January 5, 2022

VIA ELECTRONIC MAIL (comments.mailbox@njcourts.gov)
Hon. Glenn A. Grant
Acting Administrative Director of the Courts
Attention: Retainer Fee Agreements in Fee-Shifting Cases
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037

Re: ACPE Recommendations Relating to Retainer Agreements in Statutory Fee-Shifting Cases

Dear Judge Grant:

The signatories of this letter all exclusively practice employment law on behalf of employees. Collectively, we have over two hundred years of experience vindicating the rights of workers subjected to discrimination, harassment, retaliation, and other unlawful conduct at their jobs. We write to provide input to the Advisory Committee on Professional Conduct ("ACPE") and the Supreme Court of New Jersey that is informed by our practical experiences actually representing plaintiffs in statutory fee-shifting cases. We note that it appears that while the ACPE includes in-house counsel who represent management's interests exclusively, there are no plaintiffs' employment lawyers on the ACPE with actual experience litigating the statutory claims at issue here on behalf of employees.

I. The Public Policy Underlying Fee-Shifting in Civil Rights Cases

The Legislature enacted the Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 et seq., to carry out "the clear public policy of this State [] to eradicate invidious discrimination from the workplace." Carmona v. Resorts International Hotel, Inc., 189 N.J. 354, 370 (2007). The Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 et seq., also "promotes a strong public policy of this State." Abbamont v. Piscataway Tp. Bd. of Ed., 138 N.J. 405, 431 (1994). "Its purpose is to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct." Id.

The enforcement schemes of both the LAD and CEPA depend on the ability of plaintiffs and their attorneys, who act as private attorneys general, to prosecute private actions in court. Pinto v. Spectrum Chemicals and Laboratory Products, 200 N.J. 580, 593 (2010). In the LAD and CEPA, the Legislature created that framework to ensure that individuals have the opportunity to vindicate "statutory rights that the government cannot enforce alone." Id. To ensure adequate representation, the Legislature specifically provided for fee-shifting in statutory employment cases. See, e.g., N.J.S.A. 10:5-27.1 and 34:19-5. The Legislature realized that the civil rights afforded to citizens in the LAD, CEPA, and other employment statutes would be meaningless if plaintiffs were unable to attract competent counsel to represent them.

The Supreme Court has recognized the critical role that contingent-fee agreements play in the enforcement schemes underlying employment discrimination laws. See Rendine v. Pantzer, 141 N.J. 292, 317-44 (1995). Victims of unlawful termination and other unlawful employment practices generally lack the resources to fund an employment discrimination lawsuit on an hourly-fee basis. Without contingent-fee agreements, victims of unlawful discrimination would not be able to attract counsel. If plaintiffs lack meaningful access to the courts, the statutory civil rights established in the LAD, CEPA and other statutes would "exist only on paper." Id. at 323.

Coupled with fee shifting, contingent-fee agreements are what has made it possible for plaintiffs' employment lawyers in the Garden State to protect employee rights through litigation. For example, Quinlan v. Curtiss-Wright Corp., 204 N.J. 239 (2010), Lippman v. Ethicon, Inc., 222 N.J. 362 (2015), and Meade v. Township of Livingston, ___ N.J. ___ (December 30, 2021) (A-52-20) (Docket No. 085176), were each litigated for six to ten years by the three small plaintiffs' employment law firms whose attorneys have signed this letter. The defendants in two of those cases were represented by two of the largest law firms in the State. No individual plaintiff would have been able to fund those cases on an hourly-fee basis. Those cases would not have been possible without contingent-fee agreements and statutory fee sifting.

The need to incentivize competent counsel to undertake employment litigation on a contingent-fee basis stems from several factors. First, the ultimate objective in most cases is to prove a defendant's state of mind in making an adverse employment decision. That makes employment cases exceedingly difficult for plaintiffs to win. The risk of non-payment is often high. Second, the litigation is labor intensive. The typical personal injury case might only involve four brief depositions (that of each party and each party's expert), a hundred pages or so of documents, and minimal motion practice. In contrast, most employment cases involve ten to twenty lengthy depositions, tens of thousands of pages of documents, and complex extensive motion practice. Third, the damages available in employment cases can be cut off at a moment's notice when, for example, the employee finds a new job. Some bona fide employment discrimination cases involve no economic losses at all. Fourth, whereas most personal injury cases are covered by some form of insurance, many employers do not have employment practices liability insurance, making it harder to settle cases. Fifth, even in successful cases, plaintiffs' attorneys carry contingent-fee cases without any payment for years. Last, the emotional aspect of employment litigation on both sides of the case makes such cases difficult to settle.

