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THE RUSH TO REMEDIES: SOME CONCEPTUAL QUESTIONS ABOUT NONREFUNDABLE RETAINERS

STEVEN LUBET*

*In a recent article published in the North Carolina Law Review, Professors Lester Brickman and Lawrence A. Cunningham argued in favor of an ethics rule banning all use of nonrefundable specific retainers. This proposal was based on their conclusion that none of the proffered rationales in favor of nonrefundable retainers is sufficient to justify the impact on the client's discharge right occasioned by such fee practices. The New York Court of Appeals in *In re Cooperman* substantially adopted the conclusion of Professors Brickman and Cunningham and held nonrefundable retainers to be unethical.*

Professor Lubet analyzes the arguments set forth by Brickman and Cunningham and concludes that, while their position has persuasive appeal, significant questions must still be answered before it can be deemed compelling. While he agrees that Brickman and Cunningham's paradigm cases of criminal defendants and domestic litigants pose risks of attorney overreaching, he questions why a complete ban, as opposed to restrictions similar to those applicable to contingent fees, is necessary. Having pointed out these shortcomings in Brickman and Cunningham's argument, Professor Lubet concludes by urging them to give further consideration to this issue in the hope that they can dispel his concerns.

I. INTRODUCTION

What is to be done about lawyers who gouge their clients? Is it sufficient to locate and punish the miscreants? Or is it necessary to outlaw those fee practices most likely to be misused?

Identifying an injustice often is easier than prescribing a suitable solution. In cases of individual damage, constructing a remedy that appropriately balances compensation, deterrence, and incentive may

* Professor of Law, Northwestern University. I am grateful to Professors Stephen Gillers, John Leubsdorf, and John Elson for their helpful comments on earlier drafts of this essay. I received valuable research assistance from Catherine Lamsens. Research for this paper was supported by a grant from the Stanford Clinton, Sr. Faculty Fund of Northwestern University.

be difficult.¹ On a policy level the issues are even more complex. What sorts of wrongdoing justify government intervention, and which should be left to individual redress? If the government is to be involved, should that involvement be civil, regulatory, or criminal? How much leeway, if any, should be given to individuals to contract around provisions of the law?

Concerning the relationship between professionals and clients, the question of government supervision is especially troublesome. Recognizing that a free society is well served by maximizing individual access to the counsel and services of lawyers, physicians, clergy, and others, Americans traditionally have hesitated to allow government to intrude on the sanctity of the relationship between professionals and their individual clients.² On the other hand, it is impossible to ignore the potential for professionals to take advantage of their position by abusing, exploiting, or overcharging their clients.

The same impulse that motivates the current national campaign to contain medical costs also compels a close examination of certain questionable fee practices of lawyers. As with medical expenses, any proposed remedy must be calibrated carefully to resolve the identified problem without creating new ones. Just as it would not be acceptable to reduce medical expenditures in a way that would result in severely diminished services, the law should not rush to circumscribe attorneys' fees in a way that will limit client freedom or professional autonomy.

Professor Lester Brickman has performed great service with a series of articles addressing problems in the area of attorney fees.³ In

1. Balancing of compensation, deterrence, and incentive has been used to analyze a variety of legal problems. See, e.g., Jennifer H. Arlen, *Compensation Systems and Efficient Deterrence*, 52 MD. L. REV. 1093 (1993) (balancing compensation with deterrence regarding tort system); Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279 (1992) (balancing compensation with deterrence regarding takings); Saul Levmore & William J. Stuntz, *Remedies and Incentives in Private and Public Law: A Comparative Essay*, 1990 WIS. L. REV. 483 (1990) (analyzing incentive effects in a variety of legal topics by exploring the competition between damage and disgorgement remedies); Stephen F. Williams, *Second Best: The Soft Underbelly of Deterrence Theory in Tort*, 106 HARV. L. REV. 932 (1993) (suggesting that system of liability based on optimal deterrence cannot be expected to achieve optimality with respect to health and safety hazards).

2. It should be recalled, for example, that the original basis for the decision in *Roe v. Wade* was the need to protect the physician-patient relationship from undue intrusion. *Roe v. Wade*, 410 U.S. 113, 156 (1973).

3. Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. REV. 1 (1993) [hereinafter Brickman & Cunningham, *Retainers Revisited*]; Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law*, 57 FORDHAM L. REV. 149 (1988) [hereinafter Brickman & Cunningham, *Retainers Impermissible*]; see also Lester Brickman & Jonathan Klein, *The Use of Advance Fee Attorney Retainer Agreements in Bankruptcy: Another Special Law for Lawyers?*, 43 S.C. L. REV. 1037 (1992) (suggesting that Bankruptcy

particular, he and Professor Lawrence Cunningham have attacked the apparently common use of nonrefundable retainers.⁴ It is their conviction that all nonrefundable retainer agreements are unethical.⁵ The important New York Court of Appeals recently adopted their position.⁶

The nonrefundable retainer seems like a good target for those seeking to reform lawyers' fee practices. Brickman and Cunningham point out that nonrefundable retainers are frequently used in divorce and criminal cases, where clients often are extremely vulnerable to lawyer exploitation and overreaching.⁷ Unscrupulous practitioners can use (or attempt to use) such retainers to extract payment for work that is never performed. In *In re Cooperman*,⁸ for example, the court suspended a lawyer who refused to refund a client's advance payment, despite the lawyer's utter failure to provide any legal services.⁹

As a teacher of legal ethics, I would like very much to support Brickman and Cunningham in their campaign. Nonrefundable retainers, as Brickman and Cunningham describe them, seem sleazy and un-

Code may prohibit advance fee payments); Lester Brickman, *Setting the Fee When the Client Discharges a Contingent Fee Attorney*, 41 EMORY L.J. 367 (1992) (arguing that discharged attorneys employed on a contingency fee basis should not be entitled to a fee in excess of the contract percentage) [hereinafter Brickman, *Setting the Fee*].

Professor Brickman is also the principal author of a recent study criticizing the current use of contingent fees and proposing changes in the manner of their calculation. Peter Passell, *Windfall Fees in Injury Cases Under Assault*, N.Y. TIMES, Feb. 11, 1994, at A1.

4. See Brickman & Cunningham, *Retainers Revisited*, *supra* note 3 *passim*. Defining a nonrefundable retainer as "a fee paid by a client in advance of services and denominated by the lawyer as nonrefundable, irrespective of whether the client discontinues the representation or whether the lawyer does any work," Brickman and Cunningham object to their use under any circumstances. *Id.* at 3.

It is always good to see law professors stand up for clients. Far too much legal scholarship is devoted to arcana such as economic modeling or game theory. While there is nothing wrong or bad about abstraction, it is also important that the academy devote serious attention to the concrete issues that arise between lawyers and clients.

5. See Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 38-39. This position goes beyond Brickman and Cunningham's earlier conclusion that "most nonrefundable retainers are legally and ethically impermissible," Brickman & Cunningham, *Retainers Impermissible*, *supra* note 3, at 153 (emphasis added), and that "one can conceive of circumstances, however unusual, in which a nonrefundable retainer may be valid," *id.* at 188.

