

# Fordham Law Review

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Volume 65 | Issue 1

Article 17

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1996

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### Recommended Citation

Susan P. Koniak, *Principled Opinions: Response to Brickman*, 65 Fordham L. Rev. 337 (1996).  
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## Principled Opinions: Response to Brickman

### Cover Page Footnote

Professor of Law, Boston University. I wish to thank Scott Adams, B.U. 1998, for his help researching and editing this Response. I also wish to acknowledge Professor Brickman's graciousness in taking this critique with equanimity.

## PRINCIPLED OPINIONS: RESPONSE TO BRICKMAN

Susan P. Koniak\*

### I. "LET ME HAVE NO LYING. IT BECOMES NONE BUT TRADESMEN"<sup>1</sup>

PROFESSOR Brickman is not pleased. Indeed, he is outraged, if the sound and fury of his article is to be taken at face value. He and twenty-five others, lawyers and legal educators, sent the American Bar Association Standing Committee on Ethics and Professional Responsibility (the "Committee" or "Ethics Committee") a letter (the "Letter") asking for an opinion.<sup>2</sup> They got one<sup>3</sup> which Professor Brickman describes as "wrong as a matter of ethics law, malevolent as a matter of public policy, disingenuous in its presentation, unfounded in [its] critical assumptions . . . , and blatantly self-interested in elevating lawyers' financial interests above their traditional fiduciary obligations to clients."<sup>4</sup> No, Professor Brickman is not pleased.

What so infuriates Professor Brickman is not that the ABA opinion ("Formal Opinion 94-389" or the "Opinion") is "wrong." What has him so worked up is that, for him, the Opinion is unprincipled, nothing more than a thinly-veiled political exercise designed to serve the financial interests of lawyers.<sup>5</sup> He is incensed because the Opinion is wrong, not by happenstance or as a result of innocent error, but by design—wrong because it suits the ABA's interests to be wrong.<sup>6</sup> For Professor Brickman, the Ethics Committee Opinion on contingency fee practices, which is the focus of his wrath, is no aberration. Like all professional organizations, the ABA, he explains, "exist[s] to advance the interests of [its] members."<sup>7</sup> The ethical codes it has promulgated, like those issued by other professional organizations, are a means of furthering self-interest, protestations to the contrary about serving the public interest notwithstanding.<sup>8</sup> Moreover, such self-interested be-

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\* Professor of Law, Boston University. I wish to thank Scott Adams, B.U. 1998, for his help researching and editing this Response. I also wish to acknowledge Professor Brickman's graciousness in taking this critique with equanimity.

1. William Shakespeare, *The Winter's Tale* act 4, sc. 4, ll. 722-23 (Houghton Mifflin Co., Riverside Shakespeare ed. 1974) (1623).

2. See Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 *Fordham L. Rev.* 299 app. A (1996) [hereinafter Letter].

3. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 389 (1994) [hereinafter Formal Op. 94-389].

4. Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 *Fordham L. Rev.* 247, 249 (1996).

5. *Id.* at 250 & n.10.

6. See *id.* at 257-59.

7. *Id.* at 250.

8. *Id.* at 250-54.

havior continues in the processes set up to interpret the codes.<sup>9</sup> The contingency fee Opinion, for Professor Brickman, is "a case in point."<sup>10</sup>

Professor Brickman's understanding of what the ABA is about when it promulgates ethics codes and when it interprets them raises several questions. First, why did he and his colleagues request "guidance" from the ABA on contingency fee practices? Second, given his view that professional organizations serve self-interest,<sup>11</sup> how could he be so enraged about an opinion that should have been for him entirely predictable? Third, if he is right about professional organizations, what larger implications, if any, does his view and the particular tale he tells here have for how lawyers should be regulated? Fourth, if institutions, like professional organizations, can be expected to produce certain results, as Professor Brickman argues,<sup>12</sup> what does it mean to call such results "unprincipled"? Finally, if being principled is not just a characteristic of the foolish or hopelessly naive, how are we to identify the "principled" among us and sustain them?

## II. "I WAS SEEKING FOR A FOOL WHEN I FOUND YOU"<sup>13</sup>

Given Professor Brickman's view that the ABA cannot be trusted, one wonders why he and his colleagues would ask the Committee for advice. Were they merely seeking a foil to set off and enhance their own views? It is, after all, difficult to believe that Professor Brickman's views on the ABA's self-interested ways came to him as an epiphany upon receipt of the Opinion and that previously he had believed that the ABA and its Ethics Committee were above self-interest.

I imagine Professor Brickman might say that it is no crime to hope that on rare occasions the members of the ABA Committee might buck the organization of which they are a part and "do the right thing." If that is his response, however, his article would have been greatly enriched by some discussion of this point. If the Ethics Committee is capable of opining against the financial interests of members, is that true too of the larger ABA? Are there examples of the ABA or its Committee acting against the financial interests of members in the name of ethics? In the name of principle? If so, what can we learn from those examples? I do not mean to sound harsh, but the observation that Professor Brickman insists upon—that professional organizations generally serve the financial interests of their mem-

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9. *Id.* at 254-56.

10. *Id.* at 253.

11. *Id.* at 250.

12. *See id.* at 257.

13. William Shakespeare, *As You Like It* act 3, sc. 2, ll. 285-86 (Houghton Mifflin Co., Riverside Shakespeare ed. 1974) (1623).

bers<sup>14</sup>—is far less interesting than the observation that may be implicit in his having asked the ABA for “guidance,” but which he does not discuss: that sometimes organizations or parts of organizations act against the financial interests of their constituents.