All of the foregoing factors make it an economic challenge for a lawyer to practice plaintiffs' employment law exclusively. However, focusing on employment law either exclusively or almost exclusively is necessary to keep up on new developments and maintain sufficient expertise. It is the only way to level the playing field between plaintiffs who have lost their jobs and large employers represented by entire employment law departments staffed with multiple attorneys who exclusively practice employment law. Without fee shifting and contingent-fee agreements tailored to the specific circumstances of particular cases, employment plaintiffs will be left with incompetent counsel or no counsel at all contrary to legislative intent.

We respectfully submit that several of the Committee's recommendations would undermine the statutory enforcement schemes of the workplace discrimination laws, rendering it more difficult or even impossible for aggrieved employees to obtain competent counsel and less likely that employee rights will be vigorously protected the way they have been over the past several decades.

II. "Bad Facts Make Bad Law"

The case that caused the Supreme Court to ask the ACPE to make recommendations regarding ethics issues relating to retainer agreements in statutory fee-shifting cases demonstrates why the aphorism "bad facts make bad law" exists. In Balducci v. Cige, 240 N.J. 574 (2020), the plaintiff's attorney attempted to enforce a completely unconscionable retainer agreement. Although the agreement purported to provide for a contingent fee, it required the client to pay the lawyer's hourly fees at the conclusion of the litigation *even if there was no recovery for the client*. Indeed, it was a true "heads I win, tails you lose" proposition. Equally offensive, the agreement required the client to pay $1.00 per fax transmission and *$1.00 for every e-mail sent or received.*

None of the signatories to this letter has such outrageous provisions in his or her retainer agreements or has heard of any other reputable plaintiffs' employment lawyers imposing such unreasonable terms on clients. Put bluntly, the Cige retainer agreement was an outlier of shocking proportions. We respectfully submit that neither the Committee nor the Court should make policy decisions regarding retainer agreements in statutory fee-shifting cases based on such a disgraceful and unique set of facts.

Common alternatives to full hourly-fee compensation in employment cases include the following: reduced hourly fees with a reduced contingent fee, capped retainer fees at certain points in the litigation with a full contingent fee reduced by the retainer fees that have been paid, a single retainer fee with a contingent fee, and a pure contingent fee. There is no standard engagement letter or standard fee because there is no standard case. Each case is fact-specific. Some low-damage cases may involve important but unsettled questions of law relating to fundamental civil rights. Such cases transcend the private interests at stake in the case; the cases have the potential to reshape employee relations in a manner that benefits the public at large. See, e.g., See, e.g., Lehmann v. Toys R' Us, Inc., 132 N.J. 587 (1993) (recognizing cause of action for hostile work environment sexual harassment). Having qualified counsel on such a case is paramount. A fee agreement tailored to the economic realities of such a case may differ from the fee agreement in a case that presents the prospect of a large economic recovery. One size does not fit all.

In certain cases, our firms have utilized fee agreements that provide that in the event of settlement, the contingent fee is the greater of a specified percentage or the hourly-fee value of the work done. However, such provisions only apply when there is a recovery for the client. More important, as set forth in Rule of Professional Conduct 1.2(a), only the client has the

authority to settle the case. Those of us who utilize such provisions always explain to the client at the outset of the representation and during settlement negotiations that veto power remains with the client. Put another way, if the defendant's offer does not leave the client with a satisfactory recovery net of attorneys' fees, the client can simply refuse to settle.

Of course, the foregoing issue only arises in the event of a settlement. When there is a verdict and fee-award for the plaintiff, the contingent-fee litigation retainer agreements of all of the signatories to this letter provide that the contingent fee is the greater of (a) the specified percentage of the sum of the damages award and the statutory court-awarded fee award or (b) the entire court-awarded fee. That fee award is not paid by the plaintiff; it is paid directly by the wrongdoer.

III. Comments on the ACPE Recommendations

The signatories to this letter have no objections to Recommendations 1 (requiring disclosure and explanation of fee and cost provisions in retainer agreements, which ethical plaintiffs' employment lawyers already do), 5 (rendering a contingent-fee retainer agreement in which there is no risk of nonpayment presumptively unreasonable), 6 (rendering a contingent-fee retainer agreement in which the contingent-fee percentage is applied to the sum of the damages award and the fee award presumptively reasonable), and 9 (not requiring proportionality between the fee award and the damages award, which has been the law under New Jersey Supreme Court jurisprudence for over 25 years). See Szczepanski v. Newcomb Medical Center, 141 N.J. 396 (1995).

