whenever a monetary settlement proposal is less than the full value of the client's purported damages and an attorney's reasonable fees. . . .
>
> The same tensions between client and private counsel exist in fee-shifting cases, such as those arising under the Law Against Discrimination and Conscientious Employee Protection Acts [sic]. A defendant sued under one of those Acts customarily will offer a global settlement covering all monetary claims and attorneys' fees. The acceptance of the offer may not make both the client and attorney whole under their retainer agreement, and in such cases the client and attorney may have to compromise their claims to effectuate a settlement. Thus, private-practice and public-interest attorneys face the same attorney-client tension when the settlement offer does not satisfy all of the financial demands of both client and counsel.

Id. at 595, 596.

> At this juncture, this Court added in a footnote:
>
> Not all public-interest law firms are alike, a point missed in Coleman. Evidently, public-interest law firms, other than Legal Services, may enter into fee arrangements with their clients that permit a percentage of the recovery in accordance with court rules. Amici have indicated that public-interest law firms may enter into "a traditional contingency arrangement" when an action involves "substantial monetary damages" and require "for example, one-third of the lump sum as its attorneys' fees."

Id. at 596 n.6. This Court continued:

> Coleman, supra, stated that "private attorneys can arrange a fee agreement that would allow them to insist upon a statutory fee as part of any settlement." . . . But public-interest law firms can do the same, as amici indicate in their brief.

Id. at 597.

Thus, contrary to the Committee's reasoning, there is no justification whatsoever for distinguishing "public interest law firms" from lawyers in "private practice." Just as this Court in Pinto, prohibited waivers of statutory fees for "public interest counsel," this Court should also prohibit statutory fee waivers for cases handled by attorneys in "private practice." In each case, the effect of permitting such waivers is the same, to wit, to undermine the legislative goal of "attract[ing] competent counsel to enforce the CFA, LAD, CEPA, and other fee-shifting statutes." Id. at 599; see also Evans, supra, 475 U.S. at 761 (Brennan, J., dissenting) ("[e]ach individual plaintiff who waives his right to statutory fees in order to obtain additional relief for himself makes it that much more difficult for the next victim of a civil rights violation to find a lawyer willing or able to bring ***his*** case") (emphasis in original).

The Committee argues that private attorneys faced with a compelled waiver of statutory fees "may protect themselves by including alternative fee arrangements in the retainer agreement that require the client to pay reasonable legal fees." Committee Recommendation, No. 7. This statement reflects a profound misunderstanding of the legislative purpose behind fee-shifting provisions. Most victims of discrimination, harassment and retaliation simply do not have the money to hire an attorney. Charging plaintiffs on an hourly basis usually is not an option in civil rights cases. This is precisely why the Legislature enacted fee-shifting provisions. Coleman, supra, 113 N.J. at 597 (fee-shifting is designed "to ensure effective access to the judicial process for persons with civil rights grievances ***who have little or no money with which to hire a lawyer***") (emphasis added); Evans, supra, 475 U.S. at 745 (Brennan, J., dissenting) ("Congress provided fee awards to ensure that there would be lawyers available to plaintiffs ***who could not otherwise afford counsel***")(emphasis added).

The Committee may be suggesting that the "alternative fee arrangements" would be contingency fees paid from the plaintiffs' monetary recovery. But this is no solution in cases seeking primarily or exclusively injunctive relief. See Pinto, supra, 200 N.J. at 600 (the bar on statutory fee waivers "is equally justified when a defendant demands waiver of attorneys' fees as a condition of settlement in fee-shifting cases involving equitable relief"). The facts of Evans (a class of mentally and emotionally handicapped children who were seeking appropriate treatment while in the custody of the State) are particularly stark, but by no means unique. Many civil rights actions brought under 42 U.S.C. § 1983 primarily seek injunctive relief. See, e.g., Floyd v. City of New York, 959 F. Supp. 2d 668 (S.D.N.Y. 2013) (granting injunctive relief in constitutional challenge to New York City's "stop and frisk" policy); Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015) (constitutional challenge to government surveillance of Muslims in New Jersey). As Justice Brennan noted, "the possibility of obtaining protection through contingency fee arrangements is unavailable in the very large proportion of civil rights cases which . . . seek only injunctive relief." Evans, supra, 475 U.S. at 757 n.10 (Brennan, J., dissenting).