6. *In re Cooperman*, 633 N.E.2d 1069, 1072 (N.Y. 1994); see also *In re Cooperman*, 591 N.Y.S.2d 855, 859 (N.Y. App. Div. 1993) (*per curiam*) (holding that nonrefundable retainers are unethical); *Brandes v. Zingmond*, 573 N.Y.S.2d 579, 582 (N.Y. Sup. Ct. 1991) (holding that nonrefundable retainers are invalid under contract law). New York appears to be the only jurisdiction whose highest court has directly considered whether nonrefundable retainers are flatly unethical.

7. Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 12.

8. 591 N.Y.S.2d 855, 859 (N.Y. App. Div. 1993).

9. *Id.* at 858.

ethical. Who can argue that clients are not entitled to the return of unearned fees? Why should lawyers be able to keep money for work that was never done?

Nonetheless, Brickman and Cunningham's work, at least to date, raises a number of unanswered questions. They certainly make out their case that nonrefundable retainers can be a bad thing. But there has always been a case-by-case rule against charging excessive fees,¹⁰ and another longstanding rule requires lawyers to refund unearned fees upon withdrawal from representation.¹¹ Those well-established professional rules would seem to provide a sufficient basis on which to discipline lawyers who, in fact, gouge, cheat, or otherwise exploit their clients.

Brickman and Cunningham, however, take the position that all nonrefundable retainers are per se unethical, no matter how drafted. They believe that such arrangements should be strictly proscribed, and that even contractual attempts to circumvent this prohibition should expose lawyers to professional discipline.¹² According to Brickman and Cunningham, an attorney would be in trouble simply for requesting that a client agree to a nonrefundable retainer, whether or not the retainer actually harmed the client,¹³ and regardless of the client's sophistication or the nature of the negotiation.¹⁴ Much as my sentiments impel me to agree with Brickman and Cunningham, I fear that such a blanket proscription requires stronger justification than has yet been offered.

The balance of this essay details the difficulties apparent in Brickman and Cunningham's analysis of the nonrefundable retainer problem. These criticisms are offered in a spirit of general agreement with the goal of enhanced client protection, and I hope that there are answers for all of my questions.

10. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1981).

11. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(d) (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A)(2) (1981).

12. Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 39-40. Brickman and Cunningham's view on these issues seems to have hardened following the ruling of the intermediate appellate court in *In re Cooperman*, 591 N.Y.S.2d 855 (N.Y. App. Div. 1993) (per curiam). See Brickman & Cunningham, *Retainers Impermissible*, *supra* note 3, at 153, 188.

13. Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 10.

14. Cf. Brickman & Cunningham, *Retainers Impermissible*, *supra* note 3, at 179 (noting that a party's sophistication may be relevant).

II. CLIENT AUTONOMY AND WAIVER

A. *Autonomy*

Brickman and Cunningham give little weight to the possibility that a nonrefundable retainer might be the product of rational negotiation between attorney and client. Likewise, the *Cooperman* court declared nonrefundable retainers flatly unethical, thereby placing them beyond the pale of legitimate agreement.¹⁵ They may be right. Perhaps nonrefundable retainers are so unconscionable that no sane client would ever consent to one. That position, however, cannot be made convincing without taking greater account of client autonomy, acumen, and intelligence.

Brickman and Cunningham express the concern that nonrefundable retainers are "used most widely in contexts where client vulnerability is highest"¹⁶—by matrimonial, criminal defense, and bankruptcy lawyers.¹⁷ Because client vulnerability suggests lawyer overreaching, Brickman and Cunningham reject the possibility that a nonrefundable retainer might be the product of a knowing bargain. This sense of an urgent need to shield naive, powerless clients leads Brickman and Cunningham to prefer the sweeping remedy of complete abolition.

But not all clients are vulnerable. Not even all matrimonial, criminal, and bankruptcy clients are susceptible to overreaching. If certain types of cases suggest the need for extra protection, the logical solution would appear to be a restriction on nonrefundable retainers, not a complete ban under all circumstances. Indeed, the New York Court of Appeals took just such an approach to other aspects of attorney's fees by adopting a separate set of rules for domestic relations cases.¹⁸ Similarly, it is unethical in virtually every jurisdiction to charge a contingent fee in divorce or criminal cases, though not in any other kind of litigation.¹⁹ Thus, to regulate fees only in those defined circumstances where regulation is most needed is hardly a novel idea.

15. *Cooperman*, 591 N.Y.S.2d at 856.

16. Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 13.

17. *Id.* at 3; see also P. Thomas Thornbrugh, *The Nonrefundable-Fee Minefield*, A.B.A. J., Apr. 1994, at 105 (noting that nonrefundable retainers are widely used in matrimonial practice).

18. McKinney's 1993 New York Rules of Court § 136.2 (22 NYCRR § 136.2) (relating to binding fee arbitration in matrimonial cases).

It has also been widely suggested that sexual relations between attorneys and clients be made per se unethical in divorce representation, though not necessarily in other types of cases. Lawrence Dubin, *Sex and the Divorce Lawyer: Is the Client Off Limits?*, 1 GEO. J. LEGAL ETHICS 585, 618 (1988); Margit Livingston, *When Libido Subverts Credo: Regulation of Attorney-Client Sexual Relations*, 62 FORDHAM L. REV. 5, 47 (1993).

19. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d) (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(C) (1981).

There are certainly many sophisticated clients in the world, some of whom might knowingly agree to pay a nonrefundable retainer. Corporations have become increasingly adept at negotiating fee agreements; they are frequently represented in these transactions by their own in-house counsel, who are surely attuned to protecting the client's interests in the fee arrangement. At a time when creative billing is all the rage,²⁰ it is imaginable that a business client might want to offer a nonrefundable retainer as an inducement for the attorney to accept a fee cap or a reduced hourly rate. In other words, the client might say, "I will offer you a guaranteed minimum fee, even if you do little or no work, so long as you agree to a maximum charge, no matter how much work you do." Such a shared-risk compact seems eminently sensible,²¹ but it would be anathema to Brickman and Cunningham and, following *Cooperman*, unethical in New York.

Brickman and Cunningham explain in great detail that nonrefundable retainers actually buy little or nothing for the client. They ably refute the argument that a nonrefundable retainer can be seen as payment for an attorney's availability to handle a specific matter.²² What they do not address adequately, however, is the concept of the nonrefundable retainer as an initial inducement to undertake the case—a sort of signing bonus.²³ A truly busy or prominent lawyer could rationally decide to handle only cases that insure, in advance, a certain level of payment.²⁴ A client would have to guarantee that

20. See, e.g., John E. Morris, *Two Pioneers Make a Fixed-Fee Deal Work*, AM. LAW., Dec. 1993, at 5 (recognizing a prominent law firm's successful use of large-scale alternative fee arrangement with the firm's largest litigation client); Randall Samborn, *Vanguard of a Fee Revolt*, NAT'L L.J., Apr. 4, 1994, at A1 (pointing out that a new litigation boutique emphasizes creative billing methods); Stewart Yerton, *The Croesus of Cambridge*, AM. LAW., Apr. 1994, at 63 (noting that one prominent law professor utilizes complex, innovative fee structures in private practice).

