CONSUMERS LEAGUE OF NEW JERSEY

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(VIA EMAIL: Comments.Mailbox@njcourts.gov)
Honorable Glenn A. Grant
Acting Administrative Director of the Courts
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Retainer Fee Agreements in Statutory Fee-Shifting Cases

Dear Judge Grant:

We write on behalf of the Consumers League of New Jersey in response to the November 19, 2021 request for comments on recommendations by New Jersey Supreme Court Advisory Committee on Professional Ethic's ("Committee") relating to retainer fee agreements in statutory fee-shifting cases. The Consumers League respectfully submits the following comments to the Committee's recommendations:

1. We agree with the Committee with respect to Recommendation No. 1 in that it is consistent with the baseline ethical obligations set forth in Rules of Professional Conduct 1.4(c) and 1.5(b) and case law. *See, e.g., Balducci v. Cige,* 240 N.J. 574 (2020) (holding that lawyer must explain charges and costs, beyond the hourly rate, *id.* at 592, and disclose charges for identifiable costs at the beginning of the representation, id. at 604); *Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn*, 410 N.J. Super. 510,531 (App. Div. 2009), certif. den. 203 N.J. 93 (2010) (requiring full and complete disclosure of all charges that may be imposed upon the client); *see also* Michaels, New Jersey Attorney Ethics 33:4-1(2019).

However, we note that Recommendation No. 1 was not unanimous, several Committee members having been in favor of expanding the requirements to include an oral review of all provisions of the fee agreement. It is our position that this expansion would be counterproductive, in that it would detract from, and de-emphasize, the required oral discussion concerning fees.

In addition, consistent with the goals of Recommendation No. 1, we suggest that each fee agreement contain a statement acknowledging that the lawyer and client have orally discussed the hourly rate(s) and the identifiable costs and charges that may be imposed on the client.

2. We agree with Recommendation No. 2, to the extent that it is consistent with the existing obligation to disclose information required by Rules of Professional Conduct 1.4(c) (duty to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation") and 1.5(a) (the lawyer's fee "shall be reasonable"). However, we disagree with the Committee's Recommendation that lawyers provide clients with an estimate of fees and costs at the initiation of representation. As an initial

matter, statutory fee-shifting claims provide for an award of reasonable attorneys fees and costs to the party pursuing those claims. In practice, many attorneys prosecuting such claims do not seek fees or costs from their clients personally during the course of the litigation, but instead seek to recover fees from the adverse party contingent upon a successful outcome or settlement. In such instances, an estimate of fees and costs, or discussion of factors that could escalate fees, does not provide meaningful information to the client as to the value of their claims.

Furthermore, we note that the Committee bases its recommendation, in part, on a finding that fees and costs may invade, or even exceed, the client's recovery. We disagree. Statutory fee-shifting claims provide that fees and costs may be sought directly from the adverse party in instances of a successful outcome or settlement. The legislative award of fees and cost is separate and apart from any actual or statutory damages available to the client. As such, the fees and costs in fee-shifting cases do not "invade" or "exceed" the client's recovery because they are an entirely separate component. *See e.g.* New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-19 (providing for an award of "threefold damages sustained by any person interest" and "shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit."); New Jersey Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. § 56:12-17 (providing for a recovery of "a civil penalty of not less than $100 or for actual damages, or both at the election of the consumer, together with reasonable attorney's fees and court costs"); Truth-in-Lending Act, 15 § U.S.C. §1640(a)(1) and (3) ("actual damage" and "the costs of the action, together with a reasonable attorney's fee"); Real Estate Settlement Procedures Act, 12 U.S.C. § 2601(f)(1) and (3) ("[i]n addition to [actual damages or additional damages as the court may allow]," the court may also award "the costs of the action, together with any attorneys fees [...]); Fair Debt Collection Practices Act, 16 U.S.C. 1692k(a)(1) and (3) (the court may award "actual damages" as well as "the costs of the action, together with a reasonable attorney's fee"); New Jersey Law Against Discrimination, § N.J.S.A. 10:5-27.1 ("the prevailing party may be awarded a reasonable attorney's fee as part of the cost"); New Jersey Civil Rights Act, N.J.S.A. § 10:6-2(f) ("in addition to any damages, civil penalty injunction or other appropriate relief awarded in an action brought [...] the court may award the prevailing party reasonable attorney's fees and costs"). As such, the fees and costs in fee-shifting cases do not "invade" or "exceed" the client's recovery because they are an entirely separate component.

