NEW JERSEY ASSOCIATION for JUSTICE Inc.
Formerly the Association of Trial Lawyers of America - New Jersey (ATLA-NJ)

#004
150 West State Street
Capitol View Building • Trenton NJ 08608
P: 609-396-0096 • F: 609-396-2463
www.nj-justice.org • info@nj-justice.org

January 5, 2022

Hon. Glenn A. Grant, J.A.D.
Acting Director
New Jersey Administrative Office of the Courts
Attention: Retainer Fee Agreements in Fee-Shifting Cases
Hughes Justice Complex
P.O. Box 037
Trenton, New Jersey 08625-0037

Dear Judge Grant:

On behalf of the 2,700 members of the New Jersey Association for Justice (NJAJ), I offer substantive comments in response to the November 19, 2021 "Notice to the Bar," seeking comments on recommendations made by the Advisory Committee on Professional Ethics ("the Committee") for changes to be made to the Rules of Professional conduct that are specific to retainer agreements in statutory fee-shifting claims. We note that it is not clear whether these recommendations will affect retainer agreements for statutory employment and discrimination claims, as set forth in the first paragraph of the Notice to the Bar, or to retainer agreements in all statutory fee-shifting causes of action, as suggested by the "title" of the Notice to the Bar. As an appreciable portion of our members represent victims in employment, civil rights, consumer fraud and other areas in which fee-shifting is a critical way of leveling the playing field between the powerful and the powerless, this issue is of great importance to our organization.

I will speak to each of the nine proposals in order.

The Committee's first proposal suggests a rule requiring "explicit disclosure of identifiable fees or costs that clients must pay," and also suggests a mandatory "oral review" of such provisions.

It is admirable and necessary to require that attorneys do their ethical best to advise clients of what costs might be necessary in a given case. Yet we respectfully suggest that it is, on a practical basis, impossible for an attorney to predict fees – "identifiable" or otherwise – at the inception of litigation. Employment, civil rights, consumer fraud and other fee-shifting cases are not "standard," nor substantially similar to one another, the way that matters in other fields of law might bear more substantial similarity, from case to case. Requiring, as an ethical rule, that an attorney "explicitly" set forth "identifiable fees," invites dangerous speculation by the attorney. Moreover, it also, therefore, provides a means by which the attorney can be deemed to have violated the ethics rules based on what would no doubt be an arbitrary "distance" between any given "prediction" and any eventual outcome actually necessary based upon the specifics of the case.

That said, however, the second paragraph of the first proposal, which requires an oral discussion of the provisions of the fee agreement, is not only laudable, but should already be the practice of all attorneys, in all fields of law.

NJAJ certainly supports the idea that all attorneys should discuss their fee agreements in detail; especially those provisions which speak to the client's personal obligation. We strongly suggest, however, that any ethical rule which targets certain *specific* areas of legal work, and which requires an attorney to do the impossible – predicting fees – can only lead to an unfair danger to a sub-group of attorneys. This danger

might then, despite best efforts and good faith, result in multiple ethics violations, depending upon how many cases that attorney handles. Were such a rule to be put in place, it would substantially and unfairly affect lawyers doing this work.

Even more troubling, for substantially the same reasons, is the Committee's second proposal, which would require lawyers to "estimate" fees and costs and "range of case value" at the initiation of representation.

This is, again, effectively impossible, as every case is unique. Such a rule will automatically expose each attorney, in every case, to a potential ethics violation, if the attorney does not come (arbitrarily) "close enough" to such an estimated value. The New Jersey Supreme Court, in discussing whether a statutory emotional distress award in a New Jersey Law Against Discrimination case was so excessive as to shock the conscience of the court recognized the "broad range of acceptable" outcomes in these cases:

> Here the trial judge did not find "comparable" cases and verdicts selected by defendants to have sufficient similarities to plaintiffs' case to allow for a true comparison. However, if the court found a true comparable case, the next question would be, which jury conferred the right monetary award? Any true comparative analysis would require a statistically satisfactory class of cases, and the class would have to be composed not only of factually similar cases but also similarly constituted plaintiffs. Then, the court would have to announce the broad range of acceptable emotional-distress awards, given that no two juries would likely return the same award. **Stating the issue suggests the futility of that process.** *Cuevas v. Wentworth Group*, 226 N.J. 480, 506 (2016) (emphasis added).

