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NONREFUNDABLE RETAINERS REVISITED

LESTER BRICKMAN* & LAWRENCE A. CUNNINGHAM**

*Amidst widespread public attention to fee abuses, a court recently held for the first time that nonrefundable retainers violate professional ethics. The court in *In re Cooperman* essentially adopted the argument of Professors Brickman and Cunningham that nonrefundable retainers are against public policy because they impair a client's right to discharge his attorney at any time without penalty. Because declaring such agreements unethical is tantamount, in the eyes of the practicing bar, to declaring them void, *In re Cooperman* has sparked a national outcry from those who profit from enforcing nonrefundable retainers.*

*In this Article, Professors Brickman and Cunningham analyze the recent judicial adoption of their ethical argument. The authors first distinguish the many different categories of retainer agreements, confusion of which has led critics of *Cooperman* to misinterpret the court's holding. The Article then clarifies some confusing aspects of the *Cooperman* opinion itself. The authors conclude that future courts, in addition to declaring nonrefundable retainers unethical, should order restitution to the injured client, a remedy that the *Cooperman* court declined to provide. Various groups with vested interests in nonrefundable retainers assert their own particular justifications for such agreements, and the authors consider each argument in turn. They conclude that no proffered rationale for nonrefundable retainers is tenable because none can avoid violating the client discharge right. The authors propose an ethical rule banning nonrefundable retainers. They believe such a rule would both clarify exactly what constitutes a nonrefundable retainer as well as foreclose the possibility of drafting agreements that could escape the application of judicial bans like *Cooperman*. Finally, the Article explains why the client discharge right, as reinvigorated in *Cooperman*, implicates and should control other aspects of the attorney-client relationship as well.*

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We would like to thank Professors John Leubsdorf, Peter Lushing and Barry Scheck for their insightful comments.

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I. INTRODUCTION

Fee abuses by lawyers have generated considerable publicity and sharp scrutiny in recent years.¹ One of the more controversial fee abuses is the

1. *E.g.*, Edward A. Adams, *Bankruptcy Fees Here Are Highest in Nation—Studies: Billing Rates Higher, Proceedings Take Longer Here*, N.Y. L.J., June 24, 1993, at 1 (stating that attorneys' fees for bankruptcies in the Southern District of New York are the highest in the nation); Lester Brickman, *Lawyers' Fee Frenzy*, WASH. POST, Aug. 16, 1991, at A29 (proposing required disclosure of legal fees in asbestos-related product liability actions); Tom Furlong, *Many Firms Don't Survive Filings for Bankruptcy; Commerce: The Process in the Southland is the Most Expensive and Least Successful in the Nation*, L.A. TIMES, Jan. 13, 1992, at A1 (stating that excessive attorney fees decrease chances that bankrupt companies will successfully emerge from a Chapter 11 reorganization); Denise Gellene, *Bar Probing Lawyers' Fees for Entries in Visa Lottery*, L.A. TIMES, Mar. 7, 1991, at D6 (reporting that immigration lawyers charge excessive fees for entering people in State Department visa lotteries); James S. Granelli, *Briefcase: Banking; Legal Fees Still Adding to Taxpayer Pain From Lincoln Savings Fiasco*, L.A. TIMES, Apr. 2, 1993, at D5 (stating that large legal fees incurred for the revitalization of failed savings and loans will be passed on to the public in the form of increased taxes); Wayne E. Green, *Legal Fees Rankle Corporate Customers*, WALL ST. J., Oct. 9, 1990, at B1 (reporting that corporations are cutting back on their employment of outside counsel because of enormous fees being charged);

nonrefundable retainer—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. Indeed, such retainers, which are routinely used by matrimonial, criminal defense, and bankruptcy attorneys,² have recently emerged from beneath a low-visibility veneer to become an important national public policy issue.³

We analyzed the legal and ethical validity of these widely used but controversial agreements in an article published five years ago.⁴ Since then, two judicial decisions have adopted our arguments and held such agreements unlawful⁵ and unethical.⁶ The more recent decision, *In re*

Linda Himmelstein, *The Verdict: Guilty of Overcharging*, Bus. Wk., Sept. 6, 1993, at 62 (discussing steps taken by corporations to reduce excessive attorneys' fees); Douglas Jehl, *Administration Calls for Wide Legal Reforms*, L.A. TIMES, Aug. 14, 1991, at A1 (discussing former Vice President Quayle's proposal to adopt rule governing legal fees under which losing litigants pay winners' attorneys' fees); Steven L. Myers, *Cuomo Promotes Changes In Product Liability Laws*, N.Y. TIMES, Apr. 9, 1993, at B6 (discussing New York Governor Cuomo's proposal to limit legal fees significantly in virtually all cases in which contingent fees are used); Suzanne L. Oliver & Leslie Spencer, *Who Will the Monster Devour Next*, FORBES, Feb. 18, 1991, at 75 (reporting that huge legal fees and overzealous attorneys have driven many asbestos manufacturers into bankruptcy); Leslie Spencer, *Are Contingency Fees Legal?*, FORBES, Feb. 19, 1990, at 130 (stating that contingency fee percentages and profits taken by plaintiffs' lawyers are unreasonably high); Catherine Yang, *Will the Clintons Take a Scalpel to Legal Fees?*, Bus. Wk., Apr. 5, 1993, at 66 (discussing a proposal by President Clinton's health care task force to limit legal fees in certain medical malpractice actions).

2. See 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, 1068 (1992); see *infra* notes 39 and 86.

3. E.g., Edward A. Adams, *Non-Refundable Fee Agreements Banned; Wide Impact Seen of Disciplinary Ruling*, N.Y. L.J., Jan. 29, 1993, at 4; Lester Brickman & Lawrence A. Cunningham, *Clarification Offered on Lawyers' Retainers (Letter to the Editor)*, N.Y. L.J., Mar. 1, 1993, at 2; Stephen Gillers, *All Non-Refundable Fee Agreements are Not Created Equal*, N.Y. L.J., Feb. 3, 1993, at 1; Gerald E. Harper, *Are Non-Refundable Retainer Agreements Unethical?*, 1 LAW LIABILITY ALERT 63 (1993); Frederick Miller, *Hypotheticals Called Wanting in Defense (Letter to the Editor)*, N.Y. L.J., Feb. 11, 1993, at 2; Cornelia H. Tuite, *Retainers v. Advance Payments: Either Way, You Have to Earn It*, CHI. DAILY L. BULL., Mar. 5, 1993, at 6; Junda Woo, *Nonrefundable Lawyers' Fees Barred By New York State Court as Unethical*, WALL ST. J., Jan. 29, 1993, at B10. We have participated in and attended conferences concerning nonrefundable retainers and have been informed that such retainers are the subject of considerable attention from lawyers across the country. See Randall Samborn, *Lawyer Discipline to Open Up*, NAT'L L.J., June 7, 1993, at 3, 36 (reporting on the American Bar Association's 19th National Conference on Professional Responsibility and the interest of conference participants in a draft of this Article).

4. Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law*, 57 FORDHAM L. REV. 149 (1988).

5. Joel R. Brandes, P.C. v. Zingmond, 573 N.Y.S.2d 579, 581-86 (Sup. Ct. 1991) (following the arguments contained in Brickman and Cunningham, *supra* note 4, at 176-88, and holding nonrefundable retainer agreements invalid as a matter of contract law). This Article is limited to a discussion of the ethical implications of nonrefundable retainers. For the contract law analysis adopted in *Brandes*, see Brickman & Cunningham, *supra* note 4, at 176-89.

6. *In re Cooperman*, 591 N.Y.S.2d 855, 856-59 (App. Div. 1993) (following the arguments

Cooperman,⁷ is the first judicial opinion in the country to invalidate nonrefundable retainers as unethical. Because nonrefundable retainers are in such widespread use, the decision has produced a national outcry.⁸ At present, the decision is being appealed;⁹ many parties are eagerly seeking to participate as *amicus curiae*.¹⁰

The *Cooperman* court adopted our assessment of nonrefundable retainers:¹¹ such retainers are unethical because they effectively deprive a client of the right, granted in early case law and recognized by the majority of states, to discharge a lawyer with or without cause, at any time, without penalty.¹² *Cooperman* is not entirely self-explanatory, however, and is sub-

contained in Brickman & Cunningham, *supra* note 4, at 153-69, and holding nonrefundable retainer agreements impermissible and unenforceable as a matter of legal ethics).

7. 591 N.Y.S.2d 855 (App. Div. 1993). *Cooperman* was soon followed by Hegeman-Harris Co. v. Town of Greenburgh, N.Y. L.J., Mar. 25, 1993, at 25, 34 (Sup. Ct. 1993), in which a lower New York court, citing and following *Cooperman*, set aside a nonrefundable retainer as "illegal and void."

8. See *supra* note 3.

9. The attorney's motion to reargue the case in the Second Department was denied on May 25, 1993; his motion for leave to appeal to the New York Court of Appeals was granted on September 14, 1993. The last time the New York Court of Appeals had an opportunity to examine the validity of a nonrefundable retainer agreement, that court studiously avoided doing so (instead disposing of the issue by deciding that the agreement before it was unenforceable on the grounds of ambiguity). *Cooperman*, 591 N.Y.S.2d at 857 (citing *Jacobson v. Sassower*, 489 N.E.2d 1283 (N.Y. 1985)). For a detailed and critical analysis of *Jacobson v. Sassower*, see Brickman & Cunningham, *supra* note 4, at 166-70.

10. E.g., Joint Memorandum of Law of Amicus Curiae NYSACDL and NACDL in Support of Respondent's Motion for Reargument, *Cooperman*, 591 N.Y.S.2d 855 (No. 90-00429) [hereinafter NYSACDL Brief] (brief of New York State Association of Criminal Defense Lawyers and National Association of Criminal Defense Lawyers supporting motion for reargument by Mr. Cooperman); Memorandum of Law of Amicus Curiae Criminal Courts Bar Association of Nassau County in Support of Petitioner's Motion to Reargue, *Cooperman*, 591 N.Y.S.2d 855 (No. 90-00429) (brief supporting motion for reargument by Mr. Cooperman); Brief of Amicus Curiae New York State Bar Association in Support of Permission to Appeal [sic], *Cooperman*, 591 N.Y.S.2d 855 (No. 90-00429) [hereinafter N.Y. State Bar Ass'n Brief]; cf. Gillers, *supra* note 3, at 3 (criticizing the *Cooperman* court by claiming it decided more than was required, particularly since the initial proceeding in disciplinary actions cannot benefit from *amici* briefs because that initial proceeding is confidential).

11. See ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, No. 131, 45:109-11 (American Bar Association ed., 1993) ("*Cooperman* in effect adopts the argument in Brickman & Cunningham," *supra* note 4). The staff attorney of the Grievance Committee that successfully brought the disciplinary proceeding in *Cooperman* has indicated to the authors that the Grievance Committee's arguments were drawn directly from Brickman & Cunningham, *supra* note 4. See Letter from Robert P. Guido to Lester Brickman and Lawrence A. Cunningham (Mar. 4, 1993) (copy on file with the authors and the *North Carolina Law Review*).

12. *Martin v. Camp*, 114 N.E. 46 (N.Y. 1916); see *infra* note 24. A committee appointed by the chief judge of the New York Court of Appeals to examine the role of attorneys in matrimonial actions has also embraced this policy in its recommendation to that court to adopt, among other things, a court rule prohibiting nonrefundable retainers. REPORT OF THE COMMITTEE TO EXAMINE LAWYER CONDUCT IN MATRIMONIAL ACTIONS 18 (May 4, 1993) [hereinafter MATRIMONIAL COMMITTEE] ("[T]o preserve the client's unqualified right to discharge counsel, even without cause,

ject to misinterpretation.¹³ Because the opinion is destined to have a national impact and because of the national attention it has received, we think it is important to put *Cooperman* in context and clarify its implications.

Part II of this Article introduces the law and policy of retainer agreements, distinguishing between special retainer agreements, which contemplate fees for specified services, and general retainer agreements, which contemplate fees for availability to render specified or unspecified services. Part II then defines nonrefundable retainer agreements, which are special retainers, paid in advance of specified services to be rendered, with the advance fee denominated by the lawyer as nonrefundable under any circumstances (even if the lawyer does not do the work contemplated). In contrast, general retainers are not nonrefundable retainers (and therefore were not at issue in *Cooperman*); rather, they are fees paid solely for availability and therefore do not involve an advance fee but a fee that is fully earned when paid.¹⁴ Part II concludes with a discussion of some of the public policy concerns nonrefundable retainers raise, the most important of which is that such retainers interfere with a client's inviolate right to discharge her attorney at any time without incurring a penalty.

Part III of this Article analyzes *Cooperman*, which gives effect to this central public policy concern by condemning nonrefundable retainers as unethical, and discusses the court's analysis and reasoning. In Part IV, we discuss the arguments of those who criticize *Cooperman* and assess the hue and cry *Cooperman* has spawned. That assessment forms the basis for our suggestion, which we present in Part V, of an ethical rule that prohibits all nonrefundable retainers. Part V concludes by offering broader perspectives on *Cooperman*, showing that its core reinvigoration of the client discharge right extends beyond nonrefundable retainers. This part also discusses how *Cooperman* is likely to influence ethical rules governing other aspects of the attorney-client relationship as well.

II. RETAINER LAW AND POLICY

A. General and Special Retainers

Most states have long recognized two kinds of retainer agreements between lawyer and client: special retainers and general retainers.¹⁵ A spe-

the use of the nonrefundable retainer should be prohibited as being repugnant to public policy.") (citation omitted) (copy on file with the authors and the *North Carolina Law Review*).

13. See *infra* text accompanying notes 84-116.

14. See *infra* notes 26 and 93.

15. See Brickman & Cunningham, *supra* note 4, at 157 n.44 (citing 1 STUART M. SPEISER, ATTORNEYS' FEES §§ 1:17 to :21, at 23-25 (1973); Charles J. McClain, Jr., *The Strange Concept of the Legal Retaining Fee*, 8 J. LEGAL PROF. 123 (1983); CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rules 3-700(D)(2), 4-100(B) (1989); Pennsylvania Bar Ass'n Formal Op. 85-120

cial retainer is an agreement between attorney and client in which the client agrees to pay the attorney a specified fee in exchange for specified services to be rendered. The fee may be calculated on an hourly, percentage or other basis and may be payable either in advance or as billed.

A general retainer is an agreement between attorney and client in which the client agrees to pay a fixed sum to the attorney in exchange for the attorney's promise to be available to perform, at an agreed price, any legal services (which may be of any kind or of a specified kind) that arise during a specified period.¹⁶ Because the general retainer fee is given in exchange for availability, it is a charge separate from fees incurred for services actually rendered.¹⁷ In other words, such fees are "earned when paid" because the payment is made for availability.¹⁸

An attorney and client may also create a hybrid general-special retainer by agreeing that part or all of the general retainer fee be applied to the bill for any services actually performed.¹⁹

B. Client Discharge Right

Without regard to the nature of a lawyer-client retainer, it is well-established that a lawyer is a fiduciary for his client.²⁰ Fiduciary duties are imposed because society mandates that certain persons in whom public trust and confidence are reposed should be vested with a fiduciary obligation.²¹ That obligation is a matter of status, not contract.²² Lawyers

(1985); *In re McDonald Bros. Constr. Inc.*, 114 B.R. 989, 997-98 (Bankr. N.D. Ill. 1990); *In re James Contracting Group, Inc.*, 120 B.R. 868, 871 (Bankr. N.D. Ohio 1990).

16. A "general retainer" is also sometimes called a "true retainer" or a "classic retainer." *E.g.*, CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rules 3-700(D)(2), 4-100(B) (1989) (providing that an attorney must promptly refund any part of an advance fee that has not been earned except if the fee is identified as a "true retainer," defined as a fee "paid solely for the purpose of ensuring the availability of the [lawyer] for a matter or for a given period of time"); *Baranowski v. State Bar*, 593 P.2d 613, 618 n.4 (Cal. 1979) (defining a "classic" retainer as "a sum of money paid by a client to secure an attorney's availability over a given period of time").

17. Some have observed that these definitions are confusing, suggesting instead calling special retainers "advance fee payments" and general retainers simply "retainers." CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 505-06 (1986); *see also* Brickman & Klein, *supra* note 2, at 1066 n.143 (noting that the term "retainer" is ambiguous because it is used to refer to three distinct circumstances: the employment contract itself, an advance fee payment (a special retainer), and a fee paid for availability (a general retainer)).

18. *See infra* note 26.

19. Brickman & Cunningham, *supra* note 4, at 158 n.47. Examples of each of these kinds of retainer agreements are given and analyzed *infra* text following note 98.

20. *See* Brickman & Cunningham, *supra* note 4, at 153 n.19.

21. Fiduciary duties include: maintaining confidentiality; maintaining undivided loyalty; avoiding conflicts of interest; operating competently; presenting information and advice honestly and freely; acting fairly; and safeguarding client property.

22. WOLFRAM, *supra* note 17, at 146; *see also* Lester Brickman, *Attorney-Client Fee Arbitra-*

are fiduciaries because the act of retaining such a professional necessarily invokes the need to repose trust and confidence in that person. Failure to do so would impair the professional's ability to exercise independent professional judgment on the client's behalf. Hence the reposing of trust and confidence in the lawyer is an essential element of the lawyer-client relationship—one that requires protection if the relationship is to achieve its purpose effectively.²³ To maintain the efficacy of the relationship, courts have long provided that a client who loses that trust must therefore be free to discharge her lawyer at any time, for any reason, without penalty.²⁴ In the next section, we discuss how nonrefundable retainers undermine this client discharge right. We also examine other public policy objections to nonrefundable retainers.

tion: A Dissenting View, 1990 UTAH L. REV. 277, 283 n.38 (discussing the origin and development of fiduciary duties).