21. My daughter's orthodontist utilizes such an approach, which he calls a "closed fee" arrangement. At the beginning of orthodontic care he estimates the likely duration and complexity of the treatment. Based on this projection he then sets a fixed fee, which is paid in advance. If it takes longer than expected to straighten the patient's teeth, the orthodontist loses; if it takes less time, he wins. In either case, the risk of guessing incorrectly is shared with the patient (or, more realistically, with the patient's parents and insurer). In the event that the patient terminates treatment prior to conclusion, a pro rata refund may or may not be given, depending on the circumstances. This appears to be a matter of patient relations and practice economics, rather than dental ethics.

Other orthodontists, I am informed, utilize "open fees," whereby the patient pays for each separate visit and adjustment. Under this system, the patient bears the risk. According to our orthodontist, this arrangement usually results in higher cost to the patient.

22. Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 22-28.

23. The nonrefundable retainer could also function as a reward or incentive for prompt resolution. See *infra* note 96.

24. A few lawyers may be so much in demand that the acceptance of one side of a case, even if the representation is short-lived, will truly and actually preclude them from

amount, in the form of a nonrefundable retainer, to obtain the lawyer's services. Negotiated at arm's length, between equally informed parties, such a transaction seems neither better nor worse than the enormous hourly rates routinely charged by Wall Street partners.

To a vulnerable client, of course, the insistence on a nonrefundable retainer could amount to extortion. A client facing prison, impoverishment, or loss of home and family might well be bullied or slickered into thinking that a garden-variety lawyer is actually one of the prominent elite. This is one of the fears that motivate Brickman and Cunningham.²⁵ Their remedy protects such naive clients, but at the cost of precluding negotiation by all others.

B. Waiver

It does not seem possible for a client to waive the protection of the *Cooperman* rule, even in return for valuable consideration. Brickman and Cunningham propose a corresponding amendment to the ethics rules, providing that "[a]ny effort, by contract or otherwise, to [obtain a nonrefundable retainer] shall be null, void, and unenforceable, and lawyers and law firms involved in making any such effort shall have violated" the rules of ethics.²⁶

The breadth of this proposal is enormous. If adopted, the freedom from nonrefundable retainers would become one of the few unwaivable "rights" of clients. The various ethics codes allow clients to relinquish rights far more fundamental than refundability: Clients can consent to most conflicts of interest;²⁷ they can waive the attorney-client privilege;²⁸ and they can accede to limitations on the objectives of representation.²⁹ Clients can forego the right to proceed against their attorneys for malpractice,³⁰ consent to the aggregate settlement

accepting more lucrative retention by the adverse party. Brickman and Cunningham discount this as a real concern, arguing that the client does "not gain anything as a result of that preclusion." Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 34. What the client gets, however, is the instant retention of the lawyer, who might otherwise decline the case or elect to wait and see if a better offer develops in the same matter. I agree with Brickman and Cunningham that this benefit is ephemeral with regard to most practitioners, but it is quite real in the case of some.

25. *Id.* at 11.

26. *Id.* at 40.

27. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7-1.9 (1992).

28. *Id.* Rules 1.6, 1.9.

29. *Id.* Rule 1.2(c).

30. *Id.* Rule 1.8(h). Indeed, the Model Rules go so far as to allow the prospective limitation of malpractice liability, if the client is separately counseled in making the agreement. *Id.* According to Professor John Leubsdorf of Rutgers University, however, no jurisdiction appears to have allowed or upheld such an agreement. See Letter from Professor

of claims,³¹ and even agree to be sued by their own lawyers.³² Brickman and Cunningham do not explain why refundable fees should be more sacrosanct than competence, loyalty, zeal, or confidentiality.

In this regard, Rule 1.8(a) of the Model Rules of Professional Conduct is instructive, providing that a lawyer "shall not enter into a business transaction with a client" unless the client consents in writing after being given a reasonable opportunity to obtain the advice of independent counsel.³³ The rule recognizes that there is great room for abuse when attorneys engage in business dealings with their clients, but it allows informed clients to waive its protection.³⁴ Indeed, judging from the frequency of reported cases, many more clients have been victimized in the course of business relationships than have been aggrieved by nonrefundable fees.³⁵

Consider the impact of an unwaivable per se rule as it might operate regarding other common fee abuses. In my experience, the overstaffing of cases—assigning three, four, or more lawyers to do work that could just as well be accomplished by one—seems to be at least as significant a problem as nonrefundable retainers.³⁶ Indeed, overstaffing is probably a more insidious problem: A client is aware that she is signing a nonrefundable retainer agreement, but has little way of knowing how many associates are churning out unnecessary work in the back rooms of the law office.³⁷ In Brickman and Cunningham's terms, all clients "give great weight and tremendous defer-

John Leubsdorf to Steven Lubet (May 14, 1994) (on file with the *North Carolina Law Review*).

31. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) (1992).

32. See *Id.* Rule 1.7(a)(2).

33. *Id.* Rule 1.8(a).

34. *Id.*; see also *Id.* Rule 1.8(h) (allowing "agreements prospectively limiting the lawyer's liability to a client for malpractice" if the client is independently represented in making the agreement).

35. See CHARLES WOLFRAM, MODERN LEGAL ETHICS 479-85 (1986). Professor Wolfram lists scores of cases reviewing, and usually rebuking, lawyers who have entered into business dealings with their clients. *Id.* In contrast, Brickman and Cunningham point to only a handful of cases dealing directly with client complaints about nonrefundable retainers. Brickman & Cunningham, *Retainers Revisited*, *supra* note 3 *passim*. A Lexis search in July 1994 identified nearly 300 cases involving Rule 1.8(a) and its various analogs. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-104(A) (limiting business transactions with clients); CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 3-300 (1988) (same). A search of variations on "nonrefundable retainer," however, yielded fewer than 70 cases.

Of course, reported cases are only the tip of the iceberg. There are obviously many more abused clients than there are cases that have reached the appellate courts, but this is equally true of both business dealings and nonrefundable retainers.

36. Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 760 n.392 (1990).

37. *Id.* at 706.

ence to their lawyer's [sic] opinions, judgment and advice" on how the legal work is to be accomplished.³⁸ Imagine, then, a rule that made it always unethical to assign more than two lawyers to prepare for a deposition or to appear in court to argue a motion. Imagine further that this rule was unwaivable, and that attempts to circumvent it could lead to professional discipline.

Virtually all of Brickman and Cunningham's arguments could be made on behalf of such an overstaffing rule. Clients are in an unequal position with regard to determining staffing, preparation, and research needs.³⁹ The unnecessary staffing provides virtually nothing of value for the client.⁴⁰ Indeed, the multiplication of sunk costs even burdens the client's inviolable right to discharge the law firm.⁴¹ Even recognizing the need to limit overstaffing, perhaps through the use of guidelines or presumptions, it is clear that an unwaivable staffing limit would result in an intolerable restriction on the client's right to determine the nature of her own representation.⁴²

Immutable ethics rules constrain clients as well as attorneys. Respect for the autonomy and intelligence of individuals generally requires that they be allowed to choose when they do and do not want protection. Protecting clients by denying them choices is an extreme step. There may be policy reasons that dictate such an approach for nonrefundable retainers,⁴³ but Brickman and Cunningham do not ad-

38. Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 11.