Injunctive relief may also be critical in cases involving the failure to accommodate, sexual harassment or remediation of dangerous working conditions. For example, one of the two cases at issue in Walker[5] involved a failure to accommodate claim, alleging a shopping center's parking facilities did not have appropriate accommodations for people with disabilities, particularly individuals using wheelchairs. After years of litigation, the case settled, with the plaintiff obtaining only $2,500 in compensation, but as a result of the suit a variety of equitable relief was obtained. The appeal to this Court concerned whether, and to what extent, the plaintiff's counsel should be

[5] This Court's opinion in Walker involved two completely unrelated cases, because they both concerned related legal issues regarding fee-shifting.

provided with a fee enhancement under the principles of Rendine, supra, 141 N.J. 292. In reversing the lower courts, and awarding the 50% fee enhancement sought by plaintiff's counsel, this Court explained:

> [Plaintiff's] litigation sought relief that was almost entirely equitable in nature. [Plaintiff] did not seek monetary compensation, but fought for changes in the accessibility of the premises to bring it into compliance with the strong protections of our civil rights laws. Her litigation served not her sole interests, but the interests of any and all who had been or who might otherwise in the future have been denied access to the premises. . . .
>
> In light of the nature of the relief sought, her attorney could not hope, when he undertook to represent her, that he would be compensated through a large contingent fee award. Nor could he expect that [plaintiff] would be able to pay his fees when she prevailed. Moreover, the claim was met with a vigorous and wide-ranging defense.

Walker, supra, 209 N.J. at 156. But if the Committee's view were to prevail, the defendant could have resolved the case simply by offering all the equitable relief sought, but only on the condition that the plaintiff's attorney agree to waive all fees. The plaintiff's counsel would have had no more choice to reject that proposal than the plaintiff's counsel in Evans.[6]

Even in cases seeking only or primarily legal relief, the same problem is presented when the damages claims are relatively low. As Justice Brennan explained:

> [E]ven when a suit is for damages, many civil rights actions concern amounts that are too small to provide real compensation through a contingency fee arrangement. Of course, none of the parties has seriously suggested that civil rights attorneys can protect themselves through private arrangements. After all, Congress enacted the Fees Act because . . . it found such arrangements wholly inadequate.

[6] The particular circumstances of the accommodations case in Walker also are an excellent illustration of one of the reasons why the Committee's distinction between "public interest counsel" and attorneys in "private practice" is artificial and meaningless. The plaintiff's attorney was in private practice, but he was also assisting an organization that advocated for persons with disabilities. Walker, supra, 209 N.J. at 149-50. This is not uncommon. Civil rights attorneys in "private practice" frequently work together with "public interest counsel" to advance their common interests in protecting civil rights.

Evans, supra, 475 U.S. at 757 n.10 (Brennan, J., dissenting).

In the employment context, for example, in a case claiming discriminatory or retaliatory termination under the LAD or CEPA, the plaintiff's damages will largely be driven by her pre-termination earnings. A plaintiff who had been making $400,000 per year is likely to have greater economic damages than one who was making $20,000 per year. Civil rights attorneys are able and willing to represent both categories of plaintiffs, precisely because they can rely on fee-shifting as a means to be compensated. But if statutory attorneys' fees can be waived without the attorneys' consent, then most civil rights attorneys will be reluctant to represent low wage workers, absent unusual circumstances. Freedom from unlawful discrimination and retaliation should not be a special privilege only granted to corporate executives and highly paid professionals, and an act of charity for which nannies, waitresses, and bus drivers must beg. Rather, our civil rights laws provide legal protections all workers can claim, irrespective of their ability to pay. To grant those rights to workers, but then deny them the resources to enforce those rights in the real world, is a hollow promise indeed.[7]

And even in cases where the potential damages claims are significant, the defendants have no business in dictating to plaintiffs and their attorneys how fees should be paid. Plaintiffs' counsel in fee-shifting cases should be permitted to specify in their retainers that any monetary settlement offer shall be treated as a lump sum payment, to be divided according to the terms of the retainer agreement.

> How a public-interest attorney and the client divide a lump-sum settlement is no business of the defendant.
>
> . . .

[7] See Anatole France, The Red Lily, Ch. 7 (1894) ("[i]n its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread").

> In other words, defendants should not be permitted to dictate the apportionment of settlement proceeds between public-interest attorneys and their clients.
>
> . . .
>
> When a plaintiff is seeking monetary damages in fee-shifting cases, a defendant has no legitimate interest in how the plaintiff and attorney divvy up the settlement. In such circumstances, a defendant's demand that a plaintiff's attorney waive her statutory fee as the price of a settlement is not only an unwarranted intrusion into the attorney-client relationship, but a thinly disguised ploy to put a plaintiff's attorney at war with her client.