Surely attorneys meeting with clients face the same futility in determining a "range of value" to provide to a client at the inception of litigation.

While predicting fees is impossible, it is possible to summarize the *types* of expenses which typically arise. Many lawyers in New Jersey already do this.

Similarly troubling in Proposal No. 2 is the idea that fees ever "invade" a client recovery. We do not understand why this word was chosen, because, by such a definition, *all* legal fees "invade" a client recovery in any field where a sum of money is sought on a contingency. When an attorney represents a client in a personal injury matter, for example, the attorney's fee expectation "invades" the total recovery, as it does in a breach of contract matter; or in any matter where the client is not paying hourly fees in a non-contingent arrangement.

As well, the second proposal is confusing because it also uses the word "exceed" to describe fees in relation to a client recovery. Yet in Proposal No. 6 (addressed below), the committee clearly recognizes that any legal fee recovered in a fee-shifting case *is part of the client recovery* and forms a part of the *total recovery* in the matter. Once the *total* recovery – secured either by way of settlement (as the defense is made aware of accumulated fees and/or the possibility of further fees if it does not settle) or by way of

application after verdict – has been obtained, the fee agreement then operates to describe the fee the lawyer expects from that total recovery.

In the context of statutory fee-shifting matters, however, the suggestion that attorneys' fees and costs will "invade" or "exceed" a client's recovery ignores the very principles upon which fee-shifting rest. "Fee-shifting provisions 'are designed to attract competent counsel' to advance the public interest through private enforcement of statutory rights that government alone cannot enforce." *Pinto v. Spectrum Chemicals and Laboratory Products*, 200 N.J. 580, 593 (2010). The attorneys who undertake "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." *Ibid., citing Evans v. Jeff D.*, 475 U.S. 717, 745 (1986) (Brennan J., dissenting). Such shifting fees and costs, therefore, are awarded to the plaintiff in addition to any other award and therefore do *not* "invade" the plaintiff's recovery.

There is, therefore, neither "invasion" – at least, not in any way different from all other fields of law in which a sum of money is sought on a contingent basis – nor the possibility that the client recovery could be "exceeded" by the lawyer's fee. The lawyer's fee is *part* of the client's recovery.

Words like "invade" and "exceed" in describing that portion of a total recovery comprising the attorney's fee, should, respectfully, *not* be used in any discussion of this concept, as such words redefine a lawyer's fee in a way unique and specific to these cases and are unfair to the lawyers who practice in these fields of law.

We must also respectfully object to any characterization of legal fees in these cases as "astronomical," because this is an unfairly pejorative term that could easily be applied to all legal fees in all areas of law, since the word has only subjective, arbitrary and relative meaning. When, for example, in a $9 million personal injury recovery, an attorney secures a $3 million fee based upon the total lodestar of work representing a small fraction of that fee, is the fee "astronomical?"

The lawyer absolutely has an obligation to advise a client, at the inception of representation, that she or he feels that the case has whatever strengths and weaknesses the lawyer can reasonably identify (at the very start of a fact pattern, when most of what the attorney thinks about a case is based on what the client represents), but there are so many variables that affect value, as well as how long a case endures before it is resolved or goes to trial, that it is unfair and unreasonable to expect the lawyer to do more.

The very fact that the lawyer is risking their own assets (time and capital) in a case should, in and of itself, represent a commitment to the client that the lawyer believes in the matter.

The Committee's third proposal, which suggests a continuing obligation to inform clients about rising fees and costs, would require that an attorney should do so on a "continuing" basis. We do not appreciate how to temporally or quantitatively define the concept of "continuing," since a contingent attorney in a fee-shifting matter is not "billing" their client. Certainly, if a client asks, at any time, for a good faith estimate of where fees and costs might be, an attorney ought be ready to provide that information, and should certainly do so. Yet we respectfully suggest that RPC 1.4(c) already requires such communication, any time the client asks.