39. *Id.*

40. Is there any doubt that one lawyer could prepare adequately for a deposition? A single lawyer might take longer than a team, but the payoff would be the client's certainty that the case had not been churned. True, a client might not want that particular payoff, but the point of rulemaking is to provide protection even if there is a resulting loss of autonomy. The ironic nature of rulemaking is that the "protectees" may actually be harmed or restricted by the rule. The irrationality of a given result becomes an argument against using a rule to accomplish a particular goal.

41. Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 13; *see infra* part III.

42. Note that my hypothetical rule limits only the number of lawyers who could undertake a specific task, not the number who could be assigned to a case. Restricting a client's right to hire numerous lawyers would probably violate the Sixth Amendment, the Fourteenth Amendment, or both. A ceiling on staffing, however, would arguably be permissible as a fee control.

43. The rule against contingent fees in divorce cases is unwaivable, but not in order to protect individual clients. Rather, the rule is intended to advance a public policy that favors reconciliation. Thus, attorneys and clients are prohibited from entering into fee agreements where the attorney's incentive is to procure the dissolution of a marriage, even if such an agreement would be financially beneficial to the client. *See* MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.5(d)(1) (1984); *see also* WOLFRAM, *supra* note 35, at 539 ("The now customary, and quite sound, primary justification for the prohibition against contingent fees in divorce cases is that the arrangement would put strong economic pressure on the lawyer to assure that reconciliation did not occur."); *cf. In re Pagano*, 607

equately address the issue of waiver. They do not make out the empirical case that nonrefundable retainers are so prevalent (and so uniformly evil) that they must not be countenanced under any circumstances.

III. THE RIGHT OF DISCHARGE

Brickman and Cunningham's principal objection to nonrefundable retainers is that they chill the clients' absolute right to discharge counsel: Clients must be free to fire their attorneys at any time, without cost or penalty; nonrefundable retainers necessarily contravene this right. According to Brickman and Cunningham, the driving force behind the prohibition of nonrefundable retainers is "to protect the client's inviolate right to discharge her lawyer at any time, for any reason, without penalty."⁴⁴

Brickman and Cunningham see burden-free discharge as a bed-rock client right. Hence, any fee device that impedes the exercise of this right must be unethical. The argument is elegant, but it proves too much. In fact, there is no absolute right to discharge counsel. Therefore, clients often pay a price for firing their lawyers. Brickman and Cunningham's conclusion does not follow directly from their premise.

A. *Prohibiting Discharge*

As a preliminary matter, it should be acknowledged that, dicta notwithstanding, the courts do not recognize clients' absolute right to discharge counsel. If in doubt, just spend a day or so in any criminal courts building and watch judges routinely deny defendants' requests to fire their attorneys.⁴⁵

N.E.2d 1242, 1246-47 (Ill. 1992) (considering the application of a statute governing attorney's fees in divorce cases). Section 508 of the Illinois Dissolution of Marriage Act allows a court to enter an order requiring either party to a divorce to "pay a reasonable amount for his own costs and attorney's fees," but only after due notice and hearing. ILL. REV. STAT. ch. 40, para. 508(a) (1992). The court, pursuant to this statute, may enter a judgment requiring a party to pay a specific sum to her own lawyer. *Id.* The right to a hearing in this situation may be waived, however, even though "an unscrupulous attorney may unfairly use the extra leverage gained by the client's dependency." *Pagano*, 607 N.E.2d at 1247. The consequence of a non-waiver rule would be that clients could never offer their attorneys the security of a fee order without undertaking the additional time and expense of a judicial hearing. The Illinois Supreme Court adopted the position that the validity of such a waiver would depend upon the circumstances of the particular case, but that the waiver would be presumed to be the product of undue influence. *Id.*

44. Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 13.

45. See, e.g., *United States v. Gallop*, 838 F.2d 105, 107-11 (4th Cir.), *cert. denied*, 487 U.S. 1211 (1988); *United States v. Rettaliata*, 833 F.2d 361, 362-64 (D.C. Cir. 1987); *United*

The right to discharge counsel is an essential element of the right to retain counsel of choice: You cannot have the lawyer you want if you cannot get rid of the lawyer you do not want. This interest should never be stronger than in criminal proceedings, where the client is protected by the Sixth Amendment. Nonetheless, there is virtually no dissent from the rule that a court's interest in expediting trial may take precedence over a client's interest in counsel of choice.⁴⁶

This principle has been enshrined in the ethics rules. Rule 1.16(c) of the Model Rules of Professional Conduct provides that a lawyer must continue to represent a client, even if discharged, "when ordered to do so by a tribunal."⁴⁷ Rule 1.16(c), moreover, does not distinguish between criminal and civil cases, raising at least the possibility that a civil litigant, like a criminal defendant, could be forced to trial

States v. Whaley, 788 F.2d 581, 583-84 (9th Cir.), *cert. denied*, 479 U.S. 962 (1986); *Thomas v. Wainwright*, 767 F.2d 738, 740-44 (11th Cir. 1985), *cert. denied*, 475 U.S. 1031 (1986); *People v. Turner*, 9 Cal. Rptr. 2d 388, 389-92 (Cal. Ct. App. 1992); *Commonwealth v. Diatchenko*, 443 N.E.2d 397, 403 (Mass. 1982); *Paris v. Commonwealth*, 389 S.E.2d 718, 719-23 (Va. App. 1990).

46. Perhaps the most famous example of this occurred in the Chicago Conspiracy trial. *See United States v. Seale*, 461 F.2d 345 (7th Cir. 1972). Bobby Seale, one of the original Chicago Eight defendants, was represented by his personal attorney, Charles Garry of San Francisco. *Id.* at 349. Mr. Garry, however, became ill and could not appear for the beginning of the trial. *Id.* The trial judge, Julius Hoffman, refused to grant a continuance or adjournment, and instead insisted that William Kunstler represent Seale. *Id.* at 349-50 (As attorney for several of the other defendants, Kunstler had also appeared for Seale on certain pretrial matters.) Seale protested, to the point of "firing" Kunstler in open court. *Id.* Kunstler accepted his discharge with grace, but the court would not recognize his resignation. *Id.* Seale persisted in protesting that he had fired Kunstler, after which the court ordered the defendant bound and gagged. *Id.* Seale eventually was severed from the trial, which proceeded as the Chicago Seven. *Id.* The Seventh Circuit ruled that Judge Hoffman had erred by refusing to consider the circumstances of Kunstler's appearance, but did not reach the issue of the defendant's right to fire his attorney. *Id.* For a more detailed description of Bobby Seale's statements and conduct during the trial, see JOHN SCHULTZ, *THE CHICAGO CONSPIRACY TRIAL*, 35-80 (1993). For less famous instances in which defendants were not allowed to fire counsel, see *supra* note 45 and accompanying text.

47. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(c) (1992). More specifically, Rule 1.16(a) requires a lawyer to withdraw from representation if "the lawyer is discharged," except in circumstances covered by subparagraph (c). *Id.* Rule 1.16(a). In turn, Rule 1.16(c) states that "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for termination the representation." *Id.* Rule 1.16(c).