Pinto, supra, 200 N.J. at 585, 593, 599; see also Evans, supra, 475 U.S. at 765 (Brennan, J., dissenting) ("several Bar Associations have already declared it unethical for defense counsel to seek fee waivers").

Further, as this Court has recognized, plaintiffs' attorneys in fee-shifting cases should be permitted to include in the retainer a provision that prohibits the waiver of statutory fees. Indeed, this Court recognized such a provision as a legitimate means to protect the attorney's interest in being compensated for her work. In explaining why simultaneous negotiation of the merits and attorneys' fees should be permitted for private counsel in fee shifting cases, this Court explained:

> [P]rivate attorneys can insist, without ethical conflict, on a fee allowance because they would not be reducing their clients' share. In addition, ***private attorneys can arrange a fee agreement that would allow them to insist upon a statutory fee as part of any settlement.*** . . . The private attorney will be free then, without impairing the client's interests, to insist on vindication of the fee-shifting provisions of the Act.

Coleman, supra, 113 N.J. at 603 (emphasis added); see also Pinto, supra, 200 N.J. at 597 ("'private attorneys can arrange a fee agreement that would allow them to insist upon a statutory fee as part of any settlement'" and "public-interest law firms can do the same"); Evans, supra, 475 U.S. at 766 (Brennan, J., dissenting) ("it may be that civil rights attorneys can obtain agreements from their clients not to waive attorney's fees). Thus, as this Court has recognized, a natural corollary

to a ban on fee waivers is permitting plaintiff's counsel in a fee-shifting case to negotiate for a retainer that provides that the client may not waive statutory fees.

Allowing such retainer agreements for plaintiff's counsel in fee-shifting cases does not provide them with any special advantage, but merely places them on the same level playing field with other attorneys in non-fee-shifting cases, and, thus, creates conditions where civil rights plaintiffs can obtain effective legal representation. This Court has always held that fee-shifting awards are supposed to reflect "economic reality" where they correspond to the compensation the attorney would ordinarily receive in the private market. In Rendine, for example, this Court explained the justification for contingency fee enhancements as follows:

> "No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success."
>
> . . .
>
> In our view, the case for contingency enhancement
>
> . . . rests on the desire to enable parties to compete for legal services in the private market. In that market, parties who can offer only fee awards contend with parties who can offer certain hourly payments and with parties who can offer contingent percentage fees from damage awards. To bid for services effectively, parties with only fee awards to offer must be able to pay market rates. They cannot do that when they are denied contingency enhancements because they cannot cover the nonpayment risk. A lawyer given a choice between an unenhanced hourly rate in a fee award case and an equal rate in a case where payment is certain will have a strong incentive to decline the fee award case.

Rendine, supra, 141 N.J. at 338, 339 (citations omitted).

There are at least two ways in which permitting fee waivers in civil rights cases defies "economic reality" and places attorneys in fee-shifting cases in a uniquely disadvantaged position as compared to other attorneys. First, it means even when the attorney does everything right and successfully prosecutes the case, she can get nothing.

> Attorneys, uncertain of the prospect of seeing any return on their investment of time, energy, and money, even when successful in winning relief for their clients, would be less likely to bring a case in the future. . . . Attorneys who nonetheless took civil rights cases in the hopes of receiving their statutorily prescribed fee were assuming a risk significantly greater than that of an attorney taking a tort claim on contingency – the contingency fee attorney runs the risk of not getting paid if she loses her case; the civil rights attorney ran the risk of not being paid even if she secured a favorable settlement for her client.

William Fedullo, Classless and Uncivil: The Three-Decade Legacy of *Evans v. Jeff D.*, 21 U. of Pa. J. Const. L. 1349, 1354-55 (May 2019).

Second, as Justice Brennan noted, requiring counsel in a fee-shifting case to sacrifice her statutory fees in order to settle the case, imposes on the attorney the peculiar obligation of contributing toward the settlement.

> One of the more peculiar aspects of the Court's interpretation of the Fees Act is that it permits defendants to require plaintiff's counsel to contribute his compensation to satisfying the plaintiff's claims. In ordinary civil litigation no defendant would make – or sell to his adversary – a settlement offer conditioned upon the plaintiff's convincing his attorney to contribute to the plaintiff's recovery. Yet today's decision creates a situation in which plaintiff's attorneys in civil rights cases are required to do just that. Thus, rather than treating civil rights claims no differently than other civil litigation, . . . the Court places such litigation in a quite unique – and unfavorable – category.