Of course, Professor Brickman and some or all of his Letter-signing colleagues might have asked the Ethics Committee for advice, although they believed that there was virtually no chance that the Ethics Committee would issue an opinion to their liking. It could be that they were seeking no more than a foil. Professor Brickman and presumably most, if not all, of the Letter’s other signatories are proponents of an initiative that would require lawyers to abide by specific new standards in charging contingency fees (the “Initiative”).<sup>15</sup> The Initiative would require lawyers to solicit early settlement offers from defendants<sup>16</sup> and restrict the percentage fee that lawyers could charge clients against any such early offer made by a defendant,<sup>17</sup> provided that the offer came complete with material information from the defendant that would allow the plaintiff’s lawyer and the plaintiff to assess the reasonableness of the offer.<sup>18</sup> The Initiative’s proponents seek to advance this proposal through legislation, court decision or rule, or opinions issued by state bar ethics committees. An adverse opinion by the ABA Ethics Committee could serve to fuel their cause, if that opinion could be portrayed as corrupt and motivated by self-interest.

If Professor Brickman and his colleagues believed that there was little if any chance that the ABA would issue the opinion that they wanted, but believed that even an adverse opinion would help their cause—a cause I have no reason to doubt they believe in deeply—was their Letter seeking “guidance” unprincipled, political, disingenuous? What if Professor Brickman believed that the Committee would never adopt his conclusions, but that it would be embarrassed enough by the inquiry that the opinion would contain some language that might be used to support his cause? Would his signing a request for “guidance” then be disingenuous? Political? Unprincipled? Worthy of the condemnation he heaps on others?

To assure the reader that I am capable of a declaratory thought and am not seeking to hide behind rhetorical questions, let me make my position on these matters plain. I have no problem with the actions of those, including Professor Brickman, who put the Ethics Committee on the spot, even if their intent was to do just that and their hope was to gain political advantage. The Ethics Committee is there to answer

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14. See Brickman, *supra* note 4, at 260.

15. See Lester Brickman et al., *Rethinking Contingency Fees 69-82* (1994) (setting forth the Initiative in an appendix).

16. *Id.* at 74-77.

17. *Id.* at 80.

18. *Id.* at 77-78.

hard questions involving the conduct of ABA members. Suggesting that questions should not be asked because they might require the Committee to provide answers that are politically unpopular with either a majority of ABA members or some group of committed others is ludicrous. Moreover, I do not see political commitment as a sin, nor smart political maneuvering as something to be condemned.

I disagree with the Initiative co-authored by Professor Brickman,<sup>19</sup> but my hat is off to whomever thought of asking the ABA for Formal Opinion 94-389. I believe that there was only gain to be achieved by such a move—gain not only for the Initiative's proponents but for the political process itself, gain for everyone. The Letter gave the ABA, or more precisely, the members of the Ethics Committee, an opportunity to weigh in with their own understanding of the ethical good served by the contingency fee, the potential for such fees to be abused, and the measures required to prevent abuse. Given that the Letter's authors had some reason to believe that the ABA and its Committee would be less than fully supportive of the Initiative, which I assume many of the Letter's signers supported, it is admirable that they encouraged the ABA to get into the debate, to weigh in, to explain, if the Committee could, what ethical vision underlies current contingency fee practice. The authors of the Letter gave the Ethics Committee an opportunity to engage in constructive dialogue and debate with those with whom the Committee might be anticipated to disagree. For encouraging dialogue and debate, the Letter's writers deserve

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19. First, I believe that restricting the proposal to those early settlement offers that are accompanied by disclosures of material information in the defendant's possession, as the proposal does, is both essential and unworkable. It is essential because only with such information could the plaintiff make an intelligent choice and the plaintiff's lawyer give reasonable advice to the plaintiff on whether to accept the settlement. It is unworkable because there is no simple and reliable mechanism for assessing whether such information has been provided by a defendant and thus no way to distinguish a qualifying early settlement offer from a non-qualifying one.

Second, even if the first problem could be overcome, the Initiative in its present form threatens to make an existing problem of ethics even worse. The problem I refer to is the problem of plaintiff's lawyers advising (coercing) clients to settle cases for less money than the plaintiff should receive. That practice allows plaintiffs' lawyers to walk away with some percentage of something without doing much, if any, work. True, the proposal limits the percentage a lawyer would walk away with, but it also makes it much riskier to fight through discovery and/or trial for a more just recovery for the client. The lawyer who fights might end up much poorer for his trouble than had he advised the client to take the low settlement without putting any energy into the case. This is so because it is quite expensive for lawyers to fight. A client might have his recovery substantially improved by such a fight, but the lawyer would often be better off having moved on to the next early settlement case at 15%.

Third, the proposal penalizes plaintiffs' lawyers who venally, incompetently, or innocently misjudge how much money the case will ultimately yield, but does not penalize the defendants or their lawyers for undervaluing what the plaintiff might recover. This one-sided incentive system will, in my opinion, give defendants every incentive to produce low-ball settlement offers, knowing that even such offers might tempt plaintiffs' lawyers to settle rather than fight. If that happens, injured plaintiffs will be the ultimate losers and defendants the hands-down winners.

commendation. The Committee also merits praise for issuing an opinion instead of finding an excuse to remain silent.