The predecessor Model Code of Professional Responsibility, still in effect in New York and several other states, is to the same effect. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A)(1), DR 2-110(B)(4) (1981). Disciplinary Rule 2-110(A)(1) provides that "[i]f permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission," even though withdrawal would otherwise be mandatory upon discharge by the client. *Id.* DR 2-110(A)(1); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(B)(4) (1981) (providing that withdrawal is mandatory when lawyer is discharged by client).

with an attorney whom she has "fired." Admittedly, that result is more likely in criminal cases, where the Sixth Amendment all but requires that some lawyer represent each defendant. In civil cases a court has the option of allowing the discharge and forcing the client to trial without an attorney.⁴⁸ Of course, proceeding to trial without counsel is a steep price to pay for firing one's lawyer. Certainly, it is a burden on the "right of discharge" of the sort that Brickman and Cunningham maintain must not exist.

It is evident that the "right of discharge" is not so absolute as Brickman and Cunningham posit.⁴⁹ To be sure, a court's interest in efficiency is not the same as a lawyer's interest in payment. It is certainly possible that the client's discharge right should trump the lawyer's concerns, though not the court's. Brickman and Cunningham, however, base their argument on the assertion of an absolute right, claiming that it is not necessary to examine the competing considerations.⁵⁰ Upon realizing, however, that the discharge right is not quite sacrosanct, it becomes necessary to analyze the lawyer's contrary interests, if only to distinguish them from the court's.

B. *Burdening Discharge*

The extent of a client's right to discharge his attorney is only the beginning of the discussion. That a lawyer may always be fired does not mean that there should never be economic consequences to the client.⁵¹

48. See, e.g., *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 256-57 (1st Cir. 1986); *Hall v. Doctors' Hosp. of Tioga*, 486 So. 2d 1164, 1168 (La. App. 1986); *Bacon v. Carey Co.*, 669 P.2d 533, 535 (Wyo. 1983).

49. Of course, requiring clients to be represented by lawyers whom they mistrust and have attempted to fire would be poor policy. I do not mean to suggest that such "representation" should generally be permitted or encouraged. My point, however, is that the current state of the law definitely *does* give courts the discretion to thwart a client's effort to discharge her lawyer.

50. Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 28-29, 31.

51. In *Howard v. Babcock*, 863 P.2d 150 (Cal. 1993), for example, the California Supreme Court upheld a law firm partnership agreement that required withdrawing partners to forego certain contractual benefits if they thereafter competed with their former partners. *Id.* at 155. Although it was argued that this provision violated the ethical prohibition against lawyers participating in an agreement that "restricts the right of a member of the State Bar to practice law," *id.* at 156 n.6, the court held that it was permissible to "assess[] a reasonable cost against a partner who chooses to compete with his or her former partners," *id.* at 156. In other words, the rules of ethics do not prohibit the attachment of an economic consequence to an otherwise unrestricted choice. *Id.*

The California court recognized that the imposition of such a "toll" could limit the ability of clients to have access to the attorney of their choice. *Id.* at 159-60. Nonetheless, the court reasoned that "the theoretical freedom of any client to select his or her attorney

For the origin of the termination-at-will rule, Brickman and Cunningham look to *Martin v. Camp*,⁵² in which the New York Court of Appeals held that a discharged lawyer could not sue his client for contract damages.⁵³ The basic holding of the case is that the client may terminate the attorney's employment at any time and for any reason, and that this right is an implied provision of their contract. Thus, the lawyer could not seek his expected profit as damages for wrongful discharge, although he could recover in quantum meruit.⁵⁴

Most significantly, though, the *Martin* court held that the quantum meruit limitation does not apply where "the attorney in entering into such a contract has changed his position or incurred expense."⁵⁵ The lawyer in such circumstances could obtain consequential damages upon being terminated by the client.⁵⁶ A client's absolute right of discharge, therefore, can be burdened by an obligation to compensate the attorney for reliance-based losses.⁵⁷

Imagine, for instance, that a client retained a New York lawyer to render certain specific, identified services⁵⁸ in Washington, D.C. Relying on the contract of employment, the attorney leased office space, moved her residence, and perhaps even withdrew from lucrative pending matters in New York. Under *Martin*, the client could nonetheless discharge the lawyer at any time and for any reason. The lawyer has no right to insist on the fulfillment of the contract or to maintain an action for expected profits. The lawyer could sue, however, for the damages occasioned by her reliance-based changes of position, even if those changes conferred no economic benefit on the client, and even if the lawyer had not yet done any work pursuant to the retainer.

of choice is inconsistent with the reality that [this freedom is] actually circumscribed." *Id.* at 158.

52. 114 N.E. 46, 48 (N.Y. 1916).

53. *Id.*

54. *Id.*

55. *Id.*

56. The *Martin* court also excepted "general retainers" from the sweep of its holding. *Id.* For a review of Brickman and Cunningham's analysis of general retainers, see *infra* part IV.

57. Such a burden may not be of the sort that concerns Brickman and Cunningham, since it compensates the lawyer for expenses incurred in the performance of the contract. The question remains, however, whether the distinction makes a difference. To the client, a financial cost is a burden, no matter what it covers. To establish their proposition, Brickman and Cunningham therefore cannot rely on the construct of absolute burden-free discharge. Rather, they must demonstrate that, depending on the form, some burdens are "ethical," while others are not.

58. Note that this hypothetical involves a specific, as opposed to a general, retainer, the significance of which is stressed by Brickman and Cunningham. See *infra* part IV.

The prospect of paying for an unused office lease, not to mention the possibility of providing compensation for foregone work, would no doubt discourage the client from discharging her counsel. Nonetheless, that outcome is not prohibited by *Martin* or its progeny.⁵⁹

An additional host of adverse economic consequences may flow from a client's decision to dismiss her counsel. The lawyer is generally under no duty to refund earned fees even if, as a result of the discharge, some or all of their benefit will be lost to the client. The client probably will have to spend extra money to bring her new attorney "up to speed." In nearly every case there will be delay, duplication of effort, or other waste, all of which may result in additional attorney's fees. In other words, the termination of a privately retained lawyer almost always will be attended by some cost to the client. Hence, the notion of an unburdened right of discharge is a myth.

Brickman and Cunningham would no doubt point out the difference between costs that inevitably accompany discharge and those that are separately (or additionally) imposed by the retainer agreement. It might be said that we cannot protect clients from all of the economic consequences of firing their lawyers, but we can protect them from nonrefundable retainers. But this argument still leaves questions unanswered. For example, why should a fired lawyer be required to return only unearned fees?⁶⁰ An absolute, unfettered right of discharge would seem to compel a return of all fees, whether earned or not; otherwise, the client is inhibited in exercising her right to choice of counsel.⁶¹ The New York Court of Appeals was concerned that the forfeiture of a nonrefundable retainer could render a

59. Moreover, the *Martin* doctrine would not necessarily prohibit advance, nonrefundable payments to a lawyer in consideration of her change of position. That is, if the lawyer could sue the client for changed-circumstances damages, why not allow the attorney and client to negotiate that aspect of the fee up front? Brickman and Cunningham apparently accepted the availability of changed circumstances lawsuits in their first article on nonrefundable retainers. See Brickman & Cunningham, *Retainers Impermissible*, *supra* note 3, at 157. Nonetheless, the *Cooperman* opinion, not to mention Brickman & Cunningham's latest proposal, appears to prohibit *ex ante* negotiation. See Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 10 n.31. This is an anomaly. Under Brickman and Cunningham's suggested ethics rule, a discharged lawyer could sue a client for damages based on changed circumstances, but the client could not limit her exposure by agreeing in advance to a liquidated payment.

60. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(d) (1992).

61. In the abortion area, the United States Supreme Court has held that a right is not infringed simply because it is made more costly, so long as it still may be freely exercised. *Maier v. Roe*, 432 U.S. 464, 474 (1977). Both nonrefundable retainers and the retention of earned fees make the exercise of the right of discharge more costly. In the absence of a compelling argument, it would seem that the two types of costs ought to be treated comparably. It falls to Brickman and Cunningham to explain how one cost infringes on the client's rights, while the other does not.

client hostage to "an unwanted fiduciary relationship," because the loss of the retainer would "impose a penalty on a client for daring to invoke a hollow right to discharge."⁶² But the same logic also applies to quantum meruit payments, which both the New York Court and Brickman and Cunningham endorse.⁶³ A client who has sunk considerable funds into a lawyer's representation no longer has that money available to retain new counsel. Much, if not all, of the first lawyer's work may well be untransferable, thus requiring a complete duplication of effort by the replacement lawyer. Depending upon the client's financial situation this may render her hostage to the unwanted relationship just as firmly as would a nonrefundable retainer. Indeed, from the client's perspective there is very little difference between losing a nonrefundable retainer and losing an identical (or greater) amount in the name of quantum meruit. In either case, the client's ability to obtain a new lawyer is damaged.

It is no answer to say that the quantum meruit payment represents the "fair and reasonable value of the completed services,"⁶⁴ at least insofar as the sum is calculated on the basis of the lawyer's hours.⁶⁵ Counsel's services, as of the date of discharge, may have resulted in slight or no benefit to the client, no matter how valuable they were to the lawyer in terms of expended time. Compelling a client to pay a lawyer for unproductive services unquestionably "burdens" the right of discharge.

This situation may arise most clearly in the case of contingent fee agreements. Personal injury cases usually are taken on contingency, typically ranging from twenty-five percent to forty percent of the ultimate recovery. In many jurisdictions, a discharged contingent-fee lawyer is entitled to quantum meruit compensation, not to exceed the maximum fee provided in the fee agreement.⁶⁶ This approach fairly

62. *In re Cooperman*, 633 N.E.2d 1069, 1072-73 (N.Y. 1994).

63. *See Cooperman*, 633 N.E.2d at 1072; Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 51.

64. *Cooperman*, 633 N.E.2d at 1072; *see also* Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 42.

65. *See Kannewurf v. Johns*, 632 N.E.2d 711, 717 (Ill. App. 1994) (noting that a lawyer's quantum meruit fee award was calculated on an hourly basis).

66. *Rosenberg v. Levin*, 409 So. 2d 1016, 1021 (Fla. 1982); *see also* Brickman, *Setting the Fee*, *supra* note 3, at 380-82 (recommending that if an attorney is entitled to recover quantum meruit, "the courts must limit the attorney's recovery to the contract price"). Brickman and Cunningham endorse the approach of using the contingent fee contract percentage as a cap on any quantum meruit payment. Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 43. They recognize that such a cap is necessary to protect the client from having to pay the discharged lawyer even in the event of non-recovery for the client. *Id.* They do not appear to recognize, however, that any quantum meruit payment to a discharged contingent-fee lawyer, cap or no cap, will operate as a penalty to the client.

compensates the lawyer, but leaves the client facing a dilemma. In most cases, she will have to retain a new contingent-fee attorney, obliging her to pay *both* a contingency and the quantum meruit amount. Alternatively, she might attempt to find a new lawyer who will credit the quantum meruit payments against the eventual contingency, but this could dramatically limit the range of counsel from which she may choose.⁶⁷ In either circumstance, the quantum meruit principle severely taxes the client's exercise of the right to discharge counsel.

Of course, no court is likely to hold that a discharged lawyer automatically forfeits all fees.⁶⁸ Even the *Cooperman* court recognized the need to "deter clients from taking undue advantage of attorneys."⁶⁹ Some nonrefundable retainers—between some lawyers and some clients—are surely used as a hedge against economically exploitive discharge. Unfortunately, neither the New York Court of Appeals nor Brickman and Cunningham admit this possibility, and consequently neither attend to the economic similarities between nonrefundable retainers and payments in quantum meruit.

There is certainly a moral difference between providing payments in quantum meruit and allowing a nonperforming lawyer to keep a nonrefundable retainer. But both the New York Court of Appeals and Brickman and Cunningham grounded their arguments on the client's right to fire her attorney, not on the immorality of allowing the lawyer to keep the money. The client-based appeal, though, should be recognized as an economic argument; to be convincing it must con-

67. For example, in *Kannewurf*, the Kannewurfs originally retained counsel to bring a personal injury action, agreeing to pay a contingency fee of one third of any eventual recovery. *Kannewurf*, 632 N.E.2d at 712. Once the litigation was well under way, the clients and their lawyer had a falling-out, which led to counsel's withdrawal. *Id.* Thereafter, the Kannewurfs obtained a judgment for \$120, 000, which would have led to a maximum contingency fee of \$40, 000. *Id.* at 713. The original lawyer then petitioned for a quantum meruit fee. *Id.* He was eventually awarded \$31, 360, reflecting 224 hours at a rate of \$140. *Id.* at 714. The opinion does not disclose what the Kannewurfs paid to their new attorney, but any payment of more than \$9000 would result in a financial penalty to the clients as a consequence of discharging their first lawyer.

68. Indeed, some courts have approved quantum meruit payments even to lawyers who were discharged for cause. In *Searcy Denney Scarola Barnhart & Shipley, P.A. v. Scheller*, 629 So. 2d 947 (Fla. App. 1993), the Florida Court of Appeals allowed quantum meruit fees to a lawyer who not only breached his fee agreement with the client, but who also abandoned the client "at a critical stage, without adequate protection for the client's interests." *Id.* at 949. There can be little doubt that the prospect of a quantum meruit payment will discourage, if not deter, some clients from firing their lawyers for misfeasance, a right that is even more essential than the right to discharge counsel without cause. See *In re Pagano*, 607 N.E.2d 1242, 1250 (Ill. 1992) (stating that a lawyer may be awarded reasonable attorney's fees notwithstanding a breach of fiduciary duty to his client).