Evans, supra, 475 U.S. at 766 n.21 (Brennan, J., dissenting). Like any attorney in a contingency fee case, plaintiff's counsel in a fee-shifting case can decide to compromise on her fee in order to facilitate settlement. But the attorney "after litigating a case for many long years should not be placed in the untenable position of being ***required*** to sacrifice all attorneys' fees for the sake of a settlement." Pinto, supra, 200 N.J. at 600 (emphasis in original).

Finally, while not mentioned by the Committee, some defenders of compelled statutory fee waivers contend they are necessary to facilitate settlement. The majority in Evans argued prohibiting settlement offers conditioned on the waiver of statutory fees would "reduc[e] the attractiveness of settlement" to defendants. Evans, supra, 475 U.S. at 761. We submit the opposite

is true: banning the waiver of statutory fees will encourage early settlements. Because the parties can negotiate the merits and attorneys' fees simultaneously, defendants can ascertain their potential exposure for fees, and thus are not negotiating in the dark. Id. at 762 & n.17 (Brennan, J., dissenting); Pinto, supra, 200 N.J. at 590-91, 594. If defendants understand needlessly prolonging litigation could expose them to significant statutory fees owed to plaintiff's counsel, they will be incentivized to seek an early settlement.

> [T]he defendant must weigh the risk of a nonnegotiated fee to be fixed by the court after a trial; as the Court reminds us, fee awards in ***this*** context may be very uncertain and, potentially, of very great magnitude. . . . Thus, powerful incentives remain for defendants to seek settlement.

Evans, supra, 475 U.S. at 764 (Brennan, J., dissenting) (emphasis in original). See also Fedullo, supra, 21 U. of Pa. J. Const. L. at 1367 ("Defendants would still be incentivized to settle such cases early in litigation, because the more quickly they resolved the case, the less they would pay in fees").

But this does not give plaintiff's counsel an unfair advantage in such negotiations. In this regard, it is important to bear in mind that any statutory fees must be approved by the trial court, which is obligated to ensure any such award is ***reasonable***. As this Court has repeatedly explained, plaintiff's counsel in a fee-shifting case cannot expect to be compensated for time unreasonably spent on litigation.

> In particular, we admonished trial courts "not [to] accept passively" the submissions of counsel, . . . directing them instead to "evaluate carefully and critically the aggregate hours and specific hourly rates advanced by counsel for the prevailing party to support the fee application" . . . .
>
> The evaluation of hours expended includes several components, including a recognition that the focus must be on "the amount of time ***reasonably*** expended" rather than merely an acceptance of "the amount of time ***actually*** expended." . . .
>
> . . .

> [A] reduction may be appropriate if "the hours expended, taking into account the damages prospectively recoverable, the interests to be vindicated, and the underlying statutory objectives, exceed those that competent counsel reasonably would have expended." . . . We also observed that the "trial court should reduce the lodestar fee if the level of success achieved in the litigation is limited as compared to the relief sought."

Walker, supra, 209 N.J. at 131, 132 (emphasis in original; citations omitted).

And, in this regard, this Court has specifically held that if a plaintiff turns down an "entirely reasonable" settlement offer in a fee-shifting case, this is a factor that should be taken into account in determining the amount of reasonable fees to be awarded.

> [P]laintiff's application [for fees] must be scrutinized, as are all statutory fee claims, against a reasonableness standard, including an assessment of plaintiff's rejection of a reasonable offer of judgment in favor of the continuation of litigation. In short, we agree with the courts below that if a judge determines, under all the circumstances, that defendant proffered a reasonable offer of judgment that plaintiff unjustifiably rejected, that is a factor to be taken into account in determining plaintiff's entitlement to fees.

Best, supra, 200 N.J. at 360-61; see also Evans, supra, 475 U.S. at 764 (by making reasonable settlement offers early in the case, defendants may "limit liability for attorney's fees if the plaintiff refuses the offer and proceeds to trial") (Brennan, J., dissenting). In other words, should plaintiff's counsel discourage acceptance of an entirely reasonable settlement offer early in the case, in the hope of driving up her court awarded fees, she may find at the end of the case that she will not be compensated for significant portions of time she spent.

To summarize, NELA-NJ contends that fee waivers in statutory fee-shifting cases undermine the Legislature's intent to ensure plaintiffs bringing statutory claims for discrimination, retaliation and the like have the means to secure competent counsel to advance their claims. Defendants should be prohibited from making settlement offers conditioned on the waiver of statutory fees. Defendants have no business in dictating how settlement proceeds are divided between plaintiffs and their attorneys in fee-shifting cases. Plaintiff's counsel should be permitted

to include in the retainer a provision that any monetary settlement shall be treated as a lump sum to be divided according to the terms of the retainer. And plaintiff's counsel likewise should be permitted to include in the retainer agreement a provision prohibiting the waiver of statutory fees. This approach will ensure the availability of competent counsel for plaintiffs with meritorious claims in fee-shifting cases and will also have the benefit of encouraging early settlement of such cases to avoid unnecessary litigation costs.