23. We develop this trust-based theory of the lawyer-client relationship more fully in Brickman & Cunningham, *supra* note 4, at 153-70.

24. *In re Cooperman*, 591 N.Y.S.2d 855, 858 (App. Div. 1993) (citing *Martin v. Camp*, 114 N.E. 46 (N.Y. 1916)). *Martin v. Camp* has "become the national rule, conquering the jurisdictions with its force of reasoning." Lester Brickman, *Setting the Fee When the Client Discharges a Contingent Fee Attorney*, 41 EMORY L.J. 367, 373 (1992) [hereinafter Brickman, *Setting the Fee*] (citing, e.g., *Owens v. Bolt*, 118 So. 590 (Ala. 1928); *State Farm Mut. Ins. Co. v. St. Joseph's Hosp.*, 489 P.2d 837 (Ariz. 1971) (en banc); *Henry, Walden & Davis v. Goodman*, 741 S.W.2d 233 (Ark. 1987); *Fracasse v. Brent*, 494 P.2d 9 (Cal. 1972) (en banc); *People v. Radinsky*, 512 P.2d 627 (Colo. 1973) (en banc); *Cole v. Myers*, 21 A.2d 396 (Conn. 1941); *Rosenberg v. Levin*, 409 So. 2d 1016 (Fla. 1982); *Brookhaven Supply Co. v. Rary*, 205 S.E.2d 885 (Ga. Ct. App. 1974); *Booker v. Midpac Lumber Co.*, 649 P.2d 376 (Haw. 1982); *Rhoades v. Norfolk & W. Ry. Co.*, 399 N.E.2d 969 (Ill. 1979); *Finney v. Estate of Carter*, 164 N.E.2d 656 (Ind. Ct. App. 1960); *In re Phelps*, 459 P.2d 172 (Kan. 1969), *cert. denied*, 397 U.S. 916 (1970); *Wright v. Fontana*, 290 So. 2d 449 (La. Ct. App. 1974); *Palmer v. Brown*, 40 A.2d 514 (Md. 1945); *Salem Realty Co. v. Matera*, 410 N.E.2d 716 (Mass. App. Ct. 1980), *aff'd*, 426 N.E.2d 1160 (Mass. 1981); *Ambrose v. Detroit Edison Co.*, 237 N.W.2d 520 (Mich. Ct. App. 1975); *Lawler v. Dunn*, 176 N.W. 989 (Minn. 1920); *Plaza Shoe Store, Inc. v. Hermel, Inc.*, 636 S.W.2d 53 (Mo. 1982) (en banc); *Baker v. Zikas*, 125 N.W.2d 715 (Neb. 1964); *In re Estate of Poli*, 338 A.2d 888 (N.J. Super. Ct. App. Div. 1975); *Winston v. Fitch (In re Winston's Will)*, 59 P.2d 904 (N.M. 1936); *Martin v. Camp*, 114 N.E. 46 (N.Y. 1916); *Covington v. Rhodes*, 247 S.E.2d 305 (N.C. Ct. App. 1978), *cert. denied*, 251 S.E.2d 468 (N.C. 1979); *Fox & Assoc. Co. L.P.A. v. Purdon*, 541 N.E.2d 448 (Ohio 1989); *First Nat'l Bank & Trust Co. v. Bassett*, 83 P.2d 837 (Okla. 1938); *Sundheim v. Beaver County Bldg. & Loan Ass'n*, 14 A.2d 349 (Pa. Super. Ct. 1940); *Lake v. Winfield Fuller Co.*, 173 A. 119 (R.I. 1934); *Bonham v. Farmer*, 148 S.E. 878 (S.C. 1929); *Ritz v. Carpenter*, 178 N.W. 877 (S.D. 1920); *Price v. Western Loan & Sav. Co.*, 100 P. 677 (Utah 1909); *Heinzman v. Fine*, *Fine, Legum & Fine*, 234 S.E.2d 282 (Va. 1977); *Wright v. Johanson*, 233 P. 16 (Wash. Ct. App. 1925), *aff'd*, 236 P. 807 (Wash. 1925); *Clayton v. Martin*, 151 S.E. 855 (W.Va. 1930); *Enos v. Keating*, 271 P. 6 (Wyo. 1928)). *See also Johnston v. California Real Estate Inv. Trust*, 912 F.2d 788, 789 (5th Cir. 1990) (urging Texas to reject its "inequitable rule" and adopt instead the client-discharge rule). *But see Anderson v. Gailey*, 606 P.2d 90 (Idaho 1980); *Tri City Equip. Co. v. Modern Real Estate Inv. Ltd.*, 460 N.W.2d 464 (Iowa 1990); *Mandell & Wright v. Thomas*, 441 S.W. 2d 841, 847 (Tex. 1969); *Knoll v. Klatt*, 168 N.W.2d 555 (Wis. 1969), *overruled by Herro, McAndrews & Porter, S.C. v. Gerhardt*, 214 N.W.2d 401 (Wis. 1974).

C. Nonrefundable Retainers

A nonrefundable retainer is one that "allow[s] an attorney to keep an advance payment irrespective of whether the services contemplated are rendered."²⁵ It is important to distinguish between the nonrefundable retainer and the general retainer. The nonrefundable retainer, a subspecies of the special retainer, arises only in conjunction with the rendering of specified services for a specified fee. A general retainer is not paid for the rendition of legal services, but rather for assured availability to perform legal services. Thus the nonrefundable retainer and the general retainer are separate and distinct arrangements.²⁶

A nonrefundable retainer penalizes a client for discharging his lawyer because such action imposes a cost on the client. Under the trust-based theory of the attorney-client relationship presented above, however, a client must always have the right to discharge a lawyer without penalty. Because that right would be directly impaired by a nonrefundable retainer in this "special retainer" context, such agreements are therefore prohibited.²⁷

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

26. Although it is technically correct to refer to the general retainer payment as nonrefundable, this is a misleading characterization. Indeed, this characterization has led to confusion on the part of some of *Cooperman's* critics, accentuated in part by *Cooperman's* failure to declare explicitly that its holding was not applicable to general retainers. See *infra* text accompanying notes 94-98.

Because a general retainer is paid for availability, it is therefore an option contract, which may usefully be compared with a typical real estate option transaction. See *Brickman & Cunningham*, *supra* note 4, at 158. An owner of real property sells an option to purchase the property for a specified fixed price exercisable during a defined time period. The buyer of the option may or may not decide to proceed with the purchase; either way, he is not entitled to return of the option payment. Although it is correct to conclude that the option payment was nonrefundable, it would be imprecise to do so because that characterization does not capture the essence of the transaction, which is that the option buyer enjoyed a right in exchange for his payment. For the same reasons, applying the term "nonrefundable" to a general retainer is accurate but imprecise. The imprecision creates confusion because it suggests issues that do not bear on why the payment is not recoverable in the event the client decides not to exercise his option (i.e., direct the attorney to render services during the period of availability).

27. See *Demov, Morris, Levin & Shein v. Glantz*, 428 N.E.2d 387, 389 (N.Y. 1981):

The public policy of New York which permits a client to terminate the attorney-client relationship freely at any time, notwithstanding the existence of a particularized retainer agreement between the parties, would be easily undermined if an attorney could hold a client liable for fraud on the theory that the client misrepresented his or her true intent when the retainer was executed. When an attorney-client relationship deteriorates to the point where the client loses faith in the attorney, the client should have the unbridled prerogative of termination. Any result which inhibits the exercise of this essential right is patently unsupportable.

Notwithstanding abundant authority establishing both the fiduciary nature of the attorney-client relationship and its corollary, the client discharge rule, an occasional court completely fails to recognize any of this. See, e.g., *Sado v. Ellis*, 815 F. Supp. 761, 763 (S.D.N.Y. 1993) (purporting to apply New York law, the court inexplicably ignored these principles and enforced a

Looked at another way, such a retainer is forbidden because otherwise, the lawyer would be able to charge the client for work he did not do—the fee would be “unearned.”

On the other hand, if a client has paid a lawyer a fee that the lawyer has fully earned, no fee forfeiture results if the client discharges the lawyer. The client’s discharge right remains unimpaired. This reasoning is the predicate basis for the so-called “general retainer exception” to the client discharge right, first elaborated in *Martin v. Camp*.²⁸ This “general retainer exception” to the client discharge right is, of course, not literally an “exception”—there are no “exceptions” to the client discharge right. Rather, it is a circumstance in which that inviolate right is unimpaired.²⁹

The conclusion that a general retainer is earned when paid has historically been based on the attorney’s availability to the client. The justification for that conclusion rested on the theory that lawyers make two present sacrifices at the time of signing a general retainer agreement: they reallocate their time so that they can stand ready to serve the general retainer client to the exclusion of other clients and they give up their right to be hired by persons with interests that conflict with the general retainer client, thus again foregoing potential income.³⁰ It is in this sense that the fee is deemed “earned when paid.”

Using these two present sacrifices to defend the general retainer exception to the client discharge right is overinclusive and may also be underinclusive. It is overinclusive because these two justifications do not apply to all general retainer situations. For example, a general retainer may be created that does not require a lawyer to reallocate time or to decline other representation.³¹ It may be underinclusive because there may be circum-

nonrefundable retainer agreement without any discussion). The *Sado* court’s enforcement of a nonrefundable retainer arose in a context in which the attorney had fully performed the services contemplated by the retainer agreement, earning the advance fee, as well as additional fees. *Id.* Accordingly, since no forfeiture was effected and the client discharge right was not impaired, the court reached the right result in permitting the lawyer to keep the advance fee payment. That result, however, had nothing to do with whether the agreement provided for a nonrefundable retainer, rendering the court’s statements not only inaccurate but also superfluous. In other words, the court could have reached the right result without misstating New York law.

28. 114 N.E. 46, 48 (N.Y. 1916).

29. *E.g.*, Association of the Bar of the City of New York, Formal Op. 1991-3 (1991), reprinted in N.Y. L.J., May 21, 1991, at 6 (“As a matter of law, the client’s right to discharge a lawyer is essentially absolute, and well-established legal precedent dictates that a client should not be compelled to continue being represented by a lawyer in whom the client has lost confidence or trust.”).

30. Brickman & Cunningham, *supra* note 4, at 158.

31. Indeed, it is often unlikely that a general retainer will involve either of these circumstances.

First, attorneys rarely turn down work opportunities because their plates are already full. Rather they simply pile on more work and juggle their various undertakings, or in the

stances in which the client discharge right is unimpaired, even if the lawyer neither reallocated her time nor faced conflicts of interest. That, at least, is what critics of *Cooperman* argue.³² Before analyzing *Cooperman* and its critics, however, we discuss a few additional objections to nonrefundable retainers, apart from the primary objection that they impair the client discharge right.

Consider a rule permitting nonrefundable retainers, subject to the provision that persons harmed by unfair or unreasonable nonrefundable retainers could obtain redress for that harm. This rule obviously would penalize clients for discharging lawyers and enable lawyers to charge fees for work not done. Furthermore, such a rule would necessarily be weighted in favor of lawyers and against clients for several additional reasons. First, the attorney-client fee relationship is not an arm's-length one involving parties bargaining in parity;³³ rather, it is a relationship between a fiduciary and a beneficiary in which, as discussed above, the client reposes trust and confi-

case of large firms, add more associates as needed. When they do accept a general retainer, they do not set aside time and idly await the moment when their general retainer client demands legal services. . . . Second, not all general retainer clients will yield conflicts that preclude a lawyer from representing other potential clients.

Brickman & Cunningham, *supra* note 4, at 158-59 (citations omitted). To address the problem of overinclusiveness, we have suggested an alternative approach that would not depend on whether the retainer is characterized as a general retainer or a special retainer. Rather, the overinclusiveness may be cured by reference to another "exception" to the client discharge right: the attorney's change of position. See *Martin*, 114 N.E. at 48. A literal reading of this change of position exception would consume the *Martin v. Camp* rule—almost any client relationship can be characterized as producing a change in a lawyer's position. Accordingly, we have interpreted the change of position circumstance to exist when either (1) there has been a change in the attorney's employment status or (2) the attorney has incurred some expense not arising in the ordinary course of a particular representation. Brickman & Cunningham, *supra* note 4, at 157. Thus, if the attorney reallocates his time in a way that constitutes a change of employment status (implicitly or explicitly requested by the client) or declines to represent other potential clients under circumstances benefiting the client, then any fee paid in advance was earned when paid. As such, the client's discharge right is unimpaired.

32. This is a generous statement; in fact, the critics of *Cooperman* make arguments attacking the decision without ever addressing the client discharge right or even acknowledging (other than in private) that it is the primary policy basis of the prohibition against nonrefundable retainers. See *infra* text accompanying notes 88-133.

33. *E.g.*, *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 489-90 (1988) (O'Connor, J., dissenting) ("[I]t would be unrealistic to demand that clients bargain for their services in the same arm's-length manner that may be appropriate when buying an automobile or choosing a dry cleaner."); *Ohrlick v. Ohio State Bar Ass'n*, 436 U.S. 447, 464-65 (1978) ("The detrimental aspects of face-to-face selling . . . of ordinary consumer products have been recognized . . . and it hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits [a] . . . lay person."); GEORGE P. COSTIGAN, CASES AND OTHER AUTHORITIES ON LEGAL ETHICS 496 (1917) ("[A] lawyer's superior knowledge and experience give him an advantage which tempts him to overreach the client."). Former United States Supreme Court Chief Justice Warren E. Burger has observed that "in multiple disaster cases [such as] an airline crash . . . the transaction between an experienced lawyer and inexperienced lay survivors in negotiating a contract for professional services is not an

dence in the lawyer. Accordingly, the lawyer has a built-in advantage over the client simply because of his professional status.³⁴ Second, as a practical matter, he also understands and can evaluate legal claims better than his client. Indeed, lawyers advertise this superior knowledge in initial consultations with clients as a way to mystify law and legal process. This perception promotes the lawyer's advantage over the client.³⁵ For all these reasons, clients give great weight and tremendous deference to their lawyer's opinions, judgment and advice on virtually all subjects they discuss, including the consequences to the lawyer and the client of a particular fee arrangement.

From this perspective, permitting nonrefundable retainers as a general matter would erect a strong structural presumption of their validity in a particular case, which clients would rarely be willing to challenge.³⁶ The lawyer would have additional structural advantages over the client because he would possess the funds at issue. To recover those funds, the client would have to incur out-of-pocket expenses with little or no assurance of recovery. Such expenses would, of course, include other legal fees and would also require a disgruntled client to repose trust and confidence in yet

arms-length transaction." *Chief Justice Urges Look at Limit on Lawyers' Fees*, ASSOCIATED PRESS NEWS RELEASE, May 13, 1986, available in LEXIS, Nexis Library, AP File.

34. See Chris G. McDonough, *Legal Fees: Value Billing and the Reasonableness Requirement*, N.Y. L.J., May 11, 1993, at 1, 7 (discussing and citing *Stern v. Stern*, N.Y. L.J., Apr. 2, 1993, at 33 (Sup. Ct. 1993)). McDonough discussed the superior knowledge of attorneys that enables them to "consider the intangibles of the case, evaluate the competing claims of the parties, and consider all of the factors in light of the existing law." *Id.* Specifically, the *Stern* court stated that this knowledge

requires positive and definitive advice by counsel as to the probable outcome of the proceedings and the cost of attaining satisfactory results. The client on the other hand is very often affected by the emotional impact caused by the very nature of these proceedings which diminishes judgment, and all too often unleashes wrath.

Id. (quoting *Stern v. Stern*, N.Y. L.J., Apr. 2, 1993, at 33 (Sup. Ct. 1993)).

35. See CITY OF NEW YORK DEPARTMENT OF CONSUMER AFFAIRS, WOMEN IN DIVORCE: LAWYERS, ETHICS, FEES AND FAIRNESS 32 (1992) [hereinafter FEES AND FAIRNESS] (citing Austin Sarat & William L.F. Felstiner, *Popular Legal Culture: Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1685 (1989):

[T]he lawyer's power is enhanced when the lawyer positions him/herself as superior to the client through "law talk." These are discussions of the legal system that characteristically take place between client and divorce lawyer in which the lawyer portrays him or herself as an insider with access to the right connections.);

see also MATRIMONIAL COMMITTEE, *supra* note 12, at 1 (stating that clients in matrimonial cases experience "intense and conflicting feelings of anger, rejection, guilt and vulnerability").

36. Even proponents of nonrefundable retainers and opponents of *Cooperman* recognize the validity of these arguments. *E.g.*, New York State Bar Ass'n, Formal Op. 599, at 6-7 (1989) (observing that using the term "nonrefundable" to describe a fee that is refundable confuses clients, leading them to believe that the fee cannot be refunded). See NYSACDL Brief, *supra* note 10, at 6 n.1; Gillers, *supra* note 3, at 2.

another lawyer.³⁷

These structural advantages favoring lawyers over clients raise a related concern: lawyer overreaching, a significant problem in many contexts, particularly fee arrangements.³⁸ The dangers in the context of nonrefundable retainers appear to be especially acute, because there is a strong positive correlation between the use of nonrefundable retainers and the degree of client vulnerability in particular classes of cases. Thus, nonrefundable retainers are most widely used in matrimonial, criminal defense, and bankruptcy cases.³⁹ Clients in these classes of cases are especially vulnerable because of their impaired ability and limited resources (whether financial, emotional or temporal) to interview a number of competing lawyers or to investigate alternative fee arrangements.⁴⁰

Building on all the foregoing concerns, permitting nonrefundable retainers would increase the risk that lawyers could evade scrutiny of fees that are, by any objective measure, clearly excessive and thus in violation of Disciplinary Rule 2-106 ("DR 2-106") of the Model Code of Professional Responsibility (the "Code").⁴¹ A rule permitting a nonrefundable retainer unless it is found to be clearly excessive or unreasonable would require that such retainers be evaluated in the light of standards of excessiveness or reasonableness such as those set forth in DR 2-106.⁴² Even if a nonrefundable retainer were not earned through the rendering of any services, this

37. For these reasons, we urge courts that strike down nonrefundable retainer agreements to order restitution to the victimized clients in the same proceeding. *See infra* text accompanying notes 78-83.

