

CAN A REASONABLE DOUBT HAVE AN UNREASONABLE PRICE? LIMITATIONS ON ATTORNEYS' FEES IN CRIMINAL CASES

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Abstract: *The disciplinary rules of every state prohibit attorneys from charging "unreasonable" fees. These provisions, however, are virtually never enforced; virtually all instances where the rules are invoked involve independent forms of dishonesty or misconduct. The only two cases in which attorneys have been disciplined solely based on the size of the fee involved "blue-chip" civil attorneys who represented working-class defendants in criminal matters. In both cases, the rationale for discipline was questionable; the clients were completely exonerated of criminal charges and the fees would have been unexceptional in elite civil practice. These disciplinary prosecutions were particularly doubtful because the Sixth Amendment right to counsel of