What troubles me is not the request to the Committee, nor Professor Brickman's strong disagreement with the merits of the ABA position, but instead the disingenuousness, if I might borrow a word from Professor Brickman, of his suggestion that the Ethics Committee took an apolitical request for guidance and transformed it into an opportunity to comment on a highly political matter: the Initiative to change contingency fee practice. He writes:

In [the] news release [accompanying the Opinion], the Committee erroneously attributed the request for ethical guidance to the Manhattan Institute [a public policy group generally associated with conservative causes] when in fact it came from twenty-six lawyers and legal educators . . . .

The misattribution of the request's origin appears to have been an attempt to imply that the Letter's request was political in nature, thereby justifying a political response, though one garbed in ethical rhetoric. By stating that the request had come from an entity with a conservative public policy agenda rather than from a group of distinguished lawyers and educators, the Committee sought to divert attention from the ethics issues posed in the request and to focus instead on the politics of the source of the request.<sup>20</sup>

If the Committee deserves condemnation for focusing on the politics of those making the request, so too does Professor Brickman for devoting so much of his critique to the ABA's self-interested tendencies. On the other hand, given that both the Committee and Professor Brickman address the merits and do not just describe or demean the motives of their opponents, I am at a loss to see how either deserves condemnation for recognizing or for publicly stating their understanding of the other side's motives. Such information also adds to the public debate and may shed light on the underlying issues.

Moreover, the Letter's signatories must bear some responsibility for the Ethics Committee's misattribution of the Letter's origin. Whoever drafted the news release, which I have not seen, should have carefully described who sent the Letter and what connection the Letter writers (or some of them) had to the Manhattan Institute or to the Initiative. In fairness to the Committee, however, the Letter and the Initiative, and thus the Manhattan Institute, a chief sponsor of the Initiative, were linked by the Letter signatories themselves; the link was not some fabrication concocted by the Ethics Committee.<sup>21</sup>

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20. Brickman, *supra* note 4, at 264-65 (footnotes omitted).

21. Admirably, the Letter's signatories attached the Initiative to their Letter to the ABA, demonstrating their willingness to play with an open hand. More important, the Letter itself referred to specific enforcement efforts that might be urged to implement the ethical obligations that the Letter signatories urged the ABA to accept. See *infra* text accompanying note 24 (quoting from Letter).

Furthermore, the Letter was political, despite Professor Brickman's carefully worded suggestion to the contrary.<sup>22</sup> To say that the Letter was political is neither to condemn it nor to imply that it did not raise legitimate questions about lawyers' ethical obligations. Professor Brickman seems to believe in a sharp dichotomy between politics and ethics, a view that I find somewhat incoherent, particularly in this context.

"Political" means concerned with the art and means of government. It is not a euphemism for unclean or tainted. Understood in this sense, the Letter was political. The writers asked the Committee to endorse an ethical obligation to solicit early settlement offers. I use the word "endorse" advisedly because, as Professor Brickman acknowledges in his article, Ethics Committee opinions are binding on no individual, court, or legislative body.<sup>23</sup> The Letter signatories solicited the Committee's endorsement because, as the Letter stated, the Committee's voice on these matters would be "powerfully effective, precisely as it leaves for others (and/or for a later day) the promulgation of specific enforcement policies *to implement its ethical principles*."<sup>24</sup> The Letter thus acknowledges that the Committee's endorsement, if it were given, could and undoubtedly would be used to justify "specific enforcement policies" and to implement the "ethical principles" set out therein.<sup>25</sup> The endorsement would be valuable in the political debate over legislation regarding how contingency fee lawyers are to behave: when to solicit settlement offers and how to structure their fees.

Again, I find nothing wrong with the political nature of the Letter. Rather, Professor Brickman's implicit denial of that political nature disturbs me. His condemnation of the Committee for recognizing the Letter's true character and responding with an eye toward the political ramifications of what it said is even more disquieting. True, the Committee said it did "not propose in this opinion to take a role in this often intensive public policy debate, which has and will continue to be played out . . . within the profession."<sup>26</sup> And true, the issuance of a news release accompanying Formal Opinion 94-389 certainly belies that sentiment, and misattribution is wrong. But it is also true that the Letter signatories tried to involve the Committee in the debate by soliciting an ethics opinion that could be implemented through political activity on a later day or could be used to denounce the money-grubbing motives of lawyers and their organizations.

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22. See Brickman, *supra* note 4, at 265.

23. On this point, Professor Brickman and I are in agreement. See Brickman, *supra* note 4, at 249 n.7; Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. Rev. 1389, 1416-17 (1992) [hereinafter Koniak, *The Law Between*].

24. Letter, *supra* note 2, at 310 (emphasis added).

25. *Id.*

26. Formal Op. 94-389, *supra* note 3.



The Letter signatories realized, I think rightly, that ethical obligations and interpretations of the ethics rules have political ramifications. They were the ones who acted, again I think rightly, to join ethics and politics in the debate. After all, if something is truly an "obligation," why not insist that state courts, legislatures, or some other appropriate body adopt specific and binding enforcement mechanisms? Why not, in other words, seek to secure a vision of right behavior through political action?

Because I believe that obligations, whether grounded in ethical traditions or utilitarian theory, are relevant to the rules adopted by government to regulate behavior (political matters), I see no clean division between ethics and politics. Furthermore, Professor Brickman's suggestion otherwise is incoherent, particularly when he condemns the ABA and its Ethics Committee for being too concerned with self-interest and too little concerned with the public interest.<sup>27</sup> If the ABA is to be faulted for too little concern for the public interest, it cannot simultaneously be condemned for being concerned with politics. Concern for the public interest is manifested by political action and sensitivity. Professor Brickman simply cannot have it both ways.