38. *E.g.*, FEES AND FAIRNESS, *supra* note 35, at 24-25 (discussing the practices of attorneys engaged in matrimonial representation and other domestic law matters in New York and revealing instances of unethical conduct by lawyers, many related to charging excessive fees, including nonrefundable retainer fees).

39. Brickman & Klein, *supra* note 2, at 1076 (bankruptcy); FEES AND FAIRNESS, *supra* note 35, at 3-4 (matrimonial); NYSADCL Brief, *supra* note 10, at 3 (criminal defense and matrimonial). Such fees are also sometimes used in the corporate takeover defense context. Brickman & Cunningham, *supra* note 4, at 158 n.50.

40. *See* FEES AND FAIRNESS, *supra* note 35, at 7:

To make matters worse, divorce clients are usually in an emotionally vulnerable state. Insecurity, anger, and pain—feelings common in marital break-up—put clients at a distinct disadvantage when dealing with an experienced lawyer.

Lawyers also have the advantage of possessing detailed financial information about the client, and eventually about the spouse, as well.

41. DR 2-106 prohibits an attorney from charging a "clearly excessive" fee, evaluated by reference to a variety of factors, including the time and labor required; the likelihood of precluding other employment by the lawyer; time limitations imposed by the client or circumstances; nature and length of the professional relationship; and the experience, reputation and ability of the lawyer. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1980). The Model Rules of Professional Conduct prohibit charging "unreasonable" legal fees, as defined by reference to substantially similar criteria. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1992).

42. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1991).

approach would require that it be evaluated for excessiveness. Although that is a ludicrous proposition, a rule permitting nonrefundable retainers would give it legitimacy. Thus, at least as a conceptual matter, one would have to be ready to decide, for example, how much is too much for doing no work: \$10,000, \$5,000, \$2,500 or \$100? Part of the motivation for the rule against nonrefundable retainers is to forfend such ludicrous considerations.

To summarize, nonrefundable retainers are objectionable for several reasons apart from impairing the client discharge right: a contrary rule would be lopsided in favor of lawyers and against clients; such fees currently are used most widely in contexts where client vulnerability is highest, which suggests lawyer overreaching; and a contrary rule would have the ludicrous effect of requiring evaluation of whether an unearned fee was clearly excessive. Although these policy concerns are of course important and perhaps indirectly reflected by the *Cooperman* decision, the driving force behind that decision is the overriding public policy supporting the prohibition against nonrefundable retainers—to protect the client's inviolate right to discharge her lawyer at any time, for any reason, without penalty.

III. *IN RE COOPERMAN*

Cooperman was a disciplinary proceeding commenced by the New York Grievance Committee for the Tenth Judicial District (the "Grievance Committee") against a member of the Bar of the State of New York (the "respondent").⁴³ The Grievance Committee charged the respondent with fifteen counts of professional misconduct, consisting of five theories applied to three separate but substantially similar retainer agreements, each

43. *In re Cooperman*, 591 N.Y.S.2d 855, 856 (App. Div. 1993). Each judicial department of the New York Supreme Court, Appellate Division, including the Second Department, has appointed grievance committees that are charged with the "duty and power to investigate and prosecute matters arising in or concerning attorneys practicing" in the various judicial districts of each department. *E.g.*, N.Y. Ct. RULES § 691.4 (McKinney 1993). In the Second Department, such committees are authorized to investigate professional misconduct by attorneys, *id.* § 691.5; to issue reprimands (disciplinary action after a hearing), admonishments (disciplinary action without a hearing), and letters of caution ("when it is believed that the attorney acted in a manner which, while not constituting clear professional misconduct, involved behavior requiring comment"), *id.* § 691.6; and to recommend to the Second Department that probable cause exists for the filing of disciplinary charges against attorneys who have been so investigated, *id.* § 691.4(h). Upon such a recommendation, the Second Department may authorize the committee to prosecute the disciplinary proceeding, typically before a special referee (often a retired justice or associate justice of the appellate division), whose conclusions are then reported to the Second Department for confirmation or rejection. *See Cooperman*, 591 N.Y.S.2d at 856. The appellate division itself is authorized to censure, suspend, and disbar attorneys over whom it has jurisdiction. N.Y. JUD. L. § 90(2) (McKinney 1983 & Supp. 1993). *See infra* note 59 for further discussion of the appellate division's power to regulate the practice of law and to discipline attorneys practicing in New York State.

providing that a specified fee payment would be "nonrefundable." The referee who first heard the proceeding agreed with the Grievance Committee on all charges.⁴⁴ The court then confirmed the referee's report with respect to twelve of the fifteen charges and suspended the respondent from the practice of law for two years.⁴⁵

A. *Facts and Allegations*

Edward Cooperman was a solo practitioner specializing in criminal law, but he also engaged in general practice, including estate planning and administration.⁴⁶ In September 1985, the Grievance Committee issued him a letter of caution advising him not to accept nonrefundable retainers because they were unethical.⁴⁷ Nevertheless, in the summer of 1986, the respondent entered into a fee agreement with a client in a criminal case,⁴⁸ charging \$10,000 in advance and describing it as nonrefundable even if the client discharged the respondent.⁴⁹ After the respondent noted his appearance and unsuccessfully petitioned the court for leave to withdraw his client's previously entered guilty plea, the client discharged the respondent and unsuccessfully sought a refund.⁵⁰ In June 1987, the Grievance Committee again found that the respondent had acted unethically and issued him another letter of caution "for failure to return funds to his client based on a non-refundable retainer agreement."⁵¹ Nevertheless, respondent subsequently entered into two additional similar nonrefundable retainer agree-

44. *Cooperman*, 519 N.Y.S.2d at 856.

45. *Id.* at 859. With respect to the three charges not upheld, see *infra* text accompanying notes 56-57.

46. See Harper, *supra* note 3, at 63.

47. *Cooperman*, 591 N.Y.S.2d at 859.

48. The court excerpted the following from the text of that agreement: "My minimum fee for appearing for you in this matter is fifteen thousand (\$15,000) dollars. This fee is not refundable for any reason whatsoever once I file my notice of appearance on your behalf." *Id.* at 856. Appendix A, *infra*, sets forth the entire text of all three agreements at issue in *Cooperman*, redacted to conceal the identity of the parties. Appendix A also contains two letters from Cooperman's clients, also redacted, that give an intimate illustration of the deep concerns and public policy problems raised by nonrefundable retainers and elaborated in Part II. See *supra* text accompanying notes 36-40. In one letter, for example, the client informs Cooperman that she had reposed trust in him, that she had given him all the money she had (in advance of services), that he breached that trust, and that the client therefore believed she was owed a refund of the advance fee payments. See *infra* app. A, § 2.

49. According to the Grievance Committee's brief, at the time the respondent was retained, the client had already pled guilty and was scheduled for sentencing. The parties contemplated that the respondent would seek to have the guilty plea withdrawn and proceed to trial. Petitioner's Post-Hearing Memorandum, Sept. 11, 1991, at 13; see *infra* app. A, § 2. The respondent noted his appearance at the sentencing hearing, seeking precisely that result, but the judge summarily refused the request. Petitioner's Post-Hearing Memorandum, *supra* at 15-16.

50. See *Cooperman*, 591 N.Y.S.2d at 858.

51. *Id.* at 859.

ments, both of which were also at issue in the *Cooperman* disciplinary proceeding.⁵²

The Grievance Committee argued that all three of respondent's nonrefundable retainer agreements were unethical, each for the same five reasons. First, the agreements violated the lawyer's "obligation to refund promptly any part of a fee paid in advance that has not been earned."⁵³ Second, the agreements created "an impermissible chilling effect upon the client's inherent right, upon public policy grounds, to discharge an attorney at any time with or without cause."⁵⁴ Third and fourth, with respect to each agreement, "the respondent charged a clearly excessive fee and then wrongfully refused to refund any portion of the fee."⁵⁵ While the court accepted each of these four arguments, it rejected without any discussion the Grievance Committee's fifth argument,⁵⁶ that denominating the fee payment as nonrefundable constituted "misrepresentation" in violation of DR 1-102(A)(4).⁵⁷

B. Analysis and Reasoning

Before discussing the Grievance Committee's arguments, the *Cooperman* court distinguished a nonrefundable fee from a "minimum fee." The respondent had denominated the advance fees paid to him as "minimum fees," most likely in an effort to evade characterization of the agreements as nonrefundable retainers.⁵⁸ That strategy anticipated an opinion of

52. *Id.*; see *infra* app. A, §§ 3, 5.

53. *Cooperman*, 591 N.Y.S.2d at 857 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(a)(3) (1980)). The equivalent Model Rule is MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(e) (1992).

54. *Cooperman*, 591 N.Y.S.2d at 857.

55. *Id.*

56. Petitioner's Post-Hearing Memorandum, *supra* note 49, at 19-24. For an interesting twist on the misrepresentation theory, see *In re Pearlman*, 627 A.2d 314 (R.I. 1993). *Pearlman* involved a lawyer who led his client to believe that an advance fee payment was solely to be applied against services rendered but thereafter claimed the advance was nonrefundable. *Id.* The court affirmed disciplinary sanctions against the lawyer on the grounds of misrepresentation. *Id.* at 316.

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

58. The court excerpted the following from the third (the most recent) of the three agreements:

The MINIMUM FEE for [the lawyer's] representation . . . to any extent is Ten Thousand (\$10,000) dollars. This fee will be paid Five Thousand (\$5,000) dollars today and Five Thousand (\$5,000) on or before December 1, 1988. The above amount is the minimum fee and will remain the minimum fee no matter how few court appearances are made by [the lawyer].

Cooperman, 591 N.Y.S.2d at 857. In the first two of his retainer agreements, *supra* note 48 and *infra* app. A, respondent used both terms, "minimum fee" and "nonrefundable fee," whereas in the foregoing agreement he deleted references to "nonrefundable." The omission of "nonrefundable" in the third agreement suggests that the respondent was aware of the controversy brewing at the

the New York State Bar Association Committee on Professional Ethics (the "New York Committee") recognizing that although nonrefundable retainers are probably unethical, much the same substantive result could be achieved by simply denominating the advance as a "minimum fee."⁵⁹

time concerning the ethical invalidity of retainers denominated as nonrefundable. See *infra* note 59.

59. New York State Bar Ass'n Comm. on Professional Ethics Op. 599 (1989). In Opinion 599, the New York Committee attempted to create a new class of fees, which it called minimum fees, and thereby ipse dixit circumvented the prohibition against something called nonrefundable retainers. To invent this new animal, it used the following linguistic legerdemain:

[W]e address in this opinion the ethical propriety of an agreement covering a specific legal matter that calls for an advance payment of a minimum fee that is not refundable to a client if the representation ends before the attorney expends the requisite number of hours that would, at the time charges specified in the retainer agreement, earn the minimum fee.

Id. at 3. Of course, this passage describes a nonrefundable retainer. It is possible that the New York Committee's views on this subject were influenced by the New York State Court of Appeals, which earlier refused to enforce a nonrefundable retainer because "it did not state clearly that [it] was intended to be a minimum fee and that the entire sum would be forfeited." *Jacobson v. Sassower*, 489 N.E.2d 1283 (N.Y. 1985). See Brickman & Cunningham, *supra* note 4, at 166-70 (reviewing *Jacobson* from the trial court to the court of appeals). The inference in *Jacobson* that a minimum fee could be enforceable may have simply been an off-hand, unreflective remark, or it could have been a conscious choice. It may have been the former since the court elected not to discuss the validity of nonrefundable retainers. Even if it were the latter, however, that would not validate the use of minimum fees by New York attorneys due to the following anomalies in the jurisdictional structure of the New York lawyer discipline system.

New York is perhaps the only state in which the authority to regulate the practice of law is thought to reside in the legislature. See Thomas H. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFFALO L. REV. 525, 534 (1983); WOLFRAM, *supra* note 17, at 25. The New York legislature, however, has delegated to the New York Supreme Court, Appellate Division the authority to define lawyer misconduct. N.Y. JUD. L. § 90(2) (McKinney 1993). It is under this grant of authority that the four judicial departments of the appellate division jointly promulgated the Code of Professional Responsibility for New York State (the "New York Code"). See N.Y. Comp. Codes R. & Regs. tit. 22, §§ 603.2, 691.2, 806.2, 1022.1 (1993). Accordingly, determinations about the ethical validity of the use of minimum fees and nonrefundable retainers have been consigned by the New York legislature to the appellate division. Of course, the New York Court of Appeals can overrule an appellate division decision that a lawyer acted unethically by finding a constitutional infirmity or by finding that the appellate division had misinterpreted a New York Code provision that the appellate division itself had promulgated; that is, it could treat the appellate division as if it were an administrative agency enforcing a rule that it had enacted under a legislative grant of authority. Moreover, the New York Court of Appeals can at least substantially influence the appellate division in its rulemaking. Consider the operative facts in *Cooperman*. It was the court of appeals in *Martin v. Camp*, see *supra* note 24 and accompanying text, that promulgated the client discharge rule that the Second Department of the appellate division applied in *Cooperman* to declare nonrefundable retainers unethical. Although it is theoretically possible that the court of appeals would invalidate a contract provision as against public policy even though the appellate division had held that it was not unethical in an attorney disciplinary proceeding, the contrary is simply unthinkable. See *In re Flannery*, 212 N.Y. 610, 611 (1914) ("In establishing the standard of conduct to which the bar must at its peril conform, the appellate division has wide discretion, with which we have neither the wish nor the power to interfere."). Finally, the chief judge of the New York Court of Appeals and members of that court may have constitutional authority to influence ethical standards, in-

The *Cooperman* court then defined a nonrefundable retainer as one that allows "an attorney to keep an advance payment irrespective of whether the services contemplated were rendered."⁶⁰ In contrast, the *Cooperman* court defined a minimum fee as simply "a forecast by the attorney of the minimum amount that a client can expect to pay in order for the attorney to represent the client to completion in the contemplated matter."⁶¹ By so defining nonrefundable fees and minimum fees, the court firmly rejected the New York Committee's sleight of hand effort to define "'minimum fee' agreements as a subspecies of 'non-refundable fee' agreements."⁶²

Turning to the Grievance Committee's principal arguments, the *Cooperman* court framed the issue in broad terms, asking "whether nonrefundable retainer agreements are against public policy and therefore void," and then answering in the affirmative.⁶³ It arrived at this answer by investigating whether a fee paid in advance of services to be rendered and denominated as nonrefundable was "earned" when paid. Said the court: "Since an attorney's fee is never truly non-refundable until it is earned, the use of this term . . . is misleading. . . ."⁶⁴ In other words, the court's simple and straightforward analysis is based on an unassailable premise: A lawyer cannot charge a fee for doing nothing.⁶⁵

dependent of the rulemaking authority of the appellate division. The New York State Constitution empowers the chief judge to

establish standards and administrative policies for general application throughout the state, which shall be submitted by the chief judge to the court of appeals, together with the recommendations, if any, of the administrative board. Such standards and administrative policies shall be promulgated after approval by the court of appeals.

N.Y. CONST. art. VI, § 28(c).

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

61. *Id.* Moreover, "[i]f the attorney is discharged prior to completion but after entering into a 'minimum fee' agreement he or she is entitled to payment in quantum meruit." *Id.*

62. *Id.* (citation omitted). In a prior opinion dealing with the related issue of whether advance fee payments are to be deposited to the client trust account or the lawyer's office account, discussed *infra* text accompanying notes 147-51, the New York Committee engaged in similar sophistry and similarly sought to preserve for lawyers the opportunity to take advantage of their clients in a fee matter. This latter opinion, N.Y. State Bar Ass'n Comm. on Professional Ethics Op. 570 (1986), is sharply criticized in Lester Brickman, *The Advance Fee Payment Dilemma: Should Payments Be Deposited to the Client Trust Account or to the General Office Account?*, 10 CARDOZO L. REV. 647, 654-75 (1989) [hereinafter Brickman, *The Advance Fee Payment Dilemma*], and Brickman & Klein, *supra* note 2, at 1094.

63. *Cooperman*, 591 N.Y.S.2d at 857.

64. *Id.*

65. See *Arens v. Committee on Professional Conduct*, 820 S.W.2d 263, 264 (Ark. 1991) ("Just as a lawyer cannot bill a client for work he has never performed in the past, a lawyer cannot bill a client for work he will never perform in the future.").

More simply yet, a lawyer must make his money the old fashioned way—he must earn it. See Woo, *supra* note 3, at B10 (quoting the senior author of this Article as saying, "Look, every-

The *Cooperman* court proceeded, perhaps unnecessarily, to buttress its conclusion by applying the Disciplinary Rules of the Code that it had adopted.⁶⁶ The court found that “[t]he words ‘non-refundable fee’ are imbued with an absoluteness which conflicts with DR 2-110(A)(3), which provides that a lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.”⁶⁷ The court thus made an important clarification by holding that DR 2-110(A)(3) substantively prohibits charging a nonrefundable retainer.⁶⁸ This interpretation of DR 2-110(A)(3) is consistent with the *Cooperman* court’s other holdings as well: In deciding whether a fee agreement is enforceable, the issue is whether the fee has been earned.