Finally, in many fee-shifting cases, the fees are typically driven by defendants' aggressive defense of the action. What begins as a straightforward statutory violation claim, for example, can quickly become a protracted litigation with fees on both sides eclipsing the amount at issue for the clients. Under these circumstances, it is impossible for a plaintiff's lawyer to accurately estimate the fees that will be incurred before litigation is even initiated, and such inaccurate estimates could result in confusion for the client and strain on the attorney-client relationship. *See Balducci, supra* ("mandating that LAD attorneys – or attorneys in other fee-shifting cases – 'provide examples of how much hourly fees [and costs] have totaled in similar cases" imposes a difficult, if not impossible task.")

While we disagree with Recommnedation No. 2, we recognize the obligation of Rule of Professional Conduct 1.4(c) and 1.5(a), and that there may be instances where a lawyer pursuing fee-shifting claims seeks to collect fees and costs from its client personally. Accordingly, we suggest that the Committee's Recommendation for an estimate of fees and costs only be required in instances where the lawyer intends to collect fees and costs personally from the client during the course of the litigation, and that such an estimate not be required in instances where the lawyer anticipates fees and costs to be paid by the adverse party and not by the client.

3. With respect to Recommendation No. 3, we refer to the Committee to our comment to Recommendation No. 2.

4. We disagree with Recommendation No. 4. We note that the Committee's recommendation in this regard relates to circumstances where the fees and costs invade a client's recovery, leaving the client with "nothing to gain, financially, from continuing the suit." Such a concern is not present in statutory fee-shifting claims, and further fails to consider claims where the client is pursuing injunctive relief only. In fee-shifting cases, where the client is not paying the attorney's fees directly, the recovery of damages and the recovery of attorneys' fees are treated separately. *See, supra,* comment to Recommendation No. 2. In the context of a settlement, relief for the client is negotiated first and separately from any discussion of attorneys' fees. Similarly, in the context of a trial, relief for the client is awarded separately from an award of attorneys' fees. In either case, the attorneys' fees will frequently "exceed" the client's recovery in dollar value, but will *not* diminish the relief obtained by the client. As such, the Committee's concerns with respect to Rule of Professional Conduct 1.4(c) and 1.5(a) are misplaced in the instance of statutory fee-shifting claims. With this in mind, we suggest that Recommendation No. 4 include an explicit statement that it "does not apply to fee-shifting cases."

Furthermore, we note that the Committee recommends that a lawyer "must obtain informed consent" from the client to continue litigation where the client continues for the purpose of assisting the lawyer to recover monies for legal services rendered. Again, and as recognized by the Committee, fee-shifting cases focus on a remedy that upholds an important public policy moreso than the payment of a monetary award. These cases often result in a damages award that is lower than the dollar value of the attorneys' fees and costs. However, this is intentional – the Legislature intended such a result to assure that counsel for litigants will receive reasonable compensation for services. *See Szczepanski v. Newcomb Medical Center*, 141 N.J. 346, 365-66 (1995). The Committee recognizes that lawyers should continue to have an incentive to represent clients in these types of cases, and that clients should have access to justice to pursue such claims. We respectfully find that requiring counsel to re-negotiate the terms of their retention and fee agreement mid-way through litigation for the purposes of foregoing compensation fails to meet those policy concerns and risks disincentivizing counsel to prosecute such claims.

5. We disagree with Recommendation No. 5 in that it is inconsistent with Rule 1.5(a) and *Rendine v. Pantzer,* 141 N.J. 292 (1995). In practice, many attorneys prosecuting such claims do not seek fees or costs from their clients personally during the course of the litigation, but instead seek their fees on a contingent basis in the event of a successful outcome or settlement. There may be instances, however, where there is no risk of nonpayment because the client must pay the lawyer *regular* hourly rate fees or a retainer even if there is no recovery. We fail to see how payment of a regular hourly rate or a high retainer fee should be "presumptively" unreasonable. Rule of Professional Conduct Rule 1.5(a) governs the reasonableness of attorney's fees, setting forth the factors to be considered in determining the reasonableness of the fee. There is no prohibition contained therein on compensation at a "regular" hourly rate, nor does Rule 1.5(a) prohibit a lawyer from guarding against the risk of nonpayment by seeking its reasonable hourly rates from the client personally in the event that fees are not recovered from the adverse party.

In the case relied upon by the Committee in its Recommendation, *Balducci v. Cige*, the fee agreement at issue provided for a regular hour rate fee **or** a contingency of 37.5%. The Court rejected such agreement due to the "element of uncertainty of recovery," and the potential for contingent fee award much larger than an hourly rate. *See* 240 N.J. at 598. In other words, the

fee arrangement in *Balducci* was unreasonable because of the uncertainty surrounding the fee, coupled with the potential for a contingency fee award that would be significantly in excess of the lawyer's regular hourly fee. Accordingly, this arrangement resulted in a fee potential that was inconsistent with the factors set forth Rule 1.5(a). However, the Supreme Court in *Balducci* did not state that a regular hourly fee is presumptively unreasonable in instances where an award of attorney's fees is contingent upon outcome, as the Committee suggests in its Recommendation. Indeed, the Court recognized that "[f]ee arrangements that provide incentives to lawyers to undertake the representation of clients who are unable or unwilling to pay an hourly rate are also permissible" and that contingent fees must still conform to the rule of reasonableness articulated in RPC 1.5(a). *Id.* at 598.