Professor Brickman seems to equate political activity with self-interested activity. But political activity need not be self-interested activity and self-interested activity need not be political. One can be selfish without seeking rules of government that encourage, allow, or reward selfishness.<sup>28</sup> One can seek to influence the rules of government without being motivated by financial self-interest.<sup>29</sup> For example, I oppose a capital gains tax cut, although I would benefit from one.

### III. "IN CHOOSING FOR YOURSELF, YOU SHOW'D YOUR JUDGMENT"<sup>30</sup>

I move now to Professor Brickman's condemnation of the ABA and its Ethics Committee for self-interested, as opposed to political, be-

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27. Moreover, by condemning the ABA for failing to take a position on no-fault laws, he implicitly acknowledges that on political matters there is no move the organization can take that is not political. Obviously, approving or disapproving of proposed legislation is political, and, as he suggests, taking no position can plausibly be seen as political too. See Brickman, *supra* note 4, at 260.

28. For example, as Professor Brickman points out, the ABA has passed resolutions on abortion and the importation of chromium from Rhodesia. *Id.* I take it Professor Brickman would accept that those resolutions were political but not self-interested.

29. According to Professor Brickman, financial self-interest is the type of self-interest that taints ABA decisionmaking more than any other. See *id.*

30. In choosing for yourself, you show'd your judgment;  
Which being shallow, you shall give me leave  
To play the broker in mine own behalf . . . .

William Shakespeare, *The Third Part of King Henry the Sixth* act 4, sc. 1, ll. 61-63 (Houghton Mifflin Co., Riverside Shakespeare ed. 1974) (1623).

havior. Professor Brickman correctly stated that the ABA often acts with more concern for the financial interests of its members than for the public interest.<sup>31</sup> For example, I agree with him that the ABA's attempt to prohibit lawyers from disclosing ongoing client fraud, even when the client uses the lawyer's work product to defraud others, demonstrates a disregard for the public interest and an unhealthy concern with pleasing big-paying but unethical clients.<sup>32</sup> Whatever power his critique might have is minimized, however, by his eagerness to condemn as unprincipled, in one way or another, everything the ABA has done with which he disagrees. Thus, in the midst of discussing the ABA's self-interested behavior regarding contingency fees, he also faults the organization for its positions on abortion and Rhodesia<sup>33</sup>—positions which cannot tenably be described as self-interested.

Moreover, Professor Brickman treats a statement in an ABA-commissioned report as a form of smoking gun on the question of self-interest when it is subject to many interpretations more plausible than the one he provides. The statement he quotes says that even if no-fault plans resulted in substantial savings in auto-insurance premiums, they might still be a bad idea because "lowering the cost of driving is not necessarily socially desirable."<sup>34</sup> He insists that the ABA is admitting that lowering lawyer incomes by reducing the amount of auto accident litigation is socially undesirable.<sup>35</sup> Of course, socially

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31. Brickman, *supra* note 4, at 260.

32. See Susan P. Koniak, *When Courts Refuse to Frame the Law and Others Frame It to Their Will*, 66 S. Cal. L. Rev. 1075, 1098-100 (1993) (criticizing the ABA's position on client fraud as one that serves the interests of fraud-doing clients).

33. See Brickman, *supra* note 4, at 260. His criticism of these measures appears to be that they are partisan, rather than self-interested. The positions are political, but what proof is there that they are partisan? Partisan behavior is no more synonymous with political behavior than self-interested behavior is. To be partisan is to put loyalty to party first in considering what political position to take. By reciting that the ABA has adopted positions on matters like school prayer and abortion, Professor Brickman has not demonstrated partisanship, although he has demonstrated that the organization has taken political positions that have little, if anything, to do with self-interest. Again, by political positions I mean positions on how we should govern ourselves, positions concerned with the public interest. On the evidence he cites, Professor Brickman might argue that the ABA has a distorted understanding of the public interest, but he has not mustered any evidence in support of his claim of partisanship. Nor do I think he could plausibly make out his case, which I take to be that the ABA is a partisan supporter of the Democratic party as opposed to the Republicans, by providing more evidence. For example, the many publications of the ABA's National Security Committee and the level of funding that Committee received over the years from the ABA would assure many a Republican that the ABA's agenda was very much in sync with many Republican ideas. Indeed, that committee and those publications caused this Democrat to refuse to join the ABA, although membership would cost me nothing in that the law schools for whom I have worked would have happily picked up my membership dues. On the other hand, I never thought that these publications made the ABA partisan, just wrong.

34. *Id.* at 261 (quoting Trevor Armbrister, *This Could Slash Your Car Insurance Bill*, Reader's Dig., Feb. 1995, at 181, 183-84).

35. *Id.* at 263.

undesirable effects of lowering driving costs also include further damage of the ozone layer by increased carbon monoxide emissions and decreased use of safer modes of transportation.

Professor Brickman allows his ideological commitments to interfere with his argument, but that does not make him wrong about the ABA's self-interest. The conflict does, however, permit dismissal of his argument on the wrong grounds; the ABA Committee's argument contains a parallel flaw, which invites it too to be dismissed too easily.