The *Cooperman* court also adopted the Grievance Committee’s second argument. First, the court affirmed two longstanding principles of New York law: that a client may terminate a lawyer at any time, with or without cause,⁶⁹ and that any attempt by a lawyer to hinder that right (as by charging a nonrefundable retainer fee) violates the Code.⁷⁰ Following those principles, the court held that the respondent’s retainer agreements represented an attempt to hinder the client discharge right and therefore violated the Code.⁷¹ The court’s reaffirmation of the principle that a lawyer may not impair a client’s right to discharge him without penalty also rests on the fundamental inquiry of the entire proceeding—whether a fee had been earned such that the fee arrangement did not impair the client discharge right.

The *Cooperman* court also accepted the Grievance Committee’s third and fourth arguments, that the fees respondent charged were clearly excessive and that it was unethical for the respondent not to refund such fees upon each client’s request.⁷² Indeed, some commentators have criticized

body in society would love to get paid in advance and get to keep the money, even if they don’t do any work. Lawyers would be the only ones who would get to do that, if the [*Cooperman*] court had decided it was ethical”).

66. N.Y. Comp. Codes R. & Regs. tit. 22, § 691.2 (1993); see *supra* note 59.

67. *Cooperman*, 591 N.Y.S.2d at 857.

68. Until this pronouncement, it was by no means clear that DR 2-110(A)(3) substantively stated that charging a nonrefundable retainer violates that rule. Brickman & Cunningham, *supra* note 4, at 167 n.109.

69. *Cooperman*, 591 N.Y.S.2d at 858 (citing *Martin v. Camp*, 114 N.E. 46 (N.Y. 1916)); see *supra* text accompanying notes 20-24. For a detailed analysis of *Martin*, see Brickman & Cunningham, *supra* note 4, at 157-70.

70. *Cooperman*, 591 N.Y.S.2d at 858. The *Cooperman* court did not specify what provision of the Code the respondent violated. The court probably was referring, however, to DR 2-110(B)(4), which provides that “a lawyer . . . shall withdraw from employment, if . . . [h]e is discharged by his client.”

71. *Cooperman*, 591 N.Y.S.2d at 858.

72. *Id.*

the *Cooperman* court for not limiting its opinion to precisely these two holdings, arguing that the court could have rendered a holding limited to the narrow facts of the case by finding solely that the respondent's fees under the contested agreements were excessive and therefore violated DR 2-106.⁷³ Of course the *Cooperman* court had to decide whether to limit its holding to the narrow facts before it or to use *Cooperman* as a platform from which to launch a broader rule applicable in circumstances beyond such facts.⁷⁴ Such criticism, however, overlooks two important points suggesting that the court's choice in announcing a broad rule was correct.⁷⁵ First, the criticism ignores the distinction between the prohibition against nonrefundable retainers, which seeks primarily to protect the client discharge right, and DR 2-106, which provides guidance for determining whether a legal fee is clearly excessive and says nothing about the client discharge right.⁷⁶ Second, because the appellate division is the legally sanctioned regulatory body governing the practice of law in New York State,⁷⁷ the *Cooperman* court arguably was duty-bound, once it determined that nonrefundable retainers were unethical, to declare them definitively impermissible.

We offer a separate criticism of *Cooperman* with respect to the other aspect of the court's holding—declaring it unethical for respondent to refuse to refund such fees to his clients upon their request. This criticism goes straight to the fundamental principle underlying the decision and this

73. *E.g.*, Gillers, *supra* note 3, at 3 (criticizing the *Cooperman* court for deciding the broader issue of validity of nonrefundable retainers generally when the respondent in the proceeding "was intent on defending *his* own agreements," with no one before the court advocating the broader issue); Harper, *supra* note 3, at 64, 66 n.12 (stating that the *Cooperman* court could have limited its decision to facts because it found respondent's fees to be excessive, but "leap[t] at the chance" to "decide, as a matter of law, whether every nonrefundable fee agreement violated the disciplinary rules").

74. Under the grant of authority to define lawyer misconduct, *supra* note 59, the court therefore had the following options in dealing with the issue of nonrefundable retainers: (1) it could have added to the Code a specific provision declaring them impermissible (a suggestion we make in Part V, *infra*); (2) it could have made that declaration by in effect holding that it had already done so—which is arguably what it did in *Cooperman*—and then deciding *Cooperman* itself on its narrow facts or more broadly; or (3) it could have limited its pronouncement in *Cooperman* to prospective effect only.

75. The criticism is driven partly by appeal to the beauty of the adversary system that, critics believe, was not at work in *Cooperman* because the respondent and the Grievance Committee argued only about the specific agreements at issue. See *supra* note 71. This criticism, however, wrongly depicts the nature of the adversary system, which operates at the level of the specific. Therefore, the respondent and the Grievance Committee's focus on the respondent's agreements was appropriate, and the court's assessment of the broader issue could have been—and apparently was—informed by reference to published materials concerning it, including materials the parties brought to the court's attention.

76. See *infra* text accompanying notes 112-13.

77. See *supra* note 59.

Article: the protection of clients. Notwithstanding the court's determination that the respondent acted unethically in refusing to refund the unearned advance fee charges, the *Cooperman* court declined to order restitution of those fees, even though it condemned them as unethical.⁷⁸ In other words, the respondent was not ordered to turn over to his clients any of the money he improperly withheld by imposing an unethical fee arrangement.

The *Cooperman* court's refusal to order restitution might be defended on the grounds that the court was sitting as a disciplinary court reviewing an ethics proceeding, rather than as a civil court evaluating the merits of a client's claim against his attorney.⁷⁹ We would reject this defense, however, because the court was competent to order restitution in the context of an ethics proceeding and had compelling reasons to do so in *Cooperman*. The appellate division is expressly empowered by statute to order restitution in any disciplinary proceeding in which it suspends an attorney from the practice of law upon a finding that the attorney "wilfully misappropriated" money or property belonging to his client.⁸⁰ In addition, even before the legislature allocated such power to the appellate division by statute, the appellate division had independently exercised the power in disciplinary proceedings to order lawyers to make restitution of funds obtained in violation of ethical principles.⁸¹

The *Cooperman* court should have ordered restitution for two policy reasons. First, declining to order restitution wastes judicial and administrative resources because each of the three victimized clients must now commence and prosecute separate civil lawsuits to recover funds that each client

78. *Cooperman*, 591 N.Y.S.2d at 859.

79. *See id.* (stating that rationale for refusing to order restitution was court's conclusion that the question of restitution "is more properly decided in a civil proceeding at the trial level"). For a contrary holding, see *In re Pearlman*, 627 A.2d 314 (R.I. 1993) (ordering attorney to repay advance fee payment and characterizing his refusal to refund it upon termination as "exacerbating" his "inexcusable" conduct in attempting to extract a nonrefundable retainer through deception).

80. N.Y. Jud. L. § 90-6a (McKinney 1993); see *In re Cataldi*, 571 N.Y.S.2d 319 (App. Div. 1991); *In re McCarthy*, 573 N.Y.S.2d 619 (App. Div. 1991); *In re Cooper*, 563 N.Y.S.2d 690 (App. Div. 1990). We believe charging a nonrefundable retainer involves the willful misappropriation of client money when the client discharges the attorney prior to the performance of legal services that fully consume the fee, because the part of the advance fee not earned by effort remains the client's property. Accordingly, when the attorney charges a nonrefundable retainer and therefore retains the unearned portion of the fee, he has misappropriated client funds.

81. *In re Francess*, 333 N.Y.S.2d 294 (App. Div. 1972). Indeed, the usual practice in attorney disciplinary proceedings in a majority of states is to condition the lifting of any suspension upon paying full restitution. *E.g.*, *In re Cornelius*, 521 P.2d 497, 499 (Alaska 1974); *McKnight v. State Bar*, 810 P.2d 998, 1007 (Cal. 1991); *Brookman v. State Bar*, 760 P.2d 1023, 1027 (Cal. 1988); *Colorado v. Creasey*, 811 P.2d 40, 43 (Colo. 1991); *Florida Bar v. Nagel*, 440 So. 2d 1287 (Fla. 1983); *In re Holz*, 533 N.E.2d 818, 824 (Ill. 1988); *Louisiana State Bar v. Ranel*, 534 So. 2d 951, 955 (La. 1988); *West Virginia State Bar v. Gallaher*, 376 S.E.2d 346, 350 (W. Va. 1988). *But see In re Ackerman*, 330 N.E.2d 322, 324 (Ind. 1975) (expressly rejecting this approach).

should have been able to recover upon a simple request. As entirely new and separate proceedings, those lawsuits will entail costs to all parties—as well as to the judicial system—far greater than the marginal cost necessary for the *Cooperman* court (or its referee) to have determined the proper amount of restitution.⁸² Second, by not ordering restitution (or taking any other action to protect the respondent's victimized clients), the *Cooperman* court's very pronouncements favoring client protection ring somewhat hollow, an emptiness shared by criticisms of *Cooperman*, to which we now turn.⁸³

IV. THE HUE AND CRY

In addition to criticizing the scope of the *Cooperman* decision,⁸⁴ members of the criminal bar and others have attacked some of the basic principles underlying the decision.⁸⁵ These attacks reflect the fact that nonrefundable retainer agreements are used extensively in the ordinary course of their business.⁸⁶ Accordingly, these attorneys regard *Cooperman* as a substantial threat to their established livelihoods and practices. Critics

82. This result is particularly unwelcome at a time when the Second Department is straining under a caseload that has produced tremendous backlog. That backlog has led the New York legislature and the New York Court of Appeals to evaluate extraordinary steps to alleviate the burdens, including subdividing the existing Second Department to create a new Fifth Department in New York's Appellate Division. See Gary Spencer, *Fifth Department Plan Appears Dead for Now; Legislature Deadlocked on Method for Aid*, N.Y. L.J., June 14, 1993, at 1.

83. That the court made no provision for protecting the clients who directly suffered from the respondent's misconduct underscores recent indictments of the grievance process. See, e.g., FEES AND FAIRNESS, *supra* note 35, at 46-49 ("[T]he major disadvantage of the current grievance process is that the aggrieved party can obtain no individual redress. No money is returned."). That failure is particularly troublesome in the context of *Cooperman* because it is by no means clear that the respondent's victimized clients are even aware of their rights in this regard. Certainly the *Cooperman* opinion does not indicate whether the court, its clerk, or the grievance committee has endeavored to notify them, although that would seem to be in order. Indeed, the opinion gives no indication of whether the respondent has funds equal to the unearned portion of the advance fees or, if he does, whether any such amounts have been deposited with the court or remain in the lawyer's trust account or are otherwise protected for the benefit of such clients.

84. See *supra* note 73 and accompanying text.

85. See e.g., NYSACDL Brief, *supra* note 10; N.Y. State Bar Ass'n Brief, *supra* note 10; Gillers, *supra* note 3. For example, the New York State Association of Criminal Defense Lawyers (NYSACDL) and the National Association of Criminal Defense Lawyers (NACDL) filed a joint brief supporting the respondent's motion for reargument. See NYSACDL Brief, *supra* note 10. The NYSACDL has a membership of almost 800 lawyers and the NACDL has a membership of approximately 9,000 member lawyers and 30,000 affiliated lawyers. *Id.* at 1.

86. NYSACDL Brief, *supra* note 10, at 2 (stating that nonrefundable retainers like the one at issue in *Cooperman* are "commonly used"); *id.* at 3 (noting that such retainers "are by no means unusual; attorneys have been entering into them for many years, particularly in criminal and matrimonial cases and some corporate practices"); *id.* at 7 (stating that "many attorneys" use such retainers); see also Brickman & Cunningham, *supra* note 4, at 150 nn.2-3 (citing nonrefundable retainer agreements as widely used in lawyers' handbooks and study aids).

of *Cooperman* collectively cite three examples as encapsulating their opposition to it and certain of its underlying ethical principles.⁸⁷

A. *Misconstruction of Retainer Law and Policy*

The first example was offered by Professor Stephen Gillers, a leading ethics scholar, in one of the first public assessments and criticisms of *Cooperman*.⁸⁸ Consider Professor Gillers's argument and examples, which follow from a single premise:

Time is not and never has been the only commodity that lawyers offer to sell and that clients seek to buy. *Lawyers also sell the assurance of their availability.* The market has long recognized value here. We should have good reasons before we proscribe that recognition.

[Assume the] government has announced a \$100 million civil antitrust case against five companies in the same industry. One of them, a Fortune 100 company, is the first to approach the state's most skilled antitrust defense lawyer. It agrees (through its in-house counsel) to pay him \$10,000 against usual hourly rates. The fee is said to be 'earned when paid'—i.e., by virtue of the retainer—and so 'non-refundable'.

Or assume a federal stock fraud indictment of six major Wall Street figures. In exchange for a \$5,000 fee that is 'earned when paid', a top criminal defense lawyer notes her appearance.

In each of these examples, a lawyer and a client have agreed that *a lawyer's commitment to be available (and the lawyer's corresponding unavailability to others) has value in and of itself.* That agreement deserves respect.⁸⁹

Professor Gillers's argument has initial appeal, but so did the songs of the Sirens.⁹⁰ Close analysis of the argument, with particular focus on the use of

87. Critics of *Cooperman* make another argument in addition to the examples discussed in the text. They contend that the decision is unfair to Cooperman because the law and ethics governing nonrefundable retainers were allegedly unclear prior to *Cooperman*. See, e.g., NYSACDL Brief, *supra* note 10, at 3-8. The *Cooperman* court disposed of this issue by deciding that it was not unfair because Cooperman had twice been given written notice that his fee agreements were unethical. *Cooperman*, 591 N.Y.S.2d at 859. In addition, at least as of the time of respondent's third agreement at issue in *Cooperman* in or around November 1, 1988, there was no reasonable basis to believe that the retainer agreements drafted by Cooperman were permissible. See Brickman & Cunningham, *supra* note 4. Cf. *In re Gustafson*, 493 N.W.2d 551, 553 (Minn. 1992) ("reject[ing] respondent's argument that the status of the law regarding advance fee payments was unclear before 1991" in light of both published ethical guidelines and a law journal article on the subject).

88. See Gillers, *supra* note 3, at 2.

89. *Id.* (emphasis added).

90. See HOMER, *THE ODYSSEY* 170 (T.E. Shaw trans., Woodsworth Editions Ltd. 1992):
Your next land-fall will be upon the Sirens: and these craze the wits of every mortal

the term “availability,” reveals its destructive potential. Moreover, even a cursory analysis of the argument shows a misconstruction of retainer law and policy that effectively rejects the distinction between special retainers and general retainers.

1. Meaning of “Availability”

Availability is the essence of a general retainer.⁹¹ A general retainer is an agreement by a lawyer, for value, to forego her right to refuse to perform services for the client even if the need for specific services arises at a time of great inconvenience to the lawyer. It 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.⁹² The arrangement is, in essence, an option contract, under which the client has the right at any time during the “exercise period” to call upon the lawyer and direct her to render services.⁹³

In his examples of lawyers being hired to perform specific services, Professor Gillers has coined a new term, “assurance of availability,” which

who gets so far. If a man come on them unwittingly and lend ear to their Siren-voices, he will never again behold wife and little ones rising to greet him with bright faces when he comes home from sea. The thrilling song of the Sirens will steal his life away, as they sit singing in their plasket between high banks of mouldering skeletons which flutter with the rags of skin rotting upon the bones. Wherefore sail right past them: and to achieve this successfully you must work bees-wax till it is plastic and therewith stop the ears of your companions so that they do not hear a sound. For your own part, perhaps you wish to hear their singing? Then have yourself lashed hand and foot into your ship against the housing of the mast, with other bights of rope secured to the mast itself. Ensure also that if you order or implore your men to cast you loose, their sole response shall be to bind you tighter with cord upon cord. That way you may safely enjoy the Sirens’ music.

91. RESTATEMENT OF THE LAW, THE LAW GOVERNING LAWYERS § 46, cmt. e, at 213 (Tent. Draft No. 4, 1991) (“A retainer, as that term is used in this Section . . . is a fee paid to ensure that a lawyer will be available for the client if required.”). Notably, the Restatement goes on to provide that such a fee may not be greater than is “reasonable in the circumstances,” based on whether the amount of the fee “bears a reasonable relationship to the income the lawyer sacrifices by accepting it.” *Id.* This is noteworthy because of the position it adopts on what we believe to be a difficult and often unperceived question—whether general retainer fees constitute “legal fees.” *Cf. Greenberg v. Jerome H. Remick & Co.*, 129 N.E. 211, 212-13 (N.Y. 1920) (characterizing a general retainer agreement as an “ordinary” business agreement); *see Brickman & Cunningham, supra* note 4, at 163 (discussing *Greenberg* and its distinction between fees for legal services and general retainer fees). We do not address that question in this Article.

92. *See WOLFRAM, supra* note 17, at 506 (“The purpose of the [general retainer] is to assure the client that the lawyer will be contractually on call to handle the client’s legal matters.”).