Aside from the already existing dictates of that rule, we do not believe that lawyers in these specific fields of law should be tasked with an especial obligation to provide estimates to a client on a seemingly arbitrary basis. Such an obligation does not exist for other contingent attorneys. As well, this obligation is already addressed by the above rule.

For reasons substantially similar to those already offered, we are also troubled by Proposal No. 4, which requires that attorneys "promptly" notify a client when the attorney fee may "exceed" a client recovery. As we have already suggested, the *entire* recovery in a matter, including any accumulated fee, belongs first to the client. It is not possible, therefore, for an attorney's fee to "exceed" the client's recovery; only to form a portion of it. Moreover, as the United States Supreme Court has long recognized, "a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986). "Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards." *Ibid.* The court in *Riverside*, as our own New Jersey Supreme Court has done, held that "proportionality" between the plaintiff's award and the attorneys' fee award is not necessary for the attorneys' fee to be reasonable. *Id.*; *see, Rendine v. Pantzer*, 141 N.J. 292 (1995).

Yet if there comes a point in a case where an attorney feels that the maximum amount possible in a *settlement* would be consumed, entirely, by fees and/or costs, the attorney should certainly advise the client as soon as the attorney reasonably suspects this to be the case. Once again, as long as words like "invade" and "exceed" are not utilized, as they are neither fair nor accurate, a general obligation, moderated by reasonability, to tell the client when a point of diminishing returns has been reached, is a reasonable one. Because, of course, a plaintiff in a fee-shifting matter always has the right to proceed to trial in order to obtain a verdict and a shifting attorneys' fee award, where the plaintiff is confident in his or her ability to prevail and understands the risk of loss.

We also note that the case upon which the Committee relies, *Chestone v. Chestone*, 322 N.J. Super. 250 (App. Div. 1999) is inapt. *Chestone* did not involve a fee-shifting employment, discrimination, consumer fraud or civil rights matter. Rather, it was a matrimonial case in which certain attorneys' fees and costs were ordered to be paid by one party to the other, where fees are awarded based, in part, on a party's financial need. The party need not prevail and such a fee award is authorized but not mandatory. *Chestone, supra*. at 255; N.J.S.A. 2A:34-23. The Appellate Division addressed the factors to be considered in making an award of attorneys' fees in such an action, which differ substantially from the analysis of a reasonable attorneys' fee in a statutory fee-shifting cause of action such as those existing under the LAD, the New Jersey Conscientious Employee Protection Act, the New Jersey Consumer Fraud Act and the New Jersey Civil Rights Act. "In matrimonial actions, more so than in most other areas in which counsel fees are awarded, the expenditure of attorney time is of less importance." *Chestone, supra*. at 257 (citation omitted).

The court noted that the emotional involvement of the parties to matrimonial actions. "Unfortunately, on occasion, the emotional involvement leads to acrimony. When those two factors are present, the parties, on occasion, permit their emotions and acrimony to predominate over reason. The attorney, on the other hand, must be detached from emotion and acrimony." *Id.*, at 259. It is, therefore, in matrimonial actions, "[t]he responsibility of the attorney . . . to provide sound legal advice . . . unaffected by emotion or acrimony." *Ibid*. "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 obligated to communicate that fact tot eh client." *Ibid*.

The holding and reasoning of *Chestone* are grounded in the particular nature of matrimonial litigation and the limited ability for fees to be awarded in those matters. In those cases, where an emotionally overwrought client might be inclined to spend far more than he or she can hope to achieve, with no guarantee of a fee award, the Committee's recommendation and the Appellate Division's requirement that attorneys counsel their clients regarding fees, costs and proportionality make perfect sense.

That reasoning does not, however, translate to the types of statutory fee-shifting claims at issue here, where fees "shall" shift to a prevailing plaintiff, proportionality between damages and fees is not required and our State's public policy is advanced when private citizens pursue claims that cause a benefit not only to themselves but to the public at large.

Additionally, in any contingency matter with large liens, such as a Medicaid Estate lien, or a catastrophic injury case which may ultimately have a large Medicare and/or ERISA lien, there is the prospect that the fee may "exceed" the clients' *net* recovery (after liens). This may not become clear until tremendous costs are advanced and time expended. If the case may only proceed if the client gives separate "informed consent" at that stage, it seems there may be a real risk of conflict between the client and their attorney.