The Opinion states: "[A] lawyer who always charges the same percentage of recovery regardless of the particulars of a case should consider whether he is charging a fee that is, in an ethical context, a *reasonable* one."<sup>36</sup> Buried deep in the Opinion, this sentence is the Committee's response to the first question posed in the Letter.<sup>37</sup> As a response, it is hopelessly mealy-mouthed. To say a lawyer should "consider" whether a one-size-fits-all contingency fee is "reasonable" is to say that a lawyer should consider whether such a fee is "ethical" because only reasonable fees are ethical.<sup>38</sup> Yet an Ethics Committee exists to consider such matters, not to tell individual lawyers to make up their own minds. The Committee avoided the issue, and therein lies the best evidence that the Committee was willing to put the bar members' financial self-interest above the Committee members' judgment of what constitutes ethical practice.

Read carefully and in context, the mealy-mouthed sentence quoted above strongly suggests that the Committee could not justify one-size-fits-all contingency fees as ethical under the Model Rules. Directly preceding this sentence, the Committee emphasized that in setting fees, lawyers must consider and discuss with the client all the factors listed in Model Rule 1.5(a).<sup>39</sup> "For this reason," the Committee continued, "a lawyer who always charges the same percentage of recovery regardless of the particulars of a case should consider whether he is charging a fee that is, in an ethical context, a *reasonable* one."<sup>40</sup> In context, there can be no doubt that the logical conclusion of the Committee's own reasoning is exactly what the Letter signatories advocate: a lawyer who charges the same contingency fee regardless of each case's particulars acts unethically. Finding itself on the verge of denouncing the practices of almost all lawyers who work on a contingency fee basis, the Committee evaded the question.

This avoidance deserves condemnation, although it should be noted that the legislative Initiative supported by Professor Brickman does not prohibit standardizing contingency fees either. It merely adjusts the percentage that lawyers may charge when the defendant makes an

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36. See Formal Op. 94-389, *supra* note 3.

37. See Letter, *supra* note 2, at 305.

38. See Model Rules of Professional Conduct Rule 1.5 (1994).

39. See Formal Op. 94-389, *supra* note 3.

40. *Id.*

early settlement offer.<sup>41</sup> The Initiative's proponents and the Ethics Committee may have avoided a broad attack on uniformity for practical reasons. Both groups may believe that fees would be more arbitrary and law office billing practices more chaotic and less comprehensible to clients if lawyers had to customize their fees in each case. While this practical objection to individualized fee structures might be available to the Initiative's proponents, however, it is not similarly available to the Ethics Committee.

The Initiative's proponents see the problem as one of excessive fees charged by contingency lawyers. The Committee, however, denies that and instead defines the problem as one of client autonomy and individual justice in the lawyer-client relationship, suggesting that clients are entitled under the ethics rules to tailored fees.<sup>42</sup> If the practical problems with tailoring individual fees are too great to make such tailoring reasonable or realistic, the Committee had no business suggesting that individual lawyers should do it. The Committee cannot have it both ways any more than Professor Brickman can.

The discussion of one-size contingency fees in the Opinion<sup>43</sup> leaves the Committee vulnerable to the charge of unprincipled opinion-writing because it seeks to avoid the consequences of its own logic. The Committee refers the ethical question of one-size-fits-all fees to the individual consciences of lawyers with no explanation of why such a general question should be left to the discretion of practitioners. The Ethics Committee's attempt to duck the obvious conclusion of its own logic and the specific question posed by the Letter signatories is ham-handed. Given that the one-size-fits-all question was the first question posed by the Letter writers—a brilliant strategic choice—the Committee's clumsy attempt to pass the buck is even more glaring.

While I find unsatisfactory the Committee's response to the question regarding charging one contingency fee to all clients, I agree with the conclusions reached by the Committee on the other two questions posed. To say that the Committee's conclusions on some matters seem correct as a matter of ethics law does not, however, mean that the conclusions do not also serve the financial interests of the ABA's membership. Indeed, I assume that all of the Committee's conclusions are consistent with the financial interests of ABA members, as Professor Brickman argues.<sup>44</sup> That, however, does not make the conclusions wrong.

Professor Brickman understands this last point<sup>45</sup> and argues against these conclusions on the merits<sup>46</sup> in addition to condemning them as

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41. See Brickman et al., *supra* note 15, at 79-80.

42. See Formal Op. 94-389, *supra* note 3.

43. See *id.*

44. See Brickman, *supra* note 4, at 260.

45. *Id.*

46. See *id.* at 263-67.

self-interested. While I will address the merits, they interest me less than another question raised by Professor Brickman's emphasis on self-interest: Can an individual or institution ever be trusted when its opinion aligns with self-interest?

Tradition has long counseled us to see as illegitimate opinions rendered by self-interested actors. For example, judges are generally disqualified from deciding cases that directly affect their own interests.<sup>47</sup> At the same time, a competing tradition insists that certain institutions must remain independent from outside forces and thus must decide matters directly affecting their members' self-interest. The Constitution's command that Congress be the sole judge of its members' conduct is an example of that tradition.<sup>48</sup>

While the bar continues to speak of self-regulation, the fact is that the government, the courts, and the legislature are the final arbiters of what lawyers may and may not do. The organized bar and its most powerful instrument, the ABA, nevertheless retain a great deal of influence over the rules that courts and legislatures adopt to govern lawyers. Indeed, I have argued elsewhere that the courts in particular are too reluctant to articulate what the law demands of lawyers, especially when the state has articulated norms of behavior for lawyers that diverge from the bar's understanding of how lawyers should behave.<sup>49</sup> Undeniably, however, as a matter of official state doctrine, the ABA's ethics opinions do not have the force of law.<sup>50</sup> Courts and legislatures are free to reject any such opinion at will. Indeed, they may adopt contrary interpretations without reference to a divergent ABA view.<sup>51</sup> The bar is thus not the final, nor even an official, intermediate decisionmaker in cases affecting lawyers' interests. Indeed, a powerful argument against any formal role for the bar in the state's regulation of lawyers can be made. To accept an official role in the state's regulatory scheme would compromise the healthy measure of independence from the state that the bar should have in any nation that cherishes individual freedom. If it becomes a state-dominated institution, the bar could not be expected to serve its function of protecting individuals and other institutions from the unjustified use of power by the state.