93. *See supra* note 26.

he regards as a compensable service. As used by Professor Gillers, however, the term “assurance of availability” is unrelated to the “availability” that is the essence of the general retainer. Rather, he employs the term solely in special retainer situations. As such, “assurance of availability” is nothing more than the commitment of every lawyer to be available to perform the legal service that she has agreed to provide. A lawyer hired by a client to write a will, litigate a claim, handle a divorce, or represent an accused defendant necessarily agrees to be available to perform the service that she has undertaken to perform. Because every lawyer assures availability every time she agrees to perform a service, allowing the lawyer to charge separately for that assurance of availability effectively enables the lawyer to charge a nonrefundable retainer.

Perhaps Professor Gillers’s interpretation follows from the *Cooperman* court’s failure to state explicitly the distinction between general and special retainers. It should be clear that the court followed that distinction in substance, however. After all, the pivotal issue in the court’s analysis was whether the fees at issue were “earned when paid.”⁹⁴ That is, of course, the essence of the general/special retainer distinction.⁹⁵ Indeed, the primary prongs of the court’s analysis hinged on whether the fees were earned: (a) the court specified that “[s]ince an attorney’s fee is never truly non-refundable until it is earned,” the use of the term “non-refundable” is misleading, and (b) the court found that DR 2-110(A)(3) prohibits nonrefundable retainers precisely because they are not earned when paid.⁹⁶ Recall that the reason general retainers do not impair the client discharge right is precisely that general retainers involve a fee that is earned when paid.⁹⁷ Because *Cooperman* does not proscribe fees that are earned when paid (including general retainers), the first analytical issue in evaluating any retainer agreement—and determining whether *Cooperman* applies to it—is whether it is a general retainer or a special retainer. Consider a few examples of how this analysis would proceed.⁹⁸

First, consider an executive whose three-year employment contract with a major corporation has expired. The executive is planning to begin work in a competing enterprise. However, his old contract includes a restrictive covenant not to compete for a period of one year from expiration, and he is concerned about being sued for breaching that covenant. The

94. See *supra* text accompanying notes 63-68.

95. See *supra* accompanying notes 28-30.

96. See *supra* text accompanying notes 63-68.

97. See *supra* text accompanying notes 28-30.

98. In the examples that follow, the term “available” is used in the broad sense of the general retainer, meaning a commitment (wholly apart from any specified representation) to stand ready to render legal services at any time during a specified period if and when the client demands them.

executive retains a lawyer who agrees to be available to represent the executive at any time during that year, at the attorney's regular hourly rate, in the event the executive's former employer challenges the executive's right to work in the competing enterprise. A fee of \$2000 for the year is agreed to and paid. As a matter of definition, this is a general retainer because a specified fee (\$2000) is paid in consideration for the lawyer's commitment to be available during the period. Analytically, the fee can be seen as "earned when paid" because the payment was given in consideration for availability. A discharged attorney in this circumstance would be entitled to retain that fee (both before and after *Cooperman*).

Second, consider a small business owner who decides to sell his company and negotiates a sale price with a third party. The owner then retains a lawyer to negotiate a contract for the sale of the business. A fee of \$200 per hour is agreed to and an advance payment of \$3000 is paid. As a matter of definition, this is a special retainer because a specified fee (\$200 per hour) is agreed to be paid in exchange for specified services to be rendered (negotiating and drafting the contract). Analytically, the advance fee will be earned over time as services are rendered. If the "progress" (time actually expended times the hourly fee) exceeds the advance, then additional payments will be called for. A discharged attorney in this circumstance would not be entitled to retain any portion of the \$3000 advance that was not offset by progress (both before and, emphatically, after *Cooperman*).

Third and finally, consider a hybrid case, in which the general/special retainer distinction becomes less clear-cut. A spouse seeking a divorce which is expected to be resisted and to require protracted judicial proceedings approaches a lawyer who says his fee will be \$200 per hour. In addition, the lawyer says that \$10,000 must be paid in advance and that any progress will be charged against that advance. The retainer agreement provides that the \$10,000 advance fee will be used to pay for hours as charged but that it is also for the attorney's availability and is nonrefundable. As noted, here the general retainer/special retainer classification scheme becomes complicated as a matter of definition—is this a general retainer, a special retainer, or something else? More practically, would a discharged attorney in this circumstance be entitled to retain all or any portion of the \$10,000? *Cooperman* is not explicit on this subject.

As Professor Gillers's argument interpreting the term "availability" so broadly suggests, lawyers drafting an agreement at the outset of such a representation would undoubtedly attempt to characterize and denominate the arrangement as a general retainer and would probably stress that the advance fee payment was given precisely for availability. We believe, however, that no matter how the arrangement is characterized or denominated by the lawyer in the fee agreement, in substantially all cases where a hybrid

retainer is used, the advance fee will be intended as prepayment for actual services to be rendered rather than for availability. In other words, we expect the ordinary client in ordinary circumstances to believe that payment is being made against actual services rather than for availability.⁹⁹ Moreover, once an attorney has agreed to provide specific services, she has agreed to be "available" to perform those services. This is not the "availability" that is the essence of the general retainer. Nonetheless, some attorneys will follow Professor Gillers's argument and characterize such a fee payment as being paid in exchange for availability precisely in an effort to legitimate retaining it upon discharge.¹⁰⁰

Indeed, attorneys can be expected to devise many strategies and fee structures to enable validation of nonrefundable fee agreements in the post-*Cooperman* world. For example, attorneys could design a variant of the hybrid retainer by specifying that \$7000 of the \$10,000 advance fee payment constitutes a general retainer given in exchange for availability and not subject to offset, and \$3000 of the advance fee payment is to be a special retainer, given in advance for and charged off against specific services actually rendered. We believe that the characterization of the \$7000 as payment for availability is likely to be purely pretextual. Strategies like this, therefore, demand the closest scrutiny for the same reasons that apply to the hybrid case: Lawyers can be expected to characterize their fee arrangements in whatever way is necessary to enable them to keep the advance fee if they are discharged, irrespective of client beliefs that their fee payments are for actual services to be rendered.

If, therefore, a hybrid were legitimated in a circumstance where the advance payment was not clearly and unambiguously a general retainer, then the fee form books would quickly respond by declaring that to be the favored form of retainer agreement.¹⁰¹ Thereafter, all attorneys seeking to

99. See *In re Pearlman*, 627 A.2d 314 (R.I. 1993). In that case, the attorney claimed that his written fee agreement constituted a nonrefundable retainer, but the disciplinary board found there to be "no question" that "any reasonable person" would conclude "that the receipt of a sum certain, in this case \$4,500, was a retainer against which would be applied the cost of legal services actually performed by the firm as per the standard hourly rates." *Id.* at 315. It is also clear that Cooperman's clients believed that payment was being made against actual services. See, e.g., *infra* app. A, § 4 (letter from Cooperman's client requesting return of the advance fee "less the value of any services [Cooperman] rendered and any expenses [Cooperman] incurred to date").

100. This is a common subterfuge. E.g., *In re NBI, Inc.*, 129 B.R. 212 (Bankr. D. Colo. 1991) (discussed in Brickman & Klein, *supra* note 2, at 1074-75 and holding that although law firm described its fee arrangement as a general retainer, it was a special retainer); *Hegeman-Harris Co. v. Town of Greenburgh*, N.Y. L.J., Mar. 25, 1993, at 25 (Sup. Ct. 1993) (holding that although attorney described his fee arrangement as a minimum fee, it was a nonrefundable retainer); *In re Cooperman*, 591 N.Y.S.2d 857 (App. Div. 1993) (same); *Jacobson v. Sassower*, 452 N.Y.S.2d 981, 984 (Civ. Ct. 1982) (same as in *In re NBI*), *aff'd on other grounds*, 474 N.Y.S.2d 167 (App. Term 1983), *aff'd mem.* 483 N.Y.S.2d 711 (App. Div.), *aff'd mem.* 489 N.E.2d 1283 (N.Y. 1985).

101. Nonrefundable retainer agreements are reproduced in lawyers' handbooks and practice

charge a nonrefundable retainer would use that form or a variant and the prohibition against nonrefundable retainers will have been successfully surmounted. The hybrid, therefore, is not simply a Trojan Horse that will undermine by stealth the guardians of the client discharge rule. Rather, it is a cup of hemlock.¹⁰²

Accordingly, we believe the proper approach to the hybrid case (and all variations on the hybrid case) is to recognize as a rule of construction a strong presumption—rebuttable by the attorney by clear and convincing evidence—that no part of the retainer was given for availability as that term is used in the general retainer context.¹⁰³ This approach—presuming that any retainer other than a “pure” general retainer is a special retainer—is sug-

aids. See RAOUL L. FELDER, *LAWYER'S PRACTICAL HANDBOOK TO THE NEW DIVORCE LAW 27-29* (1980); JAMES W. MCRAE, *LEGAL FEES AND REPRESENTATION AGREEMENTS 88* (1983) (Monograph Series, ABA Section of Economics of Law Practice); *NEW YORK MATRIMONIAL PRACTICE 197-98* (PLI 1979); 1 *AM. JUR. FORMS, Trials*, 1:1874 (1993).

102. We invite the reader to adopt the null hypothesis: Legitimate a hybrid and attempt to bound that “exception” in a manner that does not effectively eliminate the prohibition against nonrefundable retainers and substitute for it the issue of whether the forfeited advance payment constitutes an excessive or unreasonable fee. See *infra* text accompanying notes 112-14.

103. Presumptions are generally designed to assist courts and other tribunals in managing circumstances in which direct proof of a matter is difficult. *Basic, Inc. v. Levinson*, 485 U.S. 224, 245 (1987) (citing 1 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE 541-42* (1977)). Presumptions are also sometimes designed to allocate burdens of proof in the light of “considerations of fairness, public policy, and probability, as well as judicial economy.” *Id.* (citing EDWARD W. CLEARY ET AL., *MCCORMICK ON EVIDENCE 968-69* (3d ed. 1984); *FED. R. EVID.* 301). All these reasons apply in the context of determining whether a retainer agreement is a special retainer or a general retainer. First, the only direct proof is likely to be the agreement itself, as well as testimony of the attorney and the client. As elaborated in Part II of this Article, in the contexts in which nonrefundable retainers are typically used, the nature of the attorney-client relationship suggests that the designation of the fee structure in the agreement as a general retainer can almost never be respected as reflecting the intention of the client. The testimony of the respective parties is likely to be no more probative. Accordingly, the probability is almost absolute that a retainer fee is not a general retainer given in exchange for availability but rather is a special retainer intended as an advance fee to cover specific legal services to be rendered. Thus, as a matter of fairness and public policy, it is appropriate to erect the presumption that any given retainer agreement is a special retainer rather than a general retainer (in whole or in part). To overcome the presumption, a lawyer must demonstrate through objective evidence beyond the agreement and direct testimony of either the attorney or the client that the fee was intended for availability. There is likely to be only a small class of possible proof of this nature. Such proof, however, would be found in the circumstances in which both the attorney and the client operated before and immediately following the commencement of the representation. Without attempting to be exhaustive, those circumstances would include, with respect to the lawyer, hiring new associates as a result of entering into the agreement and, with respect to the client, her degree of legal sophistication and experience with lawyers and whether she was or might be involved in any pending or potential litigation, proceeding, or negotiation. Cf. *Greenberg v. Jerome H. Remick & Co.*, 129 N.E. 211, 213 (N.Y. 1920) (finding agreement to be an ordinary business agreement, “specific and definite in its terms, and in effect negatives the presumption that as to the client it should be deemed a contract at will”).

gested by the lower court opinion in *Jacobson v. Sassower*.¹⁰⁴ *Jacobson* involved a hybrid retainer agreement similar to the one in the divorce case just described.¹⁰⁵ The court found that, despite the attorney's contrary characterization of the retainer agreement, the agreement was not a general retainer; therefore, that "exception" to the client's discharge right did not apply.¹⁰⁶ In other words, the attorney did not rebut the presumption that such a hybrid arrangement is a special retainer rather than a general retainer. Indeed, this approach is also consistent with and follows from *Cooperman*, which ultimately required the attorney to demonstrate that the fee he charged was earned—another way of saying the arrangement involved a special retainer unless the attorney could show otherwise.¹⁰⁷

2. The Fiduciary Standard

We also must reject Professor Gillers's second argument that, because the legal services marketplace has recognized that assurance of availability has value, then any such agreement deserves respect. Under this approach, any fee that a lawyer is able to extract from a client—regardless of how

104. 452 N.Y.S.2d 981, 984 (Civ. Ct. 1982), *aff'd on other grounds*, 474 N.Y.S.2d 167 (App. Term 1983), *aff'd mem.* 483 N.Y.S.2d 711 (App. Div.), *aff'd mem.* 489 N.E.2d 1283 (N.Y. 1985).

105. The retainer agreement specified compensation at an hourly fee of \$100 to be paid as billed, plus a "non-refundable retainer of \$2,500," payable upon commencement of the relationship that would be "credited against . . . charges." *Id.*

106. *Jacobson*, 452 N.Y.S.2d at 984 (observing that an hourly charge was to be offset against the advance payment and that the lawyer was to represent the client "for a period of unspecified duration in connection with a particular legal matter"). Accordingly, the trial court refused to enforce the agreement on the ground that it impaired the client's right to terminate the attorney at any time, without penalty. *Id.* (citing *Martin v. Camp*, 114 N.E. 46 (N.Y. 1916)). The three appellate courts reviewing this case (including the New York Court of Appeals) avoided this issue. Each of those courts disposed of the case by holding the agreement unenforceable on the grounds of ambiguity. See *Brickman & Cunningham*, *supra* note 4, at 166-70 (reviewing *Jacobson* from the trial court to the court of appeals).

107. Our proposed approach is analogous to that suggested by the current version of the Restatement. First, the Restatement provides that "[a] fee payment that does not cover services already rendered is presumed to be a deposit against future services." RESTATEMENT OF THE LAW, THE LAW GOVERNING LAWYERS § 50, cmt. g, at 247 (Tent. Draft No. 4, 1991). Second, it effectively puts the burden on the lawyer to overcome that presumption:

In any [fee dispute] proceeding the lawyer has the burden of persuading the trier of fact, when relevant, of the existence and terms of any fee agreement, the making of any disclosures to the client required to render an agreement enforceable, and the extent and value of the lawyer's services.

Id. § 54(2), at 278. We must part company with the Restatement at this point, however, because it also provides that "[a] client and lawyer may agree that a payment is a retainer rather than a deposit." *Id.* § 46, cmt. g, at 247. The only limitation the Restatement would impose in this context is that the lawyer "must inform the client that a payment will be a retainer." *Id.* at 248. We think this position reposes too much confidence in lawyers' faithfulness in discharging their fiduciary obligations to clients and gives too little weight to the rationale requiring the imposition of such obligations. Permitting nonrefundable retainers to be enforced so long as the client agrees is equivalent to declaring nonrefundable retainers permissible.

pernicious, overreaching, or unfair—would be entitled to respect simply because the lawyer was able to collect it.¹⁰⁸ From that perspective, all nonrefundable retainers have a market value demanding respect, because the issue of the nonrefundable retainer only arises if a client has paid it. As a fiduciary for his client, however, a lawyer—in fee arrangements and otherwise—is held to a “fairness-in-fact” standard, which is a higher, more exacting, and less self-interested standard than is applied to commercial parties in free market transactions.¹⁰⁹ That the market will bear a fee charged by a lawyer never has been and never can be a justification for the ethical validity of charging that fee.¹¹⁰

3. Misapplication of DR 2-106

Professor Gillers does recognize that market forces alone cannot be the basis for evaluating the legitimacy of attorneys’ fees and that ethical rules must play a role. It is necessary, however, to justify any ethical restrictions that are imposed on market forces.¹¹¹ The policy purpose justifying the rule against nonrefundable retainers is to protect the client discharge right. Without that prohibition, clients would never have the right to discharge an attorney without penalty. Put another way, Professor Gillers’s approach to nonrefundable retainers would be the same approach taken with respect to other kinds of attorney fees: none would be barred a priori, but rather their validity would be evaluated solely in terms of the standards for excessiveness set forth in DR 2-106.¹¹² We believe this position involves a severe

108. Market forces unrestrained by ethical mandates would produce astronomical lawyer’s fees. See Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 COLUM. L. REV. 595, 617 n.89 (1993) (citing Attorney Grievance Comm’n v. Korotki, 569 A.2d 1124 (Md. 1990), in which the court disciplined a lawyer who charged a contingent fee equal to 75% of the recovery).

109. Brickman, *Attorney-Client Fee Arbitration*, *supra* note 22, at 284 nn. 41-43. See GEOFFREY C. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 99 (1978); 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 71 (1985) (“A fee . . . must be objectively reasonable. . . . Unreasonable fees [are prohibited even if] the client consents.”).

110. The rule envisioned by opponents of *Cooperman*, as articulated by Professor Gillers, would be less protective of clients dealing with their fiduciaries (lawyers) than existing rules applicable to consumers dealing with merchants in arm’s length commercial transactions. Consider a merchant selling a used car to a consumer and charging the equivalent of a nonrefundable retainer—a nonrefundable downpayment. Under the Uniform Commercial Code § 2-718(1)-(2), the seller can keep only a maximum of \$500 of any downpayment (in addition to any incidental or consequential damages) while under the “assurance of availability” rule, a lawyer would be permitted to keep any advance fee amount he can bargain for (subject only to tests for excessiveness or reasonableness under Model Code DR 2-106 or Model Rule 1.5).

111. See *supra* text accompanying note 89 (quoting Gillers, *supra* note 3, as saying, “We should have good reasons before we proscribe [the market’s] recognition [of value in what lawyers offer]”).