A. Recommendation 2 (Estimated Fees and Costs and Range of Value of Case Set Forth at the Initiation of Representation)

While it would be ideal if counsel could estimate the fees, costs, and value of the case at the outset of representation, that is simply not practical.

First, there is always a dramatic information imbalance at the commencement of any employment matter that disfavors the employee and his or her counsel. The employer often has exclusive access to the most significant documents, and the vast majority of the witnesses are usually current employees who will not cooperate with plaintiff's counsel for fear of retaliation. This inherent knowledge disparity renders it very difficult to judge the strength of liability prior to litigation and discovery. Second, the plaintiff's economic and emotional damages can be altered dramatically by events that have not occurred yet when representation begins, such as how long it will take the plaintiff to find another job and how the compensation at replacement employment compares with the plaintiff's compensation from his former employer. Third, the cost of litigation is only partially within plaintiff's counsel's control. Defense counsel can and often do double or triple the cost of litigation by taking unreasonable positions.

For all of these reasons, it is not practicable to require plaintiffs' employment lawyers to estimate fees, costs, and settlement value at the initiation of representation. Such predictions would be nothing more than speculation.

B. Recommendation 3 (Continuing Obligation to Inform Clients About Rising Fees and Costs)

This recommendation imposes a special obligation on plaintiffs' attorneys in fee-shifting cases to inform their clients of additional fees and costs on an ongoing basis. However, if that duty is to be imposed, it should be imposed equally on both plaintiffs' and defense counsel in employment litigation. Indeed, it should be imposed on all attorneys in all matters.

We suggest that the Court require both plaintiffs' and defendants' counsel in employment litigation to inform their clients *and adversaries* in writing every quarter as to what the fees and costs incurred to date are. Requiring such an exchange of billing data will assist the parties in evaluating their settlement positions and encourage early settlement.

It is at least equally important to impose this obligation of continuing disclosure on defense counsel, as they are more likely to have a conflict of interest with their clients regarding billing. Most often, plaintiffs' employment lawyers are compensated on some form of a contingent-fee basis. Thus, they have a built-in financial incentive to work efficiently and resolve matters quickly. On the other hand, defense attorneys are normally paid by the hour throughout the life of the litigation. Thus, they make more money the longer the case lasts and the more intensely it is contested. Settling early is not in defense counsel's personal financial interest, even if it is in the defendant-client's best interest. Put another way, defense attorneys always have an inherent conflict of interest with their clients in a way that plaintiffs' attorneys rarely do. That conflict incentivizes unscrupulous defense counsel to engage in scorched-earth litigation tactics that needlessly escalate the fees for both sides and often result in verdicts and fee awards many times greater than the plaintiff's settlement demand.

C. Recommendation 4 (Obligation to Notify Client That Fees and Costs Are Likely to "Invade" Client's Recovery)

This recommendation rests upon a complete misunderstanding of the nature of plaintiffs' employment litigation retainer agreements. The signatories to this letter and all of the competent and ethical plaintiffs' employment lawyers in this State generally enter into pre-litigation retainer agreements that provide for (1) an hourly fee with an upfront retainer fee, (2) a capped retainer fee with a reduced contingent fee, or (3) a straight contingent fee. The contingent fees are a simple percentage of the recovery. Consequently, there is no "invasion" of the client's recovery as the time and costs expended increase. The use of the word "invade" is offensive and misguided. It reflects a management bias against plaintiffs' attorneys and denigrates the fundamental role we serve empowering victims of unlawful employment practices to vindicate their civil rights in court. Indeed, in many cases, the attorneys' fees billed by defense counsel exceed the sum of the settlement or verdict plus the fees billed by plaintiff's counsel. In cases

involving private employers, do defense counsel's fees "invade" shareholder equity? In cases involving public employers, do defense counsel's fees "invade" the public fisc?