Retaining some measure of independence for the bar while not allowing a self-interested group to run roughshod over those governed by the bar is a delicate balancing act. Strong private institutions like the ABA and its Ethics Committee—institutions without official law-

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47. See John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. Rev. 237, 243 (1987).

48. See U.S. Const. art I, § 5, cls. 1, 2.

49. Koniak, *The Law Between*, *supra* note 23, at 1461-78.

50. See Charles W. Wolfram, *Modern Legal Ethics* § 2.6, at 67 (1986) ("Courts obviously do not feel bound [by ethics opinions].").

51. See *id.*

making roles but whose voice is understood as giving the group's perspective on the right balance in regulation—are essential. In an important sense, the profession's reliance on the ABA to protect the profession's interests, including those of a financial nature, makes the ABA's voice valuable. If the bar neglects to protect its members' interests, how can we expect it to serve as a powerful check on other power centers, like the state, in our system? Conversely, if the ABA always speaks in favor of its members' financial interests—if, in other words, the ABA insists that no value trumps its members' financial self-interest—it undermines its claim to a measure of independence and security. How could anyone expect a bar dedicated only to profit to stand against other power centers, the state, or corporate interests, to protect liberty or the rights of the powerless?

Contrary to Professor Brickman's suggestion,<sup>52</sup> I believe the ABA and its Ethics Committee understand that they cannot stand for financial self-interest against all other principles without losing all influence, all credibility. Any attempt to prove this with a list of examples would be futile because that which furthers financial self-interest is open to interpretation. One could, for example, argue that appearing principled on occasion is itself no more than an exercise in *financial* self-interest—who could prove otherwise? Indeed, one might mistake my argument regarding the ABA's interest in acting contrary to financial interest as just such an exercise, i.e., as expressing a view that only by occasionally pretending not to care about financial self-interest can the ABA hope to further its members' financial interests. That is not my argument. My argument is that only by occasionally foregoing financial self-interest can the ABA further the interests of all Americans—lawyers and lay people—in maintaining a bar strong enough to resist domination by the government and powerful private institutions.

While I cannot prove that a particular opinion does not further the bar's financial interests, I can offer evidence other than my own opinion to support my claim that the Ethics Committee is capable of issuing principled opinions and does so. First, there are numerous court opinions that adopt the reasoning of ABA ethics opinions as official law.<sup>53</sup> When a group's reasoning is persuasive enough to convince those who do not have the same stake in the group's financial well-being, surely that is some evidence that the group has a valid argument. While judges are indeed lawyers, their financial interests are not perfectly aligned with those of the private bar. In any event, the judiciary has rejected some ABA positions that further lawyers' finan-

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52. See Brickman, *supra* note 4, at 260.

53. See, e.g., *Woods v. Covington City Bank*, 537 F.2d 804, 812 (5th Cir. 1976) (citing the reasoning of ABA Comm. on Professional Ethics and Grievances, Formal Op. 26 (1930)); *Kizer v. Davis*, 369 N.E.2d 439, 445 (Ind. Ct. App. 1977) (citing the reasoning of ABA Op. 250 (1943)).

cial interests. For example, the judiciary has for the most part rejected the ABA's position on keeping silent about client fraud,<sup>54</sup> which both Professor Brickman and I agree is a position that favors lawyers' financial interests.

Other evidence for my proposition that the ABA and its Ethics Committee can put their financial self-interest at risk is found in opinions that involve as parties important sources of financial security, such as members of corporate America. After all, if Professor Brickman and I can see financial self-interest in rules and opinions that serve the interests of big-fee-paying clients, such as the ABA's client fraud rule, fairness demands that we consider whether opinions that speak strongly and directly against the financial interests of corporations are opinions that put the financial interests of lawyers at risk in the name of principle. For me, Formal Opinion 94-389 does not quite meet this test. Even if the Opinion's impact is adverse to corporate America's financial interests, characterizing it as a strong and direct rejection of those interests is difficult, if only because the argument on both sides of this issue is framed to downplay corporations' financial interests and to suggest that the two interests at stake are lawyer financial interest and the interests of ordinary tort plaintiffs.

Another opinion, however, does speak strongly and directly against the financial interests of corporate America. In 1993, the ABA Ethics Committee opined that agreements, drafted by twenty major corporate defendants and signed by many of the very few plaintiffs' asbestos firms,<sup>55</sup> to restrict the future handling of certain types of asbestos claims were unethical.<sup>56</sup> While this opinion, like all others, can be imagined to be in the financial interests of the bar by characterizing it as an opinion that rejects any restrictions on future practice in settlement agreements, I reject that reading. The opinion was tailored to address the much narrower question of what restrictions on future practice are ethical when searching for "creative solutions to mass tort litigation,"<sup>57</sup> and was focused on the subject asbestos litigation.<sup>58</sup> Given this narrow focus, the ABA members' financial interests were clearly on the side of the twenty companies who made the agreements,<sup>59</sup> their insurers, and the other companies facing asbestos liability who were waiting to make similar deals. The asbestos plaintiffs'

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54. Geoffrey C. Hazard, Jr. et al., *The Law and Ethics of Lawyering* 321-22 (2d ed. 1994).

