

LAW OFFICE OF DONALD F. BURKE

45 GALE ROAD

BRICK, NEW JERSEY 08723

(732) 966-4922

Email: DonaldBurkeEsq@gmail.com

DONALD F. BURKE, ESQ.

Certified by the New Jersey Supreme Court as a Civil Trial Attorney

Member of the Bars of New Jersey & New York

DONALD F. BURKE JR., ESQ.

Member of the Bars of New Jersey & New York

October 17, 2022

Honorable Glenn A. Grant, Administrative Director of the Courts

Richard J. Hughes Justice Complex

P.O. Box 037

Trenton, New Jersey 08625-0037

Attention: Settlement Conditioned on Waiver of Lawyers' Fees or Costs

(Balducci)

Dear Judge Grant,

Kindly accept this letter responding to the Supreme Court's request for comments on the propriety of including provisions in attorney retainer agreements that prohibit the client from settling a case if the settlement waives the lawyers' fees or costs. We urge the Supreme Court not to undermine the fee shifting component of employment, civil rights and education matters because to do so will result in people with viable but difficult cases who cannot afford to pay an attorney on an hourly basis being unable to obtain competent counsel

Attracting competent counsel to represent clients who cannot afford to pay an hourly fee involves making sure if an attorney prevails, he or she gets paid. These cases are brought against well-heeled defendants who are able to pay their counsel hourly and to pay expenses of litigation which can exceed \$100,000 in some cases. For an attorney to invest hundreds, maybe thousands, of hours and tens of thousands of dollars, there must be a mechanism to get paid. Defendants and their attorneys seek to drive a wedge between a plaintiff and his or her attorney by attempting to pit them against one another over fees and proposing

settlement agreements that provide relief to the plaintiff but leave the plaintiff's lawyer with nothing. Settlement agreements that deprive an attorney of the ability to recover a fee drive a wedge between an attorney and a client and inevitably damage the attorney-client relationship. Ethically, the plaintiff's lawyer must present the offer to his or her client and follow the client's instructions. Such agreements may be attractive to clients because clients are able to resolve cases on favorable terms for themselves. The issue of how the attorney will be paid is not one that might be important to many clients. However, the reason that clients are able to obtain favorable resolutions of their matters are largely the product of an attorney's time, effort and sacrifice on the client's behalf. The only way to protect against this occurring is through a Legal Services Agreement that addresses this issue before the attorney-client relationship is established.

The Court should not preclude attorneys from including provisions in retainer agreements that prohibit clients from settling the case if the settlement waives the attorney's fee or costs as long as the client understands and agrees to the arrangement. This will help preserve a relationship of trust between the attorney and the client, because the issue of these divisive settlement agreements will be addressed at the outset of the attorney-client relationship and will be removed as an option before it may surface and potentially cause irreparable harm months or years into the attorney-client relationship. Further, a retainer agreement is a contract. If a client is unwilling to enter into such an agreement, that client may seek an attorney who is willing to enter into a retainer agreement that does not prohibit the client from settling a case if the settlement waives the attorney's fee or costs. When selecting an attorney, the client can always decline one arrangement in exchange for another arrangement with a different attorney. Limiting the ability of attorneys and clients to negotiate an arrangement reasonable to both sides is not the answer to these issues and will only work to limit the pool of attorneys who will represent people with viable but difficult cases.

Ideally, this Court should resolve the issue entirely by forbidding defendants from conditioning settlement on waiver of the plaintiff's attorney's fee or costs as this practice is corrosive not only to the attorney-client relationship but to the elimination of discrimination

as well as constitutional and statutory violations . However, if the Court does not take this step, it must not prevent attorneys and clients from agreeing at the outset to an arrangement allowing the attorney to get paid if the plaintiff prevails.

Attorneys, like everyone else, deserve to be paid for their work. If the client settles a case that does not include payment of the attorney's fee or costs, the client and the attorney become adversaries. Additionally, the attorney then becomes a creditor of the client, and most resort to legal process in order to be paid. This will ultimately increase costs for attorneys, clients and the judicial system.

For these reasons, the Court should ban settlement agreements that are conditioned upon waiver of attorneys' fees or costs. Further, the Court should permit attorneys and clients to negotiate freely and to enter into an agreement that prohibits the client from settling the case if the settlement waives the attorney's fees or costs.

Thank you.

Respectfully submitted,

s/ Donald F. Burke Jr.

Donald F. Burke Jr., Esq.