69. *In re Cooperman*, 633 N.E.2d 1069, 1072 (N.Y. 1994).

sider the reality that, from the client's perspective, money is fungible. One could, of course, make the moral argument that allowing nonrefundable retainers is simply dishonorable. But that position, stripped of a basis in the client's economic interest, would have to take greater account of individual autonomy and the freedom of contract.⁷⁰

IV. GENERAL RETAINERS

Brickman and Cunningham and the New York Court of Appeals accept the use of so-called general retainers, apparently even if they are nonrefundable.⁷¹ While the *Cooperman* court's comments on this subject were opaque,⁷² Brickman and Cunningham attempt to draw a principled distinction between *general* nonrefundable retainers (ethically permissible) and *specific* nonrefundable retainers (ethically impermissible). The distinction, however, is untenable and further weakens their basic argument. According to Brickman and Cunningham, a general retainer

is a commitment to be available to represent the client in matters where the services may or may not need to be rendered in matters that may yet be unknown and undefined. The client paying a general retainer is therefore getting something for the payment: a contractual commitment that the lawyer will be on call to handle the client's legal matters, if and when the client needs her.⁷³

Such a retainer, they posit, is never unearned; it need not be refundable⁷⁴ because it is "earned when paid."⁷⁵ This analysis fails.

Accepting Brickman and Cunningham's definition of a general retainer as an "option" payment for a specified period of future availability,⁷⁶ it is evident that such a retainer is only "earned" once the obligation of availability is fulfilled. An attorney who accepts a general retainer, but who does not make herself available to the client, should at the very least be liable for a refund. Following Brickman and Cunningham's general reasoning, a lawyer similarly should not be able to keep a general retainer following mid-stream firing by the cli-

70. See *supra* part II.

71. See *Cooperman*, 633 N.E.2d at 1074; Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 23-25.

72. The *Cooperman* Court held that "[m]inimum fee arrangements and general retainers that provide for fees, not laden with the nonrefundability impediment irrespective of any services, will continue to be valid and not subject in and of themselves to professional discipline." *Cooperman*, 633 N.E.2d at 1074.

73. Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 23.

74. *Id.* at 8 n.26.

75. *Id.* at 17.

76. *Id.* at 23.

ent, as that would burden the client's "inviolable right to discharge her lawyer at any time, for any reason, without penalty."⁷⁷

Until the period of availability is fully rendered, general retainers should be indistinguishable from specific retainers, at least regarding the client's interest in her right to discharge counsel. Brickman and Cunningham want clients always to be able to say, "I no longer want you to perform a specific task so give me back my money." If that is so, clients should also be able to say, "I no longer want you to be available so give me back my money."⁷⁸

Brickman and Cunningham have not presented a convincing argument for the differential treatment of general and specific retainers. Absent further justification, the same ethical rule of refundability ought to apply to both forms of retention. Accordingly, if nonrefundable *general* retainers are ethically permissible (as Brickman and Cunningham acknowledge),⁷⁹ then nonrefundable *specific* retainers must be acceptable as well.

V. ETHICS EXPERTS

Brickman and Cunningham also would apply the nonrefundable retainer rule to the situation of "attorneys who testify as expert witnesses on the law of lawyering or who assist in matters by serving 'of counsel.'"⁸⁰ Here their analysis breaks down completely.

Brickman and Cunningham note that it is "widely assumed that a half dozen or so such experts, mostly law school professors, are the most sought after of their type and command . . . substantial nonrefundable retainers,"⁸¹ and that these experts contend that banning nonrefundable retainers would prevent them from realizing the full economic benefit of their hard-earned reputations.⁸² Brickman and Cunningham then reject this position, on the ground that it would

77. *Id.* at 13.

78. Of course, any refund would have to be prorated over the life of the retainer. Perhaps the general retainer lawyer would also be entitled to some additional payment as compensation for foregone opportunities, although Brickman and Cunningham deny this possibility to lawyers who have been specifically retained. See *supra* note 24 and accompanying text.

79. Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 9.

80. *Id.* at 36.

81. *Id.* at 37. *The American Lawyer* reports that Professor Geoffrey Hazard requires a retainer of \$5000, and a \$500 hourly fee, for work as an ethics expert. Susan Beck, *Midas Touch in the Ivory Tower*, *AM. LAW.*, Apr. 1994, at 60. Professors Stephen Gillers, Charles Wolfram, and Monroe Freedman are also identified as frequently engaged expert witnesses; their hourly fees are almost as high as Hazard's, but no mention is made of an upfront retainer. *Id.*

82. Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 37.

require an inquiry in every case into the identity and reputation of the expert.⁸³

The missing point, however, is that expert witnesses are not—indeed, cannot be—fiduciaries of clients.⁸⁴ Ethics experts, though lawyers in the professional sense, do not function as lawyers when retained to consult in lawsuits. Since virtually the entire argument against nonrefundable retainers is based on counsel's fiduciary obligations,⁸⁵ it would seem facially inapplicable to expert witnesses.

The duty of an expert witness is to be objective, not to safeguard client interests or advance client goals. Indeed, experts must be painstakingly honest, even if that means arriving at an opinion that is contrary or damaging to the client's position in litigation.⁸⁶ In evaluating a case, an ethics expert must be ready and willing to say "No" to the client, even when the client has a plausible claim or defense.⁸⁷

Because of the absolute requirement that experts not stand as fiduciaries to their clients, there can be no "inviolable right" to discharge an expert "without penalty." While litigants are obviously free to terminate the retention of expert witnesses, no policy is served by attempting to make such discharge costless.

Moreover, important policy goals may be advanced through an expert's use of nonrefundable retainers.⁸⁸ A lawyer is permitted to share the economic risk of litigation with a client; an ethical expert

83. *Id.* at 37.

84. I assume that ethics experts who appear "of counsel" may be treated, for the purpose of determining fees, in the same manner as any other lawyers. Brickman and Cunningham do not develop this point, and I am not aware of any specific law on the subject. My concern in this section is the treatment of consulting or testifying experts, who assist lawyers in a nonfiduciary capacity. Such an expert is one who "has been retained or specially employed . . . in anticipation of litigation or preparation for trial," and who may or may not be called to testify. See FED. R. CIV. P. 26(b)(4).

85. Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 6-8.

86. In most jurisdictions an expert may be retained initially on a consulting, non-testifying basis. Thus, an opinion that is unwelcome by the client will usually be shielded from discovery. See, e.g., FED. R. CIV. P. 26. Even under this protection, however, the expert must be willing to give the client the bad news.

87. The duty of an expert, then, is in sharp contrast to the duty of a lawyer, which is to raise every non-frivolous claim or defense unless instructed otherwise by the client. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1992) (describing a client's authority over the scope and objectives of representation); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1981) (describing the attorney's duty to seek her client's lawful objectives).

88. From time to time I serve as an expert witness in cases involving issues of professional responsibility, although I would not presume to place myself among the half dozen elite experts referenced by Brickman and Cunningham. In any event, I do not use nonrefundable retainers.

cannot.⁸⁹ Receiving a lump-sum fee in advance may actually reinforce the independence of an expert, who will be ensured payment and freed from any dependence on the good will of the client.⁹⁰ In this light, a nonrefundable retainer can be viewed as the equivalent of a guaranteed minimum, paid in consideration of the expert's objectivity.⁹¹ Such a payment might also remove the appearance of any incentive to generate additional work on the case by reaching a favorable opinion. The enhancement of an expert's visible independence could prove to be of value to the client in the event that the matter proceeds to trial.