In litigation, the vast majority of plaintiffs need a contingent-fee arrangement of some sort, as they cannot afford to pay hundreds of thousands of dollars in fees and costs to protect their statutory civil rights. However, if the defendant refuses to negotiate seriously until late in the litigation (which is often the case, as many employers wait for summary judgment to be denied to them before offering significant sums in settlement), the plaintiff's attorneys' fees and legal costs may dwarf the potential damages and become the real driver in any negotiation. To avoid clients obtaining a windfall under those circumstances at the expense of fair compensation to their counsel, competent and ethical plaintiffs' employment lawyers in New Jersey generally frame their litigation contingent fees as the greater of the specified percentage of the recovery or the hourly-fee value of the work they have performed in the event of a pre-judgment settlement. However, there is no "invasion" of the client's recovery, because as explained above, the client always retains the sole authority to settle the matter. If the client is not satisfied with the net recovery after payment of the lodestar value for the work, he or she can decline to settle.

In the event of recovery after an award of statutory fees and costs by the court, most competent and ethical employment attorneys provide in their litigation retainer agreements that the contingent fee will be the greater of the specified percentage of the sum of the damages and court-awarded fees or the entire fee award. Again, there is no "invasion" of the client's recovery. In the first instance, the client is getting part of the fee award just as the attorney is getting part of the damages award. In the second instance, the client is receiving everything the jury awarded him or her in damages, and the attorney is getting the court-awarded fee, which is paid by the defendant, not the plaintiff.

For the foregoing reasons, it is not necessary to require plaintiffs' employment lawyers to inform their clients of some illusory potential "invasion" of their recovery. In addition, it is almost impossible for the attorney to predict when fees will exceed damages, unless the economic loss is liquidated (as when the plaintiff has fully mitigated his or her lost pay with full replacement employment) and there is no chance for unliquidated damages, such as emotional and punitive damages. The foregoing conditions are exceedingly rare in most statutory employment cases.

D. Recommendation 7 (A Retainer Agreement May Not Prohibit Client from Settling Case When Settlement Waives Lawyer's Fee Award)

The signatories to this letter do not quarrel with this recommendation itself. Of course, no retainer agreement can ethically limit a client's unilateral authority to settle the case. However, we ask the Court to prohibit defendants from conditioning settlement of fee-shifting cases on the waiver of the attorney's right to a fee award, regardless of whether the plaintiff's counsel is engaged in the private practice of law or practicing at a public interest law firm.

In Pinto v. Spectrum Chemicals and Laboratory Products, 200 N.J. 580 (2010), the Court held that defendants in employment cases with statutory fee-shifting may not condition settlement on a waiver of the plaintiff's attorney's statutory right to apply for a fee award. Justice Albin made the following observations in his opinion for a unanimous Court:

> [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. 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.
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> [Id. at 599.]

Based on that rationale, the Court "bar[red] defendants from demanding fee waivers as a condition of settlement in fee-shifting cases involving public-interest law firms." Id. at 600.

However, the reasoning of Pinto applies with equal force to private plaintiffs' attorneys. Consequently, the Court should extend its holding in Pinto to apply to all plaintiffs' lawyers in statutory fee-shifting cases. Doing so prevents defense counsel from using a "divide and conquer" approach to settlement negotiations that pits the plaintiff and his or her counsel against one another. Allowing the creation of such conflicts of interest undermines the very purpose of fee shifting, which is to incentivize competent counsel to handle such cases so that the public interest in protecting employee civil rights is vindicated.

E. Recommendation 8 (Requiring Lawyers Charging a Contingent-Fee Percentage Higher than 33.3% to Inform the Client that Their Fee is Higher than the Presumptive Contingent-Fee Percentage)

This recommendation completely undermines the Court's deliberate exclusion of employment cases for the contingent-fee cap in the court rules. The Court purposefully excepted employment cases from the cap as part of its rule-making process. Thus, there is no "presumptive" contingent-fee percentage in employment cases. Underlying that intentional decision was the considered conclusion that it is appropriate and necessary for plaintiffs' attorneys in employment cases to charge more than a one-third contingent fee. The Committee's recommendation that plaintiffs' employment lawyers be required to inform clients that any contingent-fee percentage greater than one third is "higher than the presumptive percentage of the recovery amount" is an effort to undermine the ability of plaintiffs' employment lawyers to charge the contingent-fee percentages necessary to make the exclusive practice of plaintiffs' employment law economically feasible. Discouraging lawyers from becoming experts in this

complex area of law does not advance the public interest of eradicating the cancer of discrimination; it stifles it.

IV. Conclusion

Thank you for providing us with this opportunity to offer input based on our practical experience representing employees in statutory fee-shifting cases.

Respectfully yours,

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