112. Gillers, *supra* note 3. Others have also made this suggestion; see, e.g., NYSACDL Brief, *supra* note 10, at 8.

misapplication of DR 2-106, however, because it collapses two discrete bodies of law having different policy goals: DR 2-106 itself and the law governing nonrefundable retainers.

DR 2-106 identifies factors that bear on the excessiveness of a legal fee.¹¹³ But application of the law governing nonrefundable retainer agreements must precede any consideration of DR 2-106, because any such fee must be given in exchange for some service before the reasonableness of that fee even comes into question. These bodies of law are necessarily distinct—and must be kept distinct—because the prohibition against nonrefundable retainers is based on and protects the client discharge right. That right and its protection have nothing whatever to do with the excessiveness of a legal fee, the only subject DR 2-106 addresses. Accordingly, a retainer fee determined to be unearned cannot be nonrefundable because that would impair the client discharge right. There is no need to evaluate such an arrangement further, whether under DR 2-106 or otherwise.¹¹⁴

To summarize, we are unpersuaded by Professor Gillers's suggestion that lawyers' fees can be justified on the basis that the lawyer offered his "assurance of availability" to perform a job he agreed to perform. We cannot countenance a proposal that would permit lawyers to charge fees in the same way that nonfiduciary, commercial actors do. Moreover, not only do Professor Gillers's recommendations fail to take into account the primary policy objection to nonrefundable retainers—that they impair the client discharge right—they also ignore the other policy bases for the prohibition summarized in Part II of this Article: the lopsidedness of a rule permitting nonrefundable retainers; the acute risks of lawyer overreaching suggested by the strong positive correlation between the use of nonrefundable retainers and the level of client vulnerability; and the undermining of the prohibition against charging an excessive legal fee.¹¹⁵ We cannot accept Professor Gillers's suggestions because they are made without reference to or acknowledgement of the public policy bases upon which the prohibition against nonrefundable retainers rests, including, without limitation, the client discharge right set forth in *Martin v. Camp*.¹¹⁶

113. Substantially identical criteria are set forth in Rule 1.5 of the Model Rules of Professional Conduct concerning the "reasonableness" of a legal fee.

114. To put it simply, an unearned fee is by definition excessive. Brickman & Klein, *supra* note 2, at 1087-88 (citing *Simon v. Auler*, 508 N.E.2d 1102, 1104 (Ill. App. Ct.), *appeal denied*, 515 N.E.2d 127 (Ill. 1987); *Arens v. Committee on Professional Conduct*, 820 S.W.2d 263, 264 (Ark. 1991)). But even this truism needs to be taken one step further: the problem with the unearned fee is that it impairs the client's discharge right.

115. See *supra* text accompanying notes 33-40.

116. 114 N.E. 46 (N.Y. 1916).

B. *The Criminal Defense Bar*

The second example opponents of *Cooperman* cite in support of their position arises in the context of criminal defense practice.¹¹⁷ Consider the following example. An indictment charges several defendants with conspiracy to violate anti-racketeering laws. The alleged co-conspirators immediately contact the top criminal defense lawyers in the jurisdiction, all of whom now charge nonrefundable retainers. One of the defendants retains a lawyer and then discharges him. Because of the possibility of conflict of interest, the lawyer is thereafter disabled from representing any of the other alleged co-conspirators.

Without the ability to charge a nonrefundable retainer as compensation for the possibility of discharge and the resulting opportunity loss, the lawyer argues, he has suffered significant financial loss. He further contends that his claim is distinguishable from that of most other lawyers because, while their opportunity loss claims are inchoate, unrealistic, and merely self-serving, his is empirically demonstrable. For example, he demonstrates that whenever there is an indictment of alleged leaders of organized crime, the same half dozen attorneys (including him) are invariably the first choices of those indicted and the fees range from \$50,000 to a significant multiple thereof. Being "conflicted" out of the representation by being terminated by a defendant visits a substantial financial loss by denying the lawyer the opportunity to represent one of the other defendants. Charging a nonrefundable retainer affords compensation for that possibility.

Although persuasive from the lawyer's perspective, these arguments must be rejected for broader policy reasons that take account of client as well as societal interests. First, a nonrefundable special retainer creates a significant conflict of interest between a criminal defense lawyer and his client. To be sure, all fee arrangements give rise to conflicts of interest.¹¹⁸ Hourly rate fees provide incentive to devote more time than is necessary or beneficial; fixed fees provide incentive to shirk some tasks; and contingent fees provide incentive to the lawyer to minimize time and risk in order to maximize return, while the client would seek to maximize the lawyer's time and risk in order to minimize risk and maximize return.¹¹⁹

Nonrefundable special retainers give rise to still other conflicts of in-

117. We have discussed these issues with a number of criminal defense lawyers who supplied the examples and articulated the arguments discussed in the text.

118. HAZARD & HODES, *supra* note 109, at 70-71 ("Setting . . . fees for professional services inevitably creates a conflict between lawyer and client. . . . A potential conflict of interest . . . [between the interests of lawyer and client] attends the commencement of every client-lawyer relationship . . ."). See Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 48 (1989) [hereinafter Brickman, *Hamlet*].

119. See Brickman, *Hamlet*, *supra* note 118, at 47-48.

terest, however, which add a constitutional dimension because of the right to effective assistance of counsel grounded in the Sixth Amendment and its application to fee arrangements.¹²⁰ Moreover, nonrefundable advance fees in criminal defense cases can diminish the trust and confidence that a client reposes in her lawyer. For example, the amount of the advance fee presumably is determined by the lawyer on the expectation (or at least the degree of probability) of going to trial. If, however, the lawyer advises the client to accept a plea bargain instead of going to trial, the client may well conclude that the lawyer's advice is motivated by (or at least tainted by) self interest: the sooner the case is terminated by an accepted plea bargain, the less work the lawyer will have to do and, therefore, the higher his effective hourly rate earned from that representation. If the lawyer underestimated the amount of time required in the representation in determining his nonrefundable advance fee retainer, then his incentive to devote sufficient time to trial preparation may be reduced. Finally, clients would be uncertain how to evaluate advice to accept a plea bargain in such a fee-shortfall situation because the client will not be sure whether the lawyer is motivated by financial or professional concerns.¹²¹

120. The right to effective assistance of counsel "encompasses a subsidiary right to representation by counsel free from conflict of interest." *In re Grand Jury Subpoena*, 536 F.2d 1009, 1012 (3d Cir. 1976); see *United States v. Sims*, 845 F.2d 1564, 1570 (11th Cir. 1988); *In re Grand Jury Subpoena*, 774 F.2d 624, 627 (4th Cir. 1985); *United States v. Alvarez*, 580 F.2d 1251, 1255 (5th Cir. 1978).

121. Similar problems infect the lump sum fee, a variant of the nonrefundable retainer charged by many criminal defense lawyers. For example, a lawyer charges a defendant \$10,000 to represent him in a driving-while-intoxicated prosecution. The fee agreement provides that the \$10,000 is to be paid in advance and is the entire fee to be paid, irrespective of how involved or lengthy any proceedings (including any trial) may be. See *RESTATEMENT OF THE LAW, THE LAW GOVERNING LAWYERS* § 46, cmt. e, at 213 (Tent. Draft No. 4, 1991) (distinguishing lump sum fees from general retainers and advance payments). After expending ten hours of work over a few days, the lawyer negotiates a plea bargain of reckless endangerment, which carries a penalty of probation. The client accepts. Can the client retrieve a substantial part of the fee? We think so because we do not believe the lump sum fee is any more worthy of respect than the minimum fee artifice rejected in *Cooperman*. See *supra* notes 58-62 and accompanying text. This is because a lawyer in such a circumstance would certainly have contemplated the probability of the plea bargain, whereas his client would have only limited knowledge about its likelihood, and therefore imposing the lump sum fee structure suggests that the lawyer overreached the client.

In cases where the lawyer did not overreach but instead charged the lump sum fee in a matter where the outcome was in considerable doubt, and where the lawyer was therefore undertaking the risk that any proceedings could last longer than he had contemplated, the analytical framework would be significantly altered. If in that case a fortuitous event yielded an early plea bargain, would the client be entitled to a partial refund of the fee? In this circumstance, the analytical structure more closely resembles the contingent fee situation than it does the nonrefundable retainer situation. Although contingent fees are prohibited in criminal cases, DR 2-106(c); Model Rule 1.5(d)(2), the basis for the prohibition has been called into question. Brickman, *Hamlet*, *supra* note 118, at 47-52; Karlan, *supra* note 108, at 595; Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 J. CRIM. L. & CRIMINOLOGY 498 (1991). We take no position in this Article on the appropriateness of the lump sum fee in this latter context.

In addition to the enhanced risk of conflicts of interest in using nonrefundable special retainers in the criminal defense context, general retainers in that context also present peculiar problems. This is because the line between a special retainer and a general retainer in the criminal defense context will tend to be drawn at the same place where the nature of the representation begins to expose the lawyer to charges of either being an accessory before the fact or a co-conspirator in the client's conduct. Consider an attorney who is retained by a client under investigation for fraud or similar "white collar" crime. The attorney is to undertake immediate action to fend off the indictment and be available to represent the accused in the event those actions fail.¹²² Because such a retention involves a particular, specified undertaking, it is a special retainer and therefore would not legitimately expose the lawyer to charges of being an accessory before the fact or a co-conspirator.¹²³ On the other hand, consider an attorney who is retained to be available to represent an enterprise conducting illegal activities. This attorney's fee arrangement may well qualify as a general retainer to the extent his remuneration is given for his availability to render legal services if an investigation or indictment arises. In such a case, however, charges that the lawyer is a co-conspirator in the enterprise begin to look colorable.¹²⁴ Indeed, it is virtually impossible to conceive of an attorney-client relationship in the criminal defense context that both qualifies as a general retainer and avoids exposing the attorney to nonfrivolous charges of being a co-conspirator.

Finally, apart from whether a retainer is classified as special or general, the criminal defense bar's arguments ignore the primary public policy concern that mandates the prohibition of nonrefundable fees: Compensating the lawyer in advance for giving up the right to represent other individuals subverts the original client's right to discharge his attorney. In some cases, a client may be willing to retain and pay a lawyer to disable that

122. The criminal defense lawyers we consulted told us that avoiding indictment is a major task for the elite criminal defense bar, especially those specializing in white collar crime, and can involve a greater expenditure of time and effort than a trial.

123. As for the attorney's "availability," its meaning in this context is not the availability that is the essence of the general retainer, but rather simply another incantation of the "assurance of availability" theory already disposed of. See *supra* text accompanying notes 92-94.

124. See *United States v. Gotti*, 771 F. Supp. 552 (E.D.N.Y. 1991), in which the government sought on conflict of interest grounds to disqualify Bruce Cutler and other lawyers from representing John Gotti and Gotti's co-defendants at trial, alleging, among other things:

The named attorneys are "house counsel" to the "enterprise" charged in the indictment, namely, the Gambino Organized Crime Family, and that their representation of and services to various members of that enterprise whose obligations for legal fees were paid by John Gotti will be "part of the proof of the association-in-fact charged in the indictment."

Id. at 553.

lawyer from representing some adversary. Indeed, this situation is often the predicate for a general retainer and is defensible because the client is paying for and getting something he wants.¹²⁵ Charging a client for the lawyer's losses from client preclusion cannot be defended, however, if the client does not gain anything as a result of that preclusion. Hence, in the foregoing example, the ultimate policy choice is whether (a) to protect the lawyer's financial interest by permitting him to charge a nonrefundable retainer to one client because that representation precludes him from representing the other defendants or (b) to protect the client's inviolate right to discharge the lawyer without being penalized for doing so. The policy mandate compels protecting the client and not the lawyer, even though it is clear that the lawyer is exposed. That exposure comes with the professional and ethical territory in which lawyers practice.

Criminal defense lawyers advance the additional argument, however, that the professional and ethical territory in which they operate is different from that in other kinds of practice. They maintain that nonrefundable retainers are necessary to protect against the unique hazards of criminal defense practice and offer two examples to make their case. First, the costs of the limitations on withdrawing from a proceeding are said to be particularly high in criminal defense practice. Permission to withdraw from a criminal case is almost always required by rules of criminal tribunals and is rarely granted.¹²⁶ Indeed, in criminal defense practice judges regularly forbid lawyers to withdraw from representation even when a client fails to pay the lawyer's fees, instead ordering such lawyers to continue representation with remuneration (at court-determined rates) funded through public resources.¹²⁷

Even if the assertions in this first example are true, however, there is a

125. See Brickman & Cunningham, *supra* note 4, at 158 n.50 (discussing the retention by numerous corporate clients of the Skadden, Arps law firm partly for the purpose of preventing that firm from representing adversaries in battles for corporate control that raged in the 1980s). *But cf.* Brickman & Klein, *supra* note 2, at 1047 n.46 (discussing colonial law that "prohibited a litigant from hiring more than two attorneys because the litigant could otherwise 'fee' or hire all of the available attorneys and deprive the opponent of counsel") (citation omitted).

126. DR 2-110 governs an attorney's withdrawal from employment, providing in part as follows: "If 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." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (1980).

The equivalent Model Rule is 1.16(c). See *generally* Hammond v. T.J. Litle & Co., 809 F. Supp. 156, 159-63 (D. Mass. 1992) (interpreting standards governing attorney's request to withdraw, in light of client's failure to cooperate with lawyer and disregard of client's fee obligations to law firm).

127. See Karlan, *supra* note 108, at 620-21 n.103 (citing as examples *People v. Woods*, 457 N.Y.S.2d 173, 175 (Dist. Ct. 1982); *United States v. Gipson*, 517 F. Supp. 230, 231-32 (W.D. Mich. 1981)).

parsimonious solution to the criminal defense lawyers' dilemma that does not require debating the need or defensibility of nonrefundable retainers.¹²⁸ The particular problem identified is that a criminal defense lawyer may reach a point in a trial at which his client refuses (or is unable) to pay his fees, yet a judge orders him to continue to do the work. This problem may be addressed by requiring a client to pay his lawyer in advance of the trial, perhaps requiring payment for the entire trial. Making that advance fee nonrefundable, however, is an additional step beyond that required to protect the lawyer. In sum, demanding an advance fee is defensible; denominating it as nonrefundable is both inapposite to the problem and not required by any unique circumstances of the criminal defense bar.¹²⁹

These criticisms bring criminal defense lawyers to their second example, generated by what is commonly called the Tjoflat Rule,¹³⁰ which many jurisdictions in the United States follow.¹³¹ The Tjoflat Rule provides that, except upon an order of the tribunal, retained counsel in a criminal trial has an obligation to continue to represent a defendant until successor counsel either enters an appearance or is appointed.¹³² As a practical matter, this rule compels criminal defense trial lawyers to continue to represent a defendant on appeal without regard to whether the client is able or willing to pay for the appellate work. When so invoked, the rule rests on the theory that if fee payments received at trial exceed court-determined rates, then it is reasonable for the tribunal to require that those excess amounts be applied to defray the costs of services rendered on appeal. Because we are not aware of any similar rule applicable in noncriminal contexts, we concede that such a rule distinguishes criminal defense practice from other kinds of law practice.

However, we fail to see how charging a nonrefundable retainer com-

128. Indeed, although some have acknowledged them in private, no members of the criminal defense bar nor any other critics of *Cooperman* have publicly acknowledged, let alone debated, the fundamental public policy reasons, including protecting the client discharge right, that require the prohibition of nonrefundable retainers.

129. Moreover, the argument that these special factors render criminal defense practice *sui generis* is also unpersuasive. The applicable ethical rules do not distinguish among lawyers based on their area of practice, and judges reviewing withdrawal requests are concerned with the fair and orderly administration of justice equally in criminal and non-criminal fora. See, e.g., *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 425 (D.N.J. 1993) ("In cases when withdrawal would significantly impair a client's ability to find substitute counsel or to maintain the action, courts have refused to permit withdrawal despite the fact that representation has become unprofitable for the client's lawyers.").

130. The rule is named for the chief judge of the United States Court of Appeals for the Eleventh Circuit. Chief Judge Tjoflat promoted the Eleventh Circuit's formal adoption of the rule. See Bob Andelman, *'Tjoflat' Fees Rule is Argued in Court*, NAT'L L.J., Feb. 3, 1992, at 3.