We also note that the Committee makes no recommendation regarding the obligation of an attorney defending a statutory fee-shifting claim to have such a "frank discussion" with their clients of the potential liability they face, including fees and costs. Nor is there any suggestion that defense attorneys in these cases advise their clients that the fees and costs they expend could be far exceeded by an award to a successful plaintiff.

NJAJ agrees entirely, however, that an agreement which provides *both* for a contingent recovery in the event of success, but *also* for the payment of the full hourly fee in the event of failure, is neither contingent nor reasonable, and should be considered presumptively unreasonable.

That said, however, Proposal No. 5, which addresses this, should recognize that, in certain fee-shifting matters, a client may agree to an initial retainer for a certain period of time, after which the matter proceeds to a contingent percentage. Also common are situations where the attorney reduces the amount of their normal hourly rate in exchange for an additional contingency that materializes only in the event of success.

These "mixed" arrangements are fairly commonplace, but the use of the word "modest," in connection with the word "bonus," is troubling, inasmuch as it would establish a new way of artificially confining or reducing the agreed-upon percentages that the committee already recognizes (see below, in a later proposal) are exempt from Rule 1:21-7.

Mixed contingency agreements where there is a reduced hourly rate or a limited-time hourly relationship before converting to a contingency do not provide a "bonus." The contingency in such arrangements is to allow both the attorney and the client to share some risk in a case. To term the contingency in such a mixed relationship as a "bonus," however, and to further suggest that an ethical modification of such a "bonus" be "modest," introduces a new and arbitrary way of further burdening attorneys wishing to aid clients in these fields of law.

We fear that this will this dis-incentivize attorneys to enter into such agreements with otherwise willing clients, in cases that might be difficult enough that such agreements are the only way the client's rights might be vindicated.

Proposal No. 6, which states that it is not presumptively unreasonable to allow a fee to be based on both the ultimate recovery and upon any additional attorney's fee, is correct, and NJAJ fully supports any ethics rule which makes this clear. In fact, and as previously stated, and as the committee also recognizes, the client recovery at the end of a successful matter includes the attorney's fee a judge might separately award. The client must pay the attorney the fee from the total recovery awarded to the client, which includes any fee award by a judge. An alternative fee agreement which recognizes either a percentage or the hourly rate, whichever is greater, but not both, should correctly allow for the percentage to be based on the total recovery.

We are deeply troubled, however, by Proposal No. 7, which cites to RPC 1.2, and then suggests that the rule – which, as we appreciate it, did not contemplate the complexities presented by fee shifting – should operate to allow a defendant to condition settlement upon a waiver of plaintiff's attorneys' fee. This would allow a client, *sua sponte* and entirely unfairly, to unilaterally "renegotiate" their fee relationship with their attorney, eliminating the ability of the attorney to secure the true value of their service. Moreover, it permits defendant to impermissibly insert itself into the attorney-client relationship between plaintiff and their counsel.

The Committee relies upon the New Jersey Supreme Court's ruling in *Pinto, supra.,* incorrectly citing *Pinto* for the proposition that settlement offers contingent on fee-waivers are permitted in cases in which plaintiff is represented by private counsel. In *Pinto*, the Court held that in cases where plaintiff is represented by "public interest" counsel, settlement offers cannot be conditioned upon a fee waiver by plaintiff. The Court specifically noted that the reasoning used in reaching that result "may apply to private-practice counsel and her client but the case before us involves only a public-interest law firm." *Pinto, supra*., at 599, n. 8. Importantly, the Court recognized

> 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. Plaintiff's attorneys who are compelled to forfeit their hard-earned fee 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. As Justice Brennan noted in his dissent in *Jeff D.*:
>
> [O]nce 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 attorneys' fees. A lawyer who proposes to have his client pay more than is necessary to end litigation has

> failed to fulfill his fundamental duty zealously to represent the best interest of his client. *Pinto, supra*. at 599-600, *quoting Evans v. Jeff D*., 475 U.S. 717, 758 (1986).

The court went on to hold that the bar on fee waivers as part of settlement applies equally to fee shifting cases involving equitable relief only.