We find that the Committee's Recommendation in this regard effectively nullifies a lawyer's ability to guard against a risk of nonpayment and suggest that the Committee make no such recommendation that a contingency fee agreement is presumptively unreasonable, but instead continue to permit all fee arrangements to be guided by the requirements of RPC 1.5(a).

6. We have no comment as to recommendation No. 6.

7. We strongly disagree with Recommendation No. 7. It is our position that the protection from unfair "pick off" settlement offers by defendants be extended to protect private attorneys as well as public service attorneys. The Recommendation of the Committee in this regard could have the practice result of effectively eliminating compensation for private counsel, giving rise to a dearth of access to justice with regard to important civil, statutory and constitutional rights. *See Szczpanski v. Newcomb Medical Center*, *supra*, (1995) (fee-shifting provisions were "intended to assure that counsel for litigations like plaintiff will receive reasonable compensation for services reasonably rendered to effectuate the LAD's objectives"). Such a recommendation would undoubtedly be used as a tool by defendants to circumvent the statutory requirement for payment of attorneys fees in a number of important claims (see Comment to Recommendation No. 2) and gravely impact the availability of counsel to pursue cases that uphold important principles. The bar on defendants demanding a waiver of attorneys' fees that was addressed on *Pinto v. Spectrum Chemical and Laboratory Products*, 200 N.J. 580, 599-600 (2010), must be extended to all fee-shifting cases.

The Committee has unequivocally acknowledged "that settlement negotiations in fee-shifting cases present counsel with an ethical dilemma." We believe that it is unrealistic to suggest that private attorneys can hedge against this dilemma "by including alternative fee arrangements in the retainer agreement that require the client to pay reasonable legal fees," particularly in light of the Committee's Recommendation No. 5. The legislative purpose of fee-shifting is to provide an environment in which attorneys will accept cases in which a low-dollar recovery is likely, but a greater good will be achieved. In this regard, the role of public service attorneys and private attorneys is perfectly coincident. As such, the bar on defendants demanding a waiver of attorneys' fess as a condition of settlement should be extended to private attorneys.

8. We agree with Recommendation No. 8. Again, we note that higher fees and costs do not necessarily "invade a client's recovery." In statutory fee-shifting cases, where the client is not paying the attorney's fees directly, the recovery of damages and the recovery of attorneys' fees are treated separately. In the context of a settlement, relief for the client is negotiated first and separately from any discussion of attorneys' fees. Similarly, in the context of a trial, relief for the client is awarded separately from an award of attorneys' fees. In either case, the attorneys' fees will frequently "exceed" the client's recovery in dollar value, but will *not*

diminish the relief obtained by the client. As such, the Committee's concerns with respect to RPC 1.4(c) are misplaced in the instance of statutory fee-shifting claims.

We note that the public policy surrounding fee shifting is not just designed to "enhance the client's recovery," but also to make counsel available to clients. *See Szczpanski v. Newcomb Medical Center*, *supra*, (1995) (fee-shifting provisions were "intended to assure that counsel for litigations like plaintiff will receive reasonable compensation for services reasonably rendered to effectuate the LAD's objectives"). Statutory fee-shifting claims are legislatively designed to incentivize counsel to represent clients who have claims with low dollar value in the interest of protecting important civil, statutory, and constitutional rights. This is particularly prevalent in the consumer context. Application of the formula set forth in Rule 1:21-7(c) to statutory fee-shifting claims disregards that public policy concern. If, for example, a consumer has a claim valued at $400, application of the statutory percentage in Rule 1:21-7(c) would limit a lawyer's fee to $133. It is unlikely any attorney would undertake what could be protracted litigation for such a nominal fee. The result is that the consumer is left with without representation, and the untoward defendant would have license to continue to exact these small-dollar violations of New Jersey law without recourse. We do not agree that that such a result is consistent with New Jersey law or policy. "Fee-shifting statues do not 'require proportionality between damages recovered and counsel-fee awards even if the litigation ... vindicates no rights other than those of the plaintiff.'" *Balducci v. Cige*, 240 N.J. at 560, citing *Szczepanski v. Newcomb Med. Ctr., Inc.*, 141 N.J. 346 (1995); *see also Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1, 23.

9. We agree with Recommendation No. 9 and reiterate those reasons set forth in Recommendation No. 8.

We thank the Committee for the opportunity to comment and for its continued service to the legal profession and the public.

Respectfully,

Robert J. Russo
President, Consumers League of New Jersey