Finally, it should be noted that essentially no opportunity for overreaching exists in the retention of an expert witness. First, a client does not rely on an expert for "advice on virtually all subjects they discuss, including the consequences . . . of a particular fee arrangement."⁹² Perhaps even more important, experts are seldom, if ever, retained directly by the client. Rather, the usual, if not universal, practice is for counsel to investigate, interview, and negotiate eventual terms with potential expert witnesses. Thus, the client virtually always has the benefit of independent legal advice in evaluating the terms of the engagement of a consulting or testifying expert.

VII. CONCLUSION

Brickman and Cunningham's paradigm case is too easy. The problem they identify is the overreaching lawyer who extracts a nonrefundable retainer from a naive client, and then does little or no work.⁹³ With almost unimaginable chutzpah, the lawyer proceeds to invoke the retainer agreement as a defense against returning the cli-

89. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b), cmt., para. 3 (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(C) (1981); see also STEVEN LUBET, MODERN TRIAL ADVOCACY 211 (1993) (discussing ethics of various fee arrangements with expert witnesses).

90. See LUBET, *supra* note 89, at 205 (noting that "it may be evidence of something less than objectivity if the witness has a large unpaid fee outstanding at the time that she testifies"). Indeed, the same theory underlies the life tenure afforded to federal judges. See U.S. CONST. art. III, § 1.

91. Of course, it would be fraudulent for an expert to obtain a nonrefundable retainer and then refuse to do the work.

92. Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 11.

93. *Id.* at 37 (quoting *In re Cooperman*, 591 N.Y.S.2d 855, 858 (N.Y. App. Div. 1993)) ("We find that it is unconscionable that the respondent could claim that he earned \$15,000 by filing a notice of appearance on a client's behalf."); *id.* at 8 (quoting *Cooperman*, 591 N.Y.S.2d at 856) ("A nonrefundable retainer is one that 'allow[s] an attorney to keep an advance payment irrespective of whether the services contemplated are rendered.'"); *id.* at 9 ("[S]uch a retainer is forbidden because otherwise the lawyer would be able to charge the client for work he did not do."). Nonrefundable retainers "enable lawyers to

ent's money. In other words, the fee arrangement is not simply abusive; it borders on theft.

Some lawyers operate that way, as appears to have been the case in *Cooperman*, but broad rules of conduct are not usually the preferred approach to deterring a fraud-inclined minority. For example, there are no doubt far more lawyers who pad their bills or charge unconscionable hourly rates,⁹⁴ but the basic negotiation of fee contracts is still left to individual lawyers and clients, free from the heavy hand of the disciplinary authorities.⁹⁵

Lawyers who use nonrefundable retainers to commit fraud should be identified and disciplined. But what about other, less felonious uses of the device? Is it possible that nonrefundable retainers might be justified as a way to protect lawyers against unfair discharge? Or to compensate attorneys who are able to resolve matters quickly?⁹⁶ Or to allocate certain risks between lawyer and client? Brickman and Cunningham do not comment on these apparently rea-

charge fees for work not done." *Id.* at 10. In addition, "[a] lawyer cannot charge a fee for doing nothing." *Id.* at 17.

Brickman and Cunningham include as an appendix various client letters complaining about attorney Cooperman. In one letter the client requested the return of her retainer because Cooperman's actions and inactions had caused her to lose trust and confidence in him. In requesting a refund, the client wrote to Cooperman: "We gave you \$10,000 in cash which was all the money we had. You said that you could keep [my husband] out of prison & that there wasn't a thing to worry about . . . I'm left here with no money and no husband to make up the money that was given to you." *Id.* at 49. Cooperman insisted that the entire retainer was nonrefundable. Even after being admonished for failure to return these funds, Cooperman continued to enter into nonrefundable fee agreements and to insist on their validity in spite of client complaints. *Id.* at 14.

94. See Lerman, *supra* note 36, at 661-66; see also Randall Samborn, *Overbillings Detailed*, NAT'L L.J., May 9, 1994, at A4 (reporting admission of overbilling by partner at a prominent law firm). Regarding the possibility of drafting an ethics rule to govern overstaffing, see *supra* notes 36-42 and accompanying text.

95. Professor Lerman suggests a disciplinary rule to govern the increments in which lawyers may bill their clients, going so far as to include provisions for permissible, and impermissible, rounding. Lerman, *supra* note 36, at 750-52. This proposal has not been endorsed by any court or commentator. Regarding honest and dishonest billing practice, see ABA Comm. on Ethics and Professional Responsibility, Formal Op. 379 (1993) (discussing billing for professional fees, disbursements, and other expenses).

96. One advantage of the contingent fee, as opposed to hourly billing, is that it rewards the lawyer for bringing a case to a quick resolution. A nonrefundable retainer, or guaranteed minimum fee, could perform the same function in a case where a contingency is impractical or improper. For example, an adoption case has no *res* from which a contingency can be derived, and contingent fees are not allowed in divorce cases as a matter of public policy. See *supra* note 43. Unscrupulous lawyers, receiving payment by the hour, have been known to drag out such cases in order to enhance their billings. In either situation, however, a nonrefundable retainer could operate as a bonus for timeliness, thereby providing the attorney with a reasonable incentive to handle the matter as promptly as possible. Not all clients would care for such an arrangement, but an ethical prohibition on nonrefundable retainers deprives them of the choice.

sonable uses of the nonrefundable retainer, other than to argue that they do not *justify* nonrefundability.⁹⁷ The question, however, is not whether nonrefundable retainers are prudent or wise—those issues should be left to the lawyers and clients to decide between themselves. Rather, the critical inquiry is whether the non-fraudulent⁹⁸ use of nonrefundable retainers is nonetheless so corrosive as to require a *per se* prohibition.

For example, hourly rates of \$600 are probably, by and large, unjustified. The use of two or three associates, supervised by one or more partners, to prepare a deposition is, in most cases, unjustified. There are numerous contemporary fee practices that are essentially unjustifiable, but which are not outlawed, and for good reason.⁹⁹ It takes more than a few instances of breathtaking abuse to warrant the professional equivalent of criminalization of a fee arrangement.

Brickman and Cunningham have thoroughly dispelled any doubt that may have existed over whether nonrefundable retainers can be oppressive and abusive. The greater burden of their project, however, is to demonstrate that such arrangements are ethically unacceptable under all circumstances. Here they may be right as well, but neither they, nor the courts that have adopted their position, have yet rigorously established the full extent of that proposition.

97. See Brickman & Cunningham, *Retainers Revisited*, *supra* note 3, at 22-29.

98. It would be non-fraudulent for a lawyer to negotiate a nonrefundable retainer (making full disclosure), perform fully and satisfactorily, and keep the money under the terms of the agreement. On the other hand, fraud-by-retainer could occur when a lawyer extracts a nonrefundability agreement, fails to provide the contracted services, and refuses to return the advance; another sort of fraud would result when a lawyer is discharged for cause but still attempts to retain an advance fee. Brickman and Cunningham do not distinguish between these situations.

99. Regarding fee practices that are unethical, see ABA Comm. on Ethics and Professional Responsibility, Formal Op. 379 (1993).