55. See Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 *Brook. L. Rev.* 961, 966 (1993).

56. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 371 (1993) [hereinafter Formal Op. 93-371].

57. *Id.*

58. *Id.*

59. See Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 *Cornell L. Rev.* 1045, 1047 n.7 (1995) [hereinafter Koniak, *Feasting While the Widow Weeps*] (listing companies involved in the class action settlement).

bar is very small,<sup>60</sup> and many of those lawyers were proponents of the agreements at issue here. The AFL-CIO had blessed the underlying deal.<sup>61</sup> The judiciary seemed squarely behind it.<sup>62</sup> It seems more than fair to say that the ABA members' financial interests would have been far better served by an opinion that blessed the restrictions in this limited context.

In a strongly worded opinion, the Committee rejected the agreements limiting the handling of future asbestos cases.<sup>63</sup> I believe they did so on the merits, on the grounds discussed in the opinion. For me, this opinion stands as a striking example of the Committee's ability to be principled and of its willingness to take on the "powers that be"—corporations, labor, powerful plaintiffs' lawyers, and the judiciary—in the name of the public's interest in an independent bar.

Principle and guts were not evident in the Ethics Committee's response to whether it is ethical for plaintiffs' lawyers to take one-third or more of each and every tort plaintiff's recovery. The ABA and its Committee lost by issuing such a limp response to this question. The organized bar needs to demonstrate its integrity precisely when the public debate on regulating lawyers is most heated. No better time exists to demonstrate a strong and independent bar's value than when the public light is focused on the institution. That light was turned on by the Initiative and the Ethics Committee proved unequal to the challenge. That is a loss—not just for the bar, but for us all.

#### IV. "MORE MATTER WITH LESS ART"<sup>64</sup>

In addition to the one-size-fits-all question, the Letter writers asked the Committee whether lawyers who propose to work for a contingency fee are ethically obligated to solicit early settlement offers, and whether a lawyer may ethically charge a standard substantial contingency fee rate against an early settlement offer made by the defendant.<sup>65</sup> The Committee answered that there was no general ethical obligation to solicit early settlement offers, and that it is sometimes ethical to charge a substantial contingency fee against a recovery no greater than that offered early on by the defendant.<sup>66</sup> I agree with these two conclusions.

To hold that lawyers working for contingency fees are ethically required to solicit early settlement offers, as Professor Brickman wanted

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60. See Hensler & Peterson, *supra* note 55, at 966.

61. See *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246, 259 n.7 (E.D. Pa. 1994), *rev'd*, 83 F.3d 610 (3d Cir. 1996).

62. Koniak, *Feasting While the Widow Weeps*, *supra* note 59, at 1129 n.392, 1149.

63. See Formal Op. 93-371, *supra* note 56.

64. William Shakespeare, *Hamlet* act 2, sc. 2, l. 95 (Houghton Mifflin Co., Riverside Shakespeare ed. 1974) (1623).

65. Letter, *supra* note 2, at 307.

66. Formal Op. 94-389, *supra* note 3.



the Committee to hold,<sup>67</sup> would have been wrong as a matter of ethics law, in my opinion. Such a ruling would have limited the kind of representation available to tort plaintiffs, because it would have dictated that their lawyers always adopt a particular strategy. Plaintiffs are not legally bound to solicit early settlement offers. To require their lawyers to do so is to require all plaintiffs who hire lawyers on a contingency fee basis, which is to say, most plaintiffs, to do so. I believe, however, that no reason exists to interpret (I would say stretch) the ethics rules to impose any such requirement on plaintiffs.

Professor Brickman explains that plaintiffs should be so bound because it is the only way to protect plaintiffs from overreaching by those lawyers.<sup>68</sup> Helping people by limiting their freedom—here, their freedom to negotiate and to pursue litigation for other than monetary rewards—should always be a solution of last resort, a disfavored option. For that reason and because the ethics rules provide no textual support for the solicit-offers requirement, I think the Committee wins this argument.

While Professor Brickman and his colleagues make a plausible-sounding argument for this requirement, I ultimately find their argument strained. To borrow a phrase from mathematics, their proof is inelegant; it requires too many intermediate steps in logic to make its point. Inelegance may, however, be overlooked when the foundation is sound. Here, however, it is not. At its base, Professor Brickman's argument rests on the following propositions: (1) the ethical rules, when read properly, require that contingency fees be based on some good faith estimate of the lawsuit's riskiness; and (2) the most reliable way to make such an estimate is to solicit an early offer of settlement from the defendant. Proposition two is the problem; it does not follow from proposition one, and on its own, it is unsound. To accept proposition two, we would have to believe that defendants either tend to, or in the future will, make reasonable early settlement offers.

Moreover, underlying Professor Brickman's argument is the notion that plaintiffs should normally accept these early settlement offers either because they will generally be fair offers or because almost any early settlement offer, fair or not, avoids the costs and unpleasantness of discovery and trial and thus should be accepted. We would have to believe one of those things to accept proposition two; otherwise, a defendant's early settlement offer provides little if any information about the recovery a plaintiff has a right to expect.