131. See, e.g., 1ST CIR. R. 46-1(D)(1).

132. *Id.*

pensates an attorney for the risk that he bears in the face of the Tjoflat Rule. If, under that rule, the lawyer is compelled to represent his client on appeal without compensation, he receives no benefit from having charged that client a nonrefundable advance fee. A lawyer receives a benefit from charging a nonrefundable retainer only if he is discharged before completing the agreed upon task; in that circumstance, the lawyer is enriched by the forfeiture. Hence, the criminal defense bar argues in effect that charging a nonrefundable retainer provides the lawyer additional compensation when he is discharged to offset the loss he sustains when he is compelled to work without a fee. This is the same argument that contingent fee lawyers make: they are entitled to be overcompensated in some cases in order to make up for the unsuccessful ones. The argument is without merit. Overcharging a client in one case violates a lawyer's fiduciary and ethical duty to that client not to charge an unreasonable or excessive fee.¹³³

C. *Ethics Experts*

Opponents of *Cooperman* have also developed the example of attorneys who testify as expert witnesses on the law of lawyering or who assist in matters by serving "of counsel."¹³⁴ It is widely assumed that a half dozen or so of such experts, mostly law school professors, are the most sought after of their type and command substantial hourly fees plus substan-

133. Brickman, *Hamlet*, *supra* note 118, at 32 n.5. The overcompensation argument was approved in a now-antiquated book on contingent fees, FREDERICK B. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* 182 (1964) ("[T]he idea of using overcharges to some clients to offset undercharges to others does not seem an unfair way to support a system of providing competent legal services to clients who need them."). We recognize the overcompensation argument as a variation of robbing Peter to pay Paul. As George Bernard Shaw noted, taking from Peter to pay Paul always meets with the approval of Paul. *Thoughts on Business Life*, FORBES, Apr. 23, 1984, at 176. It is instructive to consider in the contingent fee context just who Peter and Paul are. Peter, of course, is the client being overcharged for attorneys' fees unjustified by the risk borne by the attorney. It may be thought that Paul is a subsequent client with a high risk claim who, but for the lawyer's overcharging Peter, would not gain representation. If his claim prevails, he has surely gained a windfall—but it is a one-time windfall, typically amounting to approximately one-third of the settlement or award. The lawyer is also a beneficiary, claiming one-third to one-half of the gross amount. But unlike the subsequent client, the lawyer is a repeat beneficiary. His stake in the process far exceeds that of the subsequent client. Accordingly, it is more correct to regard Paul as the attorney who overcharges Peter to pay himself to accept a future high-risk case that he would be less likely to accept were he not flush with the funds that were mulcted from Peter. An attorney owes each and every client an obligation not to charge *that* client any more than a fair and reasonable fee. Moreover, the overcompensation argument itself is specious because contingent fee percentages are typically set without regard to risk (and to the extent risk is considered, cases where risk exceeds the typical one-third to one-half contingency fee are simply not taken). In other words, contingent fee lawyers typically rob each client without allocating the booty to later clients.

134. We have discussed these issues with a number of opponents of *Cooperman* who suggested the examples and articulated the arguments discussed in the text.

tial nonrefundable retainers. These experts argue that they have toiled long and hard in the vineyards to build a reputation that enables them to command such fees. Charging an hourly rate—even \$1,000 an hour—in lieu of a nonrefundable retainer may not be adequate compensation in a given matter for any of several reasons. For example, the matter could be concluded after only an hour or two of the expert's effort (because his expertise enabled him to see right to the heart of the matter) or because settlement was induced or at least substantially assisted by either identifying the expert as "of counsel" or as an expert witness.¹³⁵ These opponents of *Cooperman* thus argue that denying them the opportunity to charge a nonrefundable retainer prevents them from realizing the full economic value of their reputations and their investments in those reputations.

We believe that, although these arguments have initial appeal, they too sound of the Sirens' songs.¹³⁶ Proponents of this position argue that entering an appearance is a compensable event that has value in the legal services marketplace.¹³⁷ We believe, however, that entering an appearance and tasks of similar import are synonymous with "assurance of availability" as that term has been used to defend nonrefundable retainers—these terms are simply linguistic variations on the theme of representation. From this perspective, denominating an advance fee as solely for the appearance is simply a semantic subterfuge to evade the prohibition against charging a nonrefundable retainer. The *Cooperman* court said it plainly: "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, which is the sum and substance of the fee agreement."¹³⁸

Opponents of *Cooperman* would argue that a determination of unconscionability should depend upon the identity and reputation of the attorney. That is, although it was unconscionable for Mr. Cooperman to make such a claim, it would not have been unconscionable for a leading ethics expert or criminal defense lawyer to do so. Acceptance of that argument would inject into every prosecution challenging a nonrefundable retainer a fact-finding component that would require the disciplinary board to argue, and the presiding panel to conclude, that the lawyer/respondent was not sufficiently eminent to charge a fee of such magnitude for a mere appearance (or some act of similar import). It would effectively eliminate the prohibition against nonrefundable retainers and transform every such prosecution into a claim

135. See FED. R. CIV. PROC. 26(B)(4)(A)(i) (providing for discovery of opposing party's expert witnesses expected to testify at trial).

136. See *supra* note 90.

137. See *supra* text accompanying note 89.

138. *Cooperman*, 591 N.Y.S.2d 855, 858 (App. Div. 1993).

of violation of the DR 2-106 prohibition against charging an excessive fee or the Rule 1.5 prohibition against charging a clearly unreasonable fee.

We think such a proposition is untenable for several reasons. First, it once again ignores the fundamental policy objection to nonrefundable retainers—that they interfere with the client's right to discharge her lawyer at any time without penalty. This policy is simply not considered by DR 2-106 or Model Rule 1.5.¹³⁹ Second, as a matter of administration of justice, this procedure would be unwieldy and would impose greater costs on the disciplinary boards without producing any public gain, resulting in a reluctance to prosecute the use of nonrefundable retainers.¹⁴⁰ Finally, it would effectively transform the system of lawyer discipline into an invidiously hierarchical and discriminatory process. Prominent lawyers would be insulated, while middle-tier and inexperienced lawyers would be exposed. There would be, in effect, one rule for the elite and another for the masses.

We believe that any exception to a general prohibition of nonrefundable retainers would consume the rule and render it nugatory. We invite the opponents of *Cooperman* to prove us wrong. We believe the burden is on them to propose a practical rule that, in an administratively feasible manner, effectuates the purpose of the *Cooperman* court—to preserve the fiduciary-law based client discharge right by banning nonrefundable retainers—but which also permits some lawyers to charge the full economic value of the use of their names—a practice that would result in payment of substantial sums to attorneys neither for the purpose of procuring their availability (as in the general retainer context) nor for the rendering of a specified service.

V. IMPLICATIONS

A. *The Need for a Rule*

A clear statement of the governing ethical rules is required in light of the substantial hue and cry *Cooperman* has produced¹⁴¹ and the arguments that the respondent in *Cooperman* should not be disciplined severely because the ethical rules governing nonrefundable retainer agreements were unclear when he used such agreements.¹⁴² Accordingly, we advocate

139. See *supra* notes 112-14 and accompanying text.

140. Indeed, if our analysis is correct, such a fact-finding component would produce public loss, since permitting the use of nonrefundable retainers except when unreasonable or unfair cuts against several public policy concerns and impairs the client discharge right. See *supra* notes 33-42.

141. We are not alone in recognizing the need for such a rule. See NYSACDL Brief, *supra* note 10, at 9-10 (suggesting establishment of an advisory committee to explore the issues raised by lawyer fee agreements generally and to formulate related standards and guidelines).

142. See *supra* note 87.

promulgating a rule specifying that nonrefundable retainers are impermissible as a matter of ethics.¹⁴³ We propose the following text:¹⁴⁴

Nonrefundable Retainers Prohibited; Advance Fees Deposited to Client Trust Account. When a client (or any other person on behalf of a client) pays a lawyer or law firm any sum of money or delivers any other property as payment in advance for specified services to be rendered in a specified matter, no such money or property shall be or become the property of the lawyer or law firm until such time, if any, as it shall have been earned through the rendering of such services. All such money and property shall be deposited by the lawyer or law firm promptly upon receipt into a separate trust account mandated in this jurisdiction for the receipt of client property,* and shall be withdrawn only when such portions of it shall have been earned through the rendering of such services. The lawyer or law firm shall promptly refund any unearned money or property to the client upon the conclusion of the representation. Any effort, by contract or otherwise, to contravene this Rule shall be null, void, and unenforceable, and law-

143. Nonrefundable retainers have also been held to be impermissible as a matter of contract law. *Joel R. Brandes, P.C. v. Zingmond*, 573 N.Y.S.2d 579, 584 (Sup. Ct. 1991) (following the arguments contained in *Brickman & Cunningham*, *supra* note 4, at 176-88, and holding nonrefundable retainer agreements invalid as a matter of contract law). Although an explicit statutory rule making it clear that nonrefundable retainers are unlawful may be appropriate, it does not seem as urgent as one specifying that nonrefundable retainers are unethical because (1) *Brandes* did not produce the same level of excitement and concern as *Cooperman*, and (2) denominating nonrefundable retainers as unethical very likely renders them void and unenforceable as a matter of public policy. See *Hegeman-Harris Co. v. Town of Greenburgh, N.Y. L.J.*, Mar. 25, 1993, at 25 (Sup. Ct. 1993) (citing and following *Cooperman* to "set aside as illegal and void" a nonrefundable retainer).

144. We have been informed that many members of the Louisiana Bar and others understand a recent Louisiana court rule, LOUISIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5(f), to mean that nonrefundable retainers are now permissible in Louisiana. A careful reading of the rule shows the opposite to be true. The lead paragraph provides that funds paid in advance of services to be rendered "become the property of the lawyer," but "subject to the provisions" of a succeeding paragraph. LOUISIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5(f) (1993). That succeeding paragraph specifies that upon any later fee dispute, the lawyer must (1) refund any unearned portion of a fee previously paid and (2) if the lawyer and client dispute the amount of such funds that were earned, the lawyer must deposit funds equal to the amount in dispute to a client trust account until the dispute is resolved. *Id.* at (f)(6). Hence, nonrefundable retainer fees are not only not permissible under this rule, they are in fact forbidden.

This erroneous interpretation of the Louisiana rule repeats errors in two Illinois State Bar Association opinions. See *Brickman & Klein*, *supra* note 2, at 1086-87 (criticizing Illinois State Bar Ass'n Op. 703 (1980) for opining that a lawyer can deposit an advance fee to her own operating account but if a fee dispute arises she must keep the funds in the client trust account; if the funds were already in the operating account, no guidance is given); *id.* at 1087-88 (criticizing Illinois State Bar Ass'n Op. 722 (1981)). "In short, according to the Illinois State Bar Association, nonrefundable retainers are refundable." *Id.*

yers or law firms involved in making any such effort shall have violated this Rule.

* See DR 9-102.

Like many rules, this text uses terms that are intended to have specialized meanings. Although we believe that readers of this Article would recognize those terms and understand their intended meanings and purposes, we also recognize that not all persons who may come to read this proposed rule or any version of it will do so. We therefore suggest that the rule be accompanied by the following brief comments that attempt to clarify the intended purpose of the rule and the meaning of its specialized terms. The comments below include a statement indicating that the jurisdiction adopting the rule has also adopted the presumption advocated in Part IV and suggests appropriate citations that may be helpful to its users.

This rule addresses fees paid by or on behalf of a client to a lawyer or law firm in advance of legal services to be rendered. Its purpose is to protect the client discharge right recognized in this jurisdiction in [insert name of applicable case in the adopting jurisdiction from footnote 24 above]; *see also* *Martin v. Camp*, 114 N.E. 46 (N.Y. 1916). To that end, it prohibits any attempt by a lawyer or law firm to retain any such advance fee payment if the services are not rendered, whether because of discharge, withdrawal or otherwise, and whether denominated as a nonrefundable fee, a minimum fee, a general retainer or otherwise. *See In re Cooperman*, 591 N.Y.S.2d 855 (App. Div. 1993).

The phrase "specified services to be provided in a specified matter" denotes a "special retainer" agreement. Special retainer agreements are to be distinguished from "general retainer" agreements. General retainer agreements are narrowly tailored agreements providing exclusively for a lawyer or law firm to be available to render services over a specified period of time. *See Greenberg v. Jerome H. Remick & Co.*, 129 N.E. 211 (N.Y. 1920). Special retainer agreements provide for the performance of specific legal services for a fee, which may be fixed, contingent, a percentage, or computed on an hourly basis. Because the distinction between general retainer agreements and special retainer agreements is sometimes difficult to draw, and in order to protect the interests of clients, all retainer agreements are rebuttably presumed to be special retainer agreements and covered by this rule.

The phrase "earned through the rendering of such services" denotes the competent performance of the activity for which the client (or such other person on his behalf) paid the lawyer or law firm the advance fee.

B. Revitalization of *Martin v. Camp*

The importance of *Cooperman's* revitalization of *Martin v. Camp*¹⁴⁵ cannot be overstated. The client discharge rule of *Martin* is a fundamental corollary of the fiduciary nature of the attorney-client relationship. As such, it applies to virtually every issue that arises in the field of attorney-client relationships. Indeed, it applies to every situation where attorneys' fees are at stake. In the nonrefundable retainer context the importance is clear, and despite the hue and cry *Cooperman* has spawned, the analysis is perfectly straightforward. A client who must forfeit property to discharge her lawyer has no free discharge right. Hence, nonrefundable retainers must be prohibited.

In other fee contexts, the importance of the client discharge right has been more deeply obscured. The resurrection of *Martin* in *Cooperman* holds the promise of piercing those virulent veneers as well. We will consider two such contexts briefly: safeguarding advance fee payments and the compensation of a discharged contingent fee lawyer.

1. Safeguarding Advance Fee Payments

In addition to declaring nonrefundable retainers unethical, the text of the foregoing proposed rule directs that advance fees shall be deposited to the client trust account (rather than to the lawyer's office or operating account). Because these issues are closely intertwined,¹⁴⁶ it is appropriate to consider how *Cooperman* itself bears on the issue of whether advance fee payments are to be deposited to the client trust account or to the lawyer's operating account.

Although the issue is highly controversial, a majority of bar association ethics committees have opined that advance fee payments are to be deposited to the client trust account.¹⁴⁷ Because *Cooperman* holds that advance fee payments may not be denominated as nonrefundable and because DR 2-110(A)(3) provides that "a lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned,"¹⁴⁸ it follows that advance fees are client funds.¹⁴⁹ DR 9-102 provides that client funds paid to a lawyer must be deposited to the client trust

145. 114 N.E. 46 (N.Y. 1916).

146. See generally Brickman, *The Advance Fee Payment Dilemma*, supra note 62 (noting that nonrefundable retainers implicate the issue of where advance fees are deposited).

147. See *id.* at 650 n.20, 654 nn.47-48.

148. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A)(3) (1991). Model Rule 1.16(d) is substantially similar.

149. See *In re Gustafson*, 493 N.W.2d 551, 553-54 (Minn. 1992) (stating that advance fee payments are client funds and must be deposited in client trust account until earned and cannot be withdrawn except upon written notice to client).

account.¹⁵⁰ *Cooperman* leads logically, but not inexorably, to the conclusion that advance fee payments must be deposited to the client trust account and held there until earned by the lawyer (or returned to the client).¹⁵¹

Two additional arguments buttress this contention. First, empirical data on the causes of lawyer defalcation indicates that the failure to return unearned advance fees constitutes a major disciplinary problem and generates substantial claims by clients against client protection funds.¹⁵² Clients often are unable to obtain the return of unearned advance fee payments because their lawyers have either spent the money or otherwise made it unavailable to the client.¹⁵³ A rule mandating that advance fees be deposited to the client trust account would reduce both the volume of litigation that clients pursue against lawyers for refunds of advance fee payments as well as the number of client claims against lawyers that are paid through client protection funds, in each case saving substantial sums of money.

Second, such a rule would effectuate the intent of DR 9-102(A)(2), which allows the client to contest the amount of a lawyer's fee when funds deposited to the security account include fees claimed by the attorney.¹⁵⁴ Once the client exercises her right to contest the fee, the funds may not be withdrawn until the dispute is resolved.¹⁵⁵ Both nonrefundable retainers

150. Model Rule 1.15 is substantially similar.

151. It is still possible to argue that even though advance fee payments are client funds, they are nonetheless to be deposited to the lawyer's general office account. Essentially, this is the position adopted in New York State Bar Ass'n Comm. on Professional Ethics Op. 570 (1985). The senior author has characterized this position as indefensible from textual, legal, fiduciary, and policy perspectives. See Brickman, *The Advance Fee Payment Dilemma*, *supra* note 62, at 654-73.

152. Client protection funds are operated in 49 states (as well as the District of Columbia, several common law nations and the Canadian provinces), Frederick Miller, *When You Can't Trust Your Lawyer*, 138 U. PA. L. REV. 785, 791 (1990), and are typically funded primarily through a portion of the annual dues paid by members of each state's bar association. Cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-7 (1992) ("[C]ontribution to a client's security fund is an acceptable method of meeting [a] lawyer's obligation . . . to participate in collective efforts of the bar to reimburse persons who have lost money or property as a result of the misappropriation or defalcation of another lawyer.").

In New York State during the period from and including 1982 through and including 1992, client losses due to unearned legal fees being withheld constituted the single largest class of claims (1,237 claims, or 27% of all claims), amounting to 4% of all losses on a dollar basis (\$4,975,000 for the period). LAWYERS' FUND FOR CLIENT PROTECTION OF THE STATE OF NEW YORK, 1992 ANNUAL REPORT 25 (1993). During 1992 alone, 144 such claims were made, constituting 23% of all claims and 1% of all losses, and amounting to \$368,000. *Id.* In New York State in each of 1985, 1986, and 1987, the single largest class of claims filed with the Clients' Security Fund of New York (the earlier name of the fund) involved attorneys who kept unearned legal fees. THE CLIENTS' SECURITY FUND OF THE STATE OF NEW YORK, 1987 ANNUAL REPORT 13 (1988); 1986 ANNUAL REPORT 13 (1987); 1985 ANNUAL REPORT 8 (1986).

153. See, e.g., Kentucky Bar Ass'n v. Banks, 847 S.W.2d 58, 59 (Ky. 1993).

154. Model Rule 1.15(c) is substantially similar.

155. *In re Strnad*, 491 N.W.2d 479, 480 (Wis. 1992) (stating that a lawyer may withdraw a

and depositing advance fees to the lawyer's office account effectively circumvent this valuable client protection, and therefore both must be forbidden.