The reasoning of *Pinto* should be applied equally to cases involving "private practice" attorneys, for the same reasons articulated by Justice Albin in *Pinto* and Justice Brennan in his dissent in *Jeff D*. Creating a rule that allows defense counsel in statutory fee-shifting matters to condition settlement upon a fee waiver flies in the face of the public policy underlying fee shifting and will do no more than create a disincentive for attorneys to undertake these cases, thus leaving the victims of discrimination, whistleblowing retaliation, consumer fraud and other civil rights violations without a means to see redress unless they have the financial wherewithal to pay counsel on an hourly basis, win or lose.

Suggesting, as the Committee has, that attorneys aggrieved by such an event might then resort to "alternative" fee agreements, or provisions within their fee agreement to address such a maneuver, is not realistic, given that most clients would be without the ability to pay (or, candidly, the *willingness* to pay, if the client thought it fair to undertake that maneuver in the first place). Such a rule would be as unfair as one allowing a personal injury client to suddenly decide that the amount offered *would* satisfy she or he, as long as the attorney's fee was not included, and forcing the PI attorney to seek her or his fee in a separate action.

A provision in accordance with the proposal would certainly be widely celebrated by every defendant violating the above statutes, as they would now be able to create ethical separation between attorneys and clients on a routine basis, forcing clients and attorneys to be adverse to one another in nearly every case.

We respectfully suggest that this is the most dangerous proposal and may have the effect of effectively ending fee-shifting work on behalf of any client who does not have, independently, significant medical or economic injury. Neither such are predicates, however, for the necessary effectuation, through litigation, of socially remedial statutes like the LAD, the CFR, the CRA and others.

With respect to the Committee's proposal No. 8, while we support a rule which states that an attorney's expected contingency be correctly and accurately spelled out in the fee agreement, the Committees' suggestion that any fee over 33.33% is not "standard" is misleading and incorrect.

The Committee's eighth proposal 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 recommends that attorneys in all such cases place a provision in their fee agreements that any contingent percentage being charged in excess of 33.33% 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 33.33% for such cases is outside the norm and possibly not charging an appropriate fee.

Statutory fee-shifting claims include those arising under the LAD and CEPA, which we will use to demonstrate why the Committee's recommendation is flawed and should be rejected. 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 v. Toys R Us,* 132 N.J. 587, 610 (1993); see also *Abbamont v. Piscataway Twp. Bd. of Educ.,* 138 N.J. 405 (1994) (CEPA is not subject to the Tort Claims Act); *Fuchilla v. Layman* 109 N.J. 319 (1988) (LAD is not subject to the Tort Claims Act); *Tarr v. Ciasulli*, 181 N.J. 70 (2004) (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 statutory fee-shifting actions is simply erroneous and unsupported. Claims arising under such statues 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 discrimination, whistleblowing retaliation and other civil rights violations.

The Committee's proposal that attorneys in statutory fee-shifting cases advise their clients and potential clients that any contingent fee charged in excess of 33.33% 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 such 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.

Finally, we fully support the observation in proposal 9, which suggests that there never be any alleged "proportionality" between a shifting fee and the amount a client in such a matter actually recovers. For the same reasons as set forth above, with regard to the proposal to allow clients to force settlement where an attorney could be forced by a defendant to waive their fee, any argument of "proportionality" would immediately end most of the fee-shifting practice seeking to support civil, employment, consumer and other critical rights. Such rights, as has been repeatedly recognized by legislative bodies and by countless courts, do not usually have the same inherent economic value as do medically and similarly documentable losses, but such rights have tremendous public policy value for the people of New Jersey.

The members of NJAJ are all, regardless of their particular type of work, committed to the idea of justice and service to our clients. We applaud the regrettable but necessary examination of retainer agreements in fee-shifting matters occasioned by the fee agreement subject to the courts' examination in *Balducci v. Cige*.

Yet we urge Your Honor not to charge the Committee with the means by which to hurt or impair the willingness of attorneys to take cases in an already challenged (and challenging) legal environment. Rather, the work of the committee, if any, should be to make clear what is already the law, and to recommit and reaffirm the rules already in place.

Respectfully,

Kathleen M. Reilly, Esq.
President