On the question of whether it is ever ethical to charge a substantial contingency fee against an amount offered by a defendant as an early settlement offer, the Committee responded that such a fee may be

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67. See Brickman, *supra* note 4, at 287-88.

68. See *id.*

ethical but that the analysis must be made on a case-by-case basis.<sup>69</sup> That also seems right to me. A lawsuit may be very difficult to win, although the plaintiff may be in the right, may deserve much more than the defendant has offered, and may avidly desire to seek the maximum recovery. In short, an early settlement offer, once rejected, is an unreliable indicator of how risky the suit may be to maintain. Thus, there is nothing necessarily wrong with charging a hefty contingency fee against some early, and rejected, settlement offers. Is it also okay to charge a hefty contingency fee against a settlement offer that is made and accepted early in the prosecution of the case? I turn to that matter next as we return to the one-size-fits-all problem.

As I have stated, I find the Committee's response to the Letter's first question entirely unsatisfactory. Because I reject both the Committee's mealy-mouthed response and Professor Brickman's alternative, at least to the extent that his response on this point is intertwined with his positions on the ethics of early settlement offers, let me suggest how I would have liked the Committee to have responded:

For a lawyer to take one-third or more of every client's recovery, a substantial percentage, is unethical. Such a substantial percentage of a client's recovery amounts to an unreasonable fee in any case in which the time and labor actually required to produce the recovery are minimal. Whenever the lawyer expends minimal time and energy to secure a recovery, the lawyer should adjust the fee downward to reflect the amount of time and energy actually expended by the lawyer to produce the result. At the inception of every contingency fee relationship, the lawyer is obligated to explain that the fee will be adjusted downward in the event a settlement is reached without significant efforts on the part of the lawyer and to reveal to the client the experience record of the lawyer in making such downward adjustments in previous cases. Of course, in providing such a record of past client billing practices, the lawyer should take care to preserve the confidences of past clients by not disclosing any information from which such past clients could be identified.

Are my conclusions "principled?" More important, how is one to judge?

My general political sympathies are to the left of liberal and when not left, are generally at least liberal rather than conservative. I am also a registered Democrat. In general, I am a proponent of the tort system with all its flaws because, along with Ralph Nader, I believe that it is one of the few deterrents to the inefficient corporate misconduct that too often results in tragedy for innocent individuals. Thus, I would prefer whenever possible to praise plaintiffs' lawyers, to help ensure that they stay financially secure and to defend them from attack, unless doing so would require me to lie about the facts, to ignore

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69. See Formal Op. 94-389, *supra* note 3.

corruption, to turn a blind eye to the misuse of power or privilege. These are values much more basic to me than the tort system.

This willingness to criticize “my own” makes me an uncertain ally in some political fights. Denouncing one’s allies when they do wrong gives comfort to one’s opponents. Indeed, much of my recent work on class action abuse<sup>70</sup> has made many of my political allies somewhat nervous. By criticizing collusive settlements, I have been told, I strengthen the hand of those seeking to pass a tort “reform” plan, which I believe would render the tort system less useful in curbing corporate abuse. I nonetheless persist because self-dealing is wrong, whether engaged in by my friends or by my foes.

But if that is what it is to be principled—and I believe it is—there is still the problem of how an outsider is to know. While here I have exposed my political leanings and discussed how some of my writing might damage causes I believe in, neither I nor any other legal academic regularly disclose such things. For one thing, who would believe them? What, after all, does it mean for me to describe myself as liberal and a supporter of the tort system when, to some, my writings might suggest otherwise? Moreover, even if such disclosure were regularly made in some manner that guaranteed its reliability, how much would that help others to assess the validity of the arguments propounded? Sometimes my political allies are right; they would not otherwise be my allies. Sometimes a policy that serves self-interest is one that I also believe is correct. Am I required to be silent then? Is there anyway to protect oneself in those situations from a charge of being unprincipled? While a person’s overall record and reputation for fairness helps, there will always be persons unfamiliar with or unpersuaded by such matters, at least in a particular instance.

There are those who see unprincipled opinions everywhere. It is no wonder, when pragmatism is so widely praised, and clever political moves are discussed as if they were the grandest of achievements. Perhaps it was ever thus, but it means that to be principled is to be mistaken for a fool—someone who unwittingly aids the “enemy,” someone who does not understand the importance of Realpolitik, a naive player, someone to be pitied, someone to be wary of, someone to be dismissed. It takes guts to be principled—the guts to see one’s dreams destroyed by one’s own words; the guts to be dismissed; the guts to be called a fool. Individuals have guts, not organizations.

The ABA and its committees sometimes act principled because individuals within the ABA and on its committees sometimes show guts. Whenever any institution appears principled, be it Congress, the Supreme Court, or the ABA, it is the courage of the people within

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70. See Koniak, *Feasting While the Widow Weeps*, *supra* note 59; Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 *Geo. J. Legal Ethics* 1 (1995).

that institution that we are witnessing. Thus, who we praise, who gets ahead, what qualities we value in those around us, all matter. We cheat ourselves and threaten all our institutions by our admiration and elevation of the slick over the substantive. Attacking organizations for self-interest simply does not get us very far. Our time is better spent demonstrating, practicing, and praising the moves that principled people make. Our time is better spent daring to be mocked by the pragmatists who surround us.