ACPE's Recommendation No. 8:

The Supreme Court Should Reject The Committee's Proposal That Requires Attorneys To Place Language In A Retainer Agreement That A Fee Percentage Above 33 1/3 Percent Is "Higher Than The Presumptive Percentage" Or "Not Standard."

The Committee's eighth recommendation acknowledges that statutory discrimination and employment matters are excluded from the cap on personal injury matters set forth in R. 1:21-7(c), but makes the flawed assumption that a one-third percentage is a "standard" or "presumptive" fee in statutory employment and discrimination cases.

Based upon that flawed presumption, the Committee recommended that attorneys in all such cases place a provision in their fee agreements that any contingent percentage being charged in excess of 33 1/3 percent is higher than the "standard" fee. This recommendation fails to apprehend that statutory employment and discrimination claims are not personal injury or tort claims. Moreover, it will have the effect of confusing and misleading clients who will inevitably be led to believe that any attorney charging in excess of 33 1/3 percent for such cases is outside the norm and possibly not charging an appropriate fee.

Statutory employment and discrimination claims arise primarily and almost exclusively under the LAD and CEPA. Both statutes are socially remedial legislation. The New Jersey Legislature has declared "that practices of discrimination against any of its inhabitants, because of

race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, disability or nationality, are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State, but menaces the institutions and foundations of a free and democratic State. . .” N.J.SA. 10:5-3. The Legislature has declared “its opposition to such practices of discrimination . . . in order that the economic prosperity and general welfare of the inhabitants of the State may be protected and ensured.” Ibid. Our Legislature has recognized and declared that, as the result of discrimination, “people suffer personal hardships, and the State suffers a grievous harm.” Ibid. The LAD prohibits discrimination in employment, housing, and places of public accommodation. See N.J.S.A. 10:5-12(a), (f), (g), (h).

“The purpose of CEPA is to provide protection ‘to vulnerable employees who have the courage to speak out against or decline to participate in an employer’s actions that are contrary to public policy mandates.’” Stapleton v. DSW, Inc., 931 F.Supp.2d 635, 638 (D.N.J. 2013)(quoting Yurick v. State, 184 N.J. 70, 77 (2005)). At the time of its enactment, CEPA was “the most far reaching ‘whistle-blower statute’ in the nation.” D’Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 120 (2007).

Although common law remedies available in tort actions are available to prevailing plaintiffs in LAD and CEPA actions, the causes of action created by the acts are not, primarily, tort-based claims. “Although the LAD provides for compensatory and punitive damages, it is not primarily a tort scheme; rather, its primary purpose is to end discrimination.” Lehmann, supra, 132 N.J. at 610; see also Abbamont, supra, 138 N.J. 405 (CEPA is not subject to the Tort Claims Act); Fuchilla, supra, 109 N.J. 319 (LAD is not subject to the Tort Claims Act); Tarr, supra, 181

N.J. 70 (standard for emotional distress damages in LAD action less stringent than that applied to tort based emotional distress claims).

Therefore, the assumption by the Committee that the one-third contingent fee mandated in personal injury actions is "standard" or "presumptive" for employment and discrimination actions is simply erroneous and unsupported. Claims arising under the LAD and CEPA are *not* personal injury actions. While we certainly do not diminish the importance of the work performed by attorneys representing plaintiffs in personal injury actions, those cases are distinctly different from the constitutionally derived claims pursued by the victims of LAD and CEPA violations.

A requirement that attorneys in LAD and CEPA cases advise their clients and potential clients that any contingent fee charged in excess of 33 1/3% is above the "standard" or "presumptive" fee will unnecessarily confuse clients who will immediately have cause to doubt or distrust an attorney they might otherwise choose to represent them in cases that are high risk and legally complex. Such a requirement does not accurately reflect the public policy behind the LAD and CEPA and their fee-shifting provisions. There is not and has never been a standard or presumptive fee in such cases. The Committee's recommendation will serve only to chill the victims of unlawful discrimination and retaliation from retaining skilled counsel to represent them. There is no sound basis to equate LAD and CEPA cases with common law personal injury actions or to impute a "standard" fee where no such thing exists.