2. Compensation of Discharged Contingent Fee Attorneys

In the contingent fee context, authorities are divided as to whether the contingent fee contract percentage establishes a cap on the discharged attorney's recovery. In other words, is the discharged attorney limited to the percentage of the underlying recovery set by her contract fee (and therefore a zero recovery if the client recovers nothing in the underlying action)? Jurisdictions that limit the discharged lawyer's quantum meruit recovery to the contract price fully effectuate the client discharge rule.¹⁵⁶ However, jurisdictions that allow the discharged contingent fee attorney to sue in quantum meruit without limitation (thereby deeming the realization of the contingency and the amount actually recovered by the client as irrelevant to the fee computation) severely depreciate the client discharge rule.¹⁵⁷ Requiring the client who discharges a contingent fee attorney to pay an attorney's fee even if the underlying action is unsuccessful penalizes the client for discharging the lawyer. Had he not discharged the lawyer (presumably to hire a second one) and the outcome was a defendant's verdict, he would not have owed the first attorney any fee. Had the action succeeded, the fee would have come out of the proceeds gained. Thus, the only time a client is liable for an out-of-pocket fee expense is when he discharges the attorney in a jurisdiction that has adopted a distorted version of *Martin v. Camp*.¹⁵⁸

In the nonrefundable retainer context, *Cooperman* goes far to underscore the importance of the fiduciary nature of the attorney-client relationship and the need for an inviolate client discharge right. Many jurisdictions are bound to follow *Cooperman*, just as they followed *Martin*.¹⁵⁹ When they do so, they will not only protect clients against the corrosive effects of nonrefundable retainers, they are also likely to extend the pure client dis-

portion of client funds held in trust once they are earned, unless the client disputes that the lawyer has earned such funds, in which case the disputed portion may not be withdrawn).

156. See authorities cited in Brickman, *Setting the Fee*, *supra* note 24, at 380 nn.67-75.

157. See authorities cited in Brickman, *Setting the Fee*, *supra* note 24, at 382 nn.76-78. See also Irving Cohen, Note, *For a Few Dollars More: Client's Right to Discharge His Attorney Under a Contingent Fee Contract*, 7 CARDOZO L. REV. 913, 924-33 (1986) (comparing results across jurisdictions and proposing an alternative rule designed to avoid duplicative and excessive fees).

158. Ironically, New York, the originator of *Martin v. Camp* and *Cooperman*, also has adopted the distorted version of the client discharge rule as applied to contingent fees. Brickman, *Setting the Fee*, *supra* note 24, at 382-85.

159. See *supra* note 24.

charge rule to other contexts in which attorneys have been committing fee abuses.

VI. CONCLUSION

We applaud the *Cooperman* decision. We believe it properly condemns as unethical a retainer agreement that, because it includes a nonrefundable fee provision, interferes with a client's right to discharge her attorney with or without cause, at any time, without penalty. We urge courts to take the additional step, in one proceeding, of requiring lawyers to make restitution of unearned funds obtained through unethical means. Moreover, we believe it is necessary that courts reviewing the validity of retainer agreements impose a presumption that a retainer fee agreement constitutes a special retainer, rather than a general retainer, to protect against the risk that lawyers will seek to construct artificial general retainers in an attempt to avoid the consequences of the *Cooperman* decision. Finally, we believe that it is desirable to promulgate a rule specifying that nonrefundable retainers are impermissible as a matter of legal ethics.¹⁶⁰ That rule should expressly address the related issue concerning safeguarding advance fee payments by requiring such fees to be deposited and held in the client trust account until such time as they are earned by the attorney and become his property through the rendering of compensable services.

160. We also continue to believe that nonrefundable retainers are impermissible as a matter of civil law (in addition to being unethical). See *Brickman & Cunningham*, *supra* note 4, at 170-89; see also *Joel R. Brandes, P.C. v. Zingmond*, 573 N.Y.S.2d 579 (Sup. Ct. 1991) (holding nonrefundable retainers unenforceable as a matter of contract law). It may therefore also be appropriate to adopt a statute specifying that such agreements are unenforceable as a matter of civil law as well. There is less urgent need for such a step in the civil area, however, since denominating nonrefundable retainers as unethical very likely renders them void and unenforceable as a matter of public policy. *Hegeman-Harris Co. v. Town of Greenburgh, N.Y. L.J.*, Mar. 25, 1993, at 34 (Sup. Ct. 1993) (citing and following *Cooperman* to set aside a nonrefundable retainer as "illegal and void").

APPENDIX A

1. Retainer Agreement, dated August 18, 1986 (the subject of disciplinary charges 1-5).
2. Letter from Client under Agreement 1, dated September 23, 1986 (the subject of disciplinary charge 4).
3. Retainer Agreement, dated November 18, 1987 (the subject of disciplinary charges 6-10).
4. Letter from Client under Agreement 3, dated January 18, 1988 (the subject of disciplinary charge 9).
5. Retainer Agreement, undated (but entered into on or around November 1, 1988) (the subject of disciplinary charges 11-15).

1.

[Letterhead of]
Edward M. Cooperman

August 18, 1986

[Clients]
[Clients' Address]

Re: *People v. [Client]*

Dear [Clients]:

This letter will constitute our agreement of retainer when signed by all of us, for my representation of [Client] in the above [name of County] criminal matter, which presently charges [Client] with [charge].

My minimum fee for appearing for you in this matter is Fifteen Thousand (\$15,000.00) Dollars. This fee is not refundable for any reason whatsoever once I file a notice of appearance on your behalf. It is deemed to be owed in full at that time even if not so paid in full by that time, whether or not you choose to continue with my services to any stage in the proceedings or you discharge me during the pendency of the case at any point. You are paying a portion of this fee today (\$1,000.00), which will be deemed to apply to the conferences we have had to date and a letter to be given to you for presentation to the presiding judge in the County Court tomorrow indicating that I have been consulted by you for the purpose of being retained, and requesting an adjournment of the matter until [date], by which time you agree to pay me an additional Nine Thousand (\$9,000.00) dollars towards the balance of the retainer. The remaining Five Thousand (\$5,000.00) dollars shall be paid One thousand (\$1,000.00) per month on the 16th day or each month, commencing the 16th of October until paid in full.

You have told me that you have already waived your right to be prosecuted by indictment and have plead guilty to a felony (I am informed that it is an "attempt" to commit the crime charged and the minimum sentence promised you is 1 1/2 to 3 years), I shall attempt to vacate this waiver and plea and attempt to proceed in this matter from the "beginning". We have discussed the possibility of having you testify before the Grand Jury and various post-indictment and pre-trial motions to dismiss the case and/or to suppress your purported "confession". I intend to take whatever steps are necessary to protect your interests in this matter, and have advised you to retain the services of a private investigator. I have recommended [private

investigator] of [town], with whom I have worked with [sic] successfully on numerous occasions and in whom I repose a great deal of trust and respect.

The initial retainer will be sufficient to pay for any proceedings required up to and including the Grand Jury. For your protection, and as we have discussed, it is not a usual occurrence for a defendant to testify at the Grand Jury, partly for the reason of testifying "against" one's self and partly for the reason that the prosecution may use this testimony against you at your trial even if you choose not to testify at the trial itself. Pending my personal familiarization with the facts of this case, and the independent private investigation, I shall not advise you to testify thereat, but it will be considered and may be recommended. In the event our application to withdraw the waiver of prosecution by indictment and the plea of guilty to the [court] is denied, the initial retainer will cover the motion and an appeal to the Appellate Division, if necessary, but will not include any out-of-pocket expenses, including extra-ordinary travel, or disbursements, such as investigation fees, filing and subpoena or process service fees, minutes of court proceedings, messenger fees, printing of the brief and record on appeal, or extra-ordinary office disbursements or expenses beyond occasional photocopying and regular postage (not certified, registered or Express Mail), etc. This will apply throughout our association, in my representation of you on any matter. You agree to pay me these expenses or disbursements within ten days of my sending you an itemized bill for same.

Should [client] be indicted by the Grand Jury, my fee will be an additional Ten Thousand (\$10,000.00) dollars, payable prior to my appearing in the County Court for his arraignment. If an appeal is necessary due to a denial of a motion to dismiss the indictment, an additional Five Thousand (\$5,000.00) dollars will be paid at the time the Notice of Appeal is filed therefor. In the event the appeal is denied, or a trial is required without an appeal, an additional Five Thousand (\$5,000.00) dollars will be required prior to the commencement of trial.

You have been informed during our numerous conversations, that while I will exercise good professional judgment and efforts on [client's] behalf, no promises or guarantees as to the final results of this case or any part thereof can be or are made to any degree.

In the event that you fail to pay me ANY of the above retainers or fees recited within ten days of my request therefor, it shall then be deemed that you have decided to terminate me from the case immediately, and consent to the entry of a Court Order relieving me as your attorney in the case or any part thereof, in any court in which I may be representing you. If a bill for the printing of the record and briefs on any appeal is presented to you and not paid within ten days, you authorize me not to perfect the appeal

(have the record and briefs printed and filed with the court and served upon the District Attorney). In the event you you [sic] so fail to pay me as above, you further consent to my discontinuing any and all work on your behalf without notice, and relieve me of any and all liability to you therefor. Notwithstanding your failure to pay me any instalment or payment that is due to me under the terms of this agreement, you will continue to owe me that sum or total of money which you may not have paid up to the date of my discharge as your attorney, even after my discharge.

There are no other promises or terms of our agreement than those contained herein.

By signing this agreement in the place indicated below, you are consenting to it, and both of you agree to remain personally obligated and bound to keep the terms contained herein.

Sincerely,

/s/Edward M. Cooperman

EDWARD M. COOPERMAN

Agreed and Consented To:

/s/[Client]

[CLIENT]

/s/[Client]

[CLIENT]

2.

[handwritten]

9/23/86

Edward Cooperman, Esq.
1205 Franklin Avenue
Garden City, N.Y. 11530

Dear Ed,

Please let this letter serve as notice to stop working on [my husband's] case.

You told us that you could help us and we trusted you. We gave you \$10,000 in cash which was all the money we had. You said you could keep [my husband] out of prison & that there wasn't a thing to worry about. You told him to just go about his business, do his [work] & assured us you would resolve his legal problem to our satisfaction. [There follows a list of several specific actions or inactions by Mr. Cooperman which led the clients to lose trust and confidence in the lawyer.]

[My husband] and I then realized that we gave you all this money up front & you weren't giving us your all.

I feel we deserve a refund on this. Please call me to discuss this. I'm left here with no money and no husband to make up the money that was given to you. You assured us he would be home to earn a living & to earn the \$1,000 a month to you [sic].

I await your response.

Sincerely,

[Client]

3.

[Letterhead of]
Edward M. Cooperman

November 18, 1987

[Client]
[Client's Address]

Re: *Retainer - Matter of Estate of [Client]*

Dear [Client]:

This letter will confirm our agreement for your retaining the services of my office to represent you in a probate matter concerning the estate of your father, [client's father], who died in the [name of State] on [date].

You have informed me that following the death of your mother, your father remarried [name], and, in a purported will dated [date], left everything to her, thus effectively disinheriting yourself and your brother. By a prior will dated [earlier], during the lifetime of your mother, the entire estate was to be shared between your brother and yourself. I have informed you that although I am not admitted to practice in the [name of State], where the laws are different than in New York, I have in the past been admitted "pro haec [sic] vice", which means for one particular case only. It is my intention to become admitted for this case pro haec [sic] vice, to investigate the circumstances of the execution of this [second] will, and to retain local counsel in [other state] to advise me and appear for me at times that it is not economically practical for you to have me appear in any court proceeding. It will be my intention to appear for actual adversary proceedings such as hearings or trials when my presence is beneficial to our cause. The object of my retainer is to have the [second] will invalidated and to reinstate the [earlier] will, wherein you will receive a substantial share of the estate.

This agreement will set forth the terms of my retainer in an effort to obtain this result or to settle this case on terms acceptable to you.

For the MINIMUM FEE and NON-REFUNDABLE amount of Five thousand (\$5,000.00) dollars, I will act as your counsel to acquire any and all information and to render a professional opinion that will be crucial to your forming your own opinion whether to pursue a court proceeding to actually file papers to invalidate the [earlier] will. This agreement is not for a time retainer which can possibly result in a higher amount than that

agreed to be paid. The fees in our arrangement are fixed. For the initial retainer, I shall ascertain all or as much as possible of the salient and pertinent facts of this matter that would enable us both to understand the truth of the entire matter. A private investigation is imperative. A background investigation of the circumstances surrounding the execution of the will(s) and a private investigator's interview with the witnesses must be done, if possible. An investigation by the private investigator as to the extent and location of any assets of the estate, together with an investigation of the depletion of any of the assets of the estate by [the second wife] is advisable and will be requested. This is the minimum fee no matter how much or how little work I do in this investigatory stage (as you are aware I can counsel you and answer your questions and be the liaison between the investigator and the court and yourself, but my efforts are dependent upon the cooperation of others), and will remain the minimum fee and not refundable [sic] even if you decide prior to my completion of the investigation that you wish to discontinue the use of my services for any reason whatsoever, or to discontinue the investigation for any reason whatsoever. If you so decide, following my rendering this opinion to you that such is feasible and/or advisable, then in that event, my retainer will be Fifteen thousand (\$15,000.00) dollars to commence any such proceeding or to file any papers to accomplish this result. The latter amount will be less the Five thousand (\$5,000.00) dollars previously paid on account of legal services. The Fifteen thousand (\$15,000.00) dollars is my MINIMUM FEE for this matter, and is NOT REFUNDABLE under any circumstances, even if you decide to terminate my services or to discontinue the case for any reason whatsoever. My actual fee for this case will be a sum equal to one-third of the gross proceeds obtained by suit, settlement or otherwise, less any amounts paid to me on account of legal fees (e.g., the \$15,000.00 minimum fee aforementioned). Any amounts you have paid on account of expenses or disbursements will be deducted from the gross settlement and repaid to you, and then you and I shall share our respective one-third and two-third shares of the remainder. I shall pay any local [other state] attorney who works for us in this matter and you shall pay the investigator who I retain for us to investigate the facts and circumstances in this matter, either directly or by reimbursing me following my rendering you a statement for his services which I may have previously paid.

You have been informed that I may have a lawyer-associate affiliated with my office work with me in the prosecution of this case, within my discretion or during times when work on your behalf is required to be done and I am unavailable due to engagement in a different county or court or for other reasons. You consent to this.

You shall be obligated to pay any and all reasonable expenses and

disbursements incurred by my office in this matter or on your behalf, including but not limited to service of process fees, filing fees, investigation fees, calendar service fees, photocopies, postage, telephone charges other than local telephone calls, cost of transcripts, official court documents, stenographic minutes when required for your benefit, etc., and any other reasonable expenses or disbursements on your behalf, including travel expenses to and from [other state], and lodging in the event I am required to be there overnight. You will pay these items to me or to the business rendering its bill to me or directly to yourself for same within ten days of the date you are billed for such expense or disbursement, and you will be consulted for your approval prior to the incurring of any of these expenses.

Aside from exercising reasonable professional efforts to obtain the best possible result for you, no promises or guarantees have been made to you as to the potential results of this case.

There are no other representations other than what are made herein, and the foregoing constitutes the entire agreement between us.

This agreement cannot be changed orally, only by another subsequent written agreement.

By signing this letter of retainer, you are agreeing to the foregoing. If you agree with the terms of my employment for you, please sign in the place indicated below. Thank you.

Sincerely,

/s/Edward M. Cooperman

EDWARD M. COOPERMAN

Agreed and consented to:

/s/[Client]

[CLIENT]

4.

[handwritten]

[Client's Address]

January 18, 1988

Edward M. Cooperman
1205 Franklin Avenue
Garden City, NY 11530

Dear Mr. Cooperman:

The purpose of this letter is to notify you that as of this date I have terminated your services. Please return the retainer I paid you, less the value of any services you rendered and any expenses you incurred to date. In addition, please include an itemized billing statement, so that I can reconcile your charges.

Sincerely yours,

[Client]

5.

[handwritten]

Retainer agreement between [Clients] and Edward M. Cooperman, Esq. to retain Mr. Cooperman's services to represent their son [name] re: a felony involving the alleged [crime].

The MINIMUM FEE for Mr. Cooperman's representation of [the son] to any extent whatsoever is TEN THOUSAND (\$10,000.00) dollars. This fee will be paid FIVE THOUSAND (\$5,000.00) dollars today and FIVE THOUSAND (\$5,000.00) on or before December 1, 1988.

The above amount is the minimum fee and will remain the minimum fee no matter how few court appearances are made by Mr. Cooperman. This fee will also cover, if required, whatever court appearances are required to complete this matter *without* a trial or any hearings that involve the taking of testimony, following indictment. The minimum fee will remain the same even if Mr. Cooperman is discharged.

In the event any pre-trial hearings are required, or a trial is held, there is an additional fee of TEN THOUSAND (\$10,000.00) dollars, payable prior to the commencement of any hearings and if no hearing, prior to the trial, whichever is first.

[The clients] have been advised that it is to the best interests of their son to retain the services of a private investigator so as to have the best possible preparation for the defense of their son. They agree to be responsible for these expenses and for any services of subpoenas or court processes for the benefit of their son that Mr. Cooperman shall require. This will also apply to any experts and expert testimony.

[The clients] have been advised that the underlying charge is quite serious and that no matter what efforts Mr. Cooperman exerts on their son's behalf, he still may have to face a prison term. Mr. Cooperman has explained to them that it is both unethical and illegal for a lawyer to guarantee anything to his clients and that, accordingly, no promises or guarantees are made as to any potential result in this case.

The above agreement represents the entire understanding between the [clients] and Mr. Cooperman and cannot be changed except by another written agreement.

/s/[Client]

[CLIENT]

/s/Edward M. Cooperman

EDWARD M. COOPERMAN

/s/[Client]

[CLIENT]