

NEW JERSEY STATE BAR ASSOCIATION



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October 17, 2022

Honorable Glenn A. Grant, J.A.D.
Administrative Director of the Courts
Attention: Settlement Conditioned on Waiver of Lawyers' Fees or Costs (Balducci)
Hughes Justice Complex, P.O. Box 037
Trenton, NJ 08625-0037

Re: Comments in Connection with Retainer Fee Agreements Foreclosing
Settlement When the Terms of the Settlement Waive the Lawyer's Fees
or Costs

Dear Judge Grant:

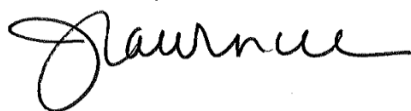
The New Jersey State Bar Association (NJSBA) thanks the Court for the opportunity to provide additional comments in connection with attorney retainer agreements that prohibit a client from settling a case if the settlement waives the lawyers' fees or costs. The NJSBA has participated in consideration of this issue to date, including as an *amicus curiae* party in *Balducci v. Cige*, 240 N.J. 574 (2020), serving on the special Judiciary committee formed following the *Balducci* decision, and submitting comments on recommendations made by the Advisory Committee on Professional Ethics (ACPE) relating to retainer agreements. The NJSBA recognizes the anticipated significant impact and potential ramifications that will stem from any action by the Court on this issue on practicing attorneys and their clients. We write today to amplify and reaffirm our previous comments.

The NJSBA continues to agree with the recommendation of the ACPE that a retainer agreement may not prohibit a client from settling a case when the settlement provides for waiver of a statutorily based fee award. We recognize the value and importance of fee shifting provisions in encouraging attorneys to take cases they might otherwise not, and we certainly favor attorneys being paid for the work they do on behalf of clients. Counsel fee reimbursement claims belong to the client, however, and it is the client's right to settle a case on whatever terms the client is prepared to accept, after being advised of all of the ramifications of acceptance.

Lawyers and clients should discuss the potential for a settlement without attorneys' fees at the outset and make a decision about how attorneys' fees will be paid in that situation. The retainer agreement should specifically address how the fees will be computed and clearly advise the client what they will be responsible for if fees are not part of an ultimate settlement. This will ensure clients can make an informed decision if presented with such a settlement option. Each client and each case is unique, and the Rules of Professional Conduct cannot address every potential scenario. Lawyers should have the flexibility to structure a clear, straightforward retainer agreement that is consistent with the Rules of Professional Conduct, reflects the particular needs of the client and the case, and preserves the client's right to make appropriate decisions about the litigation.

Once again, the NJSBA thanks the Judiciary for the opportunity to provide these additional comments. We hope they are helpful as the Court determines what action to take on this important issue.

Respectfully,

A handwritten signature in black ink, appearing to read "J. Lawrence", written in a cursive style.

Jeralyn L. Lawrence, Esq.
President

cc: Timothy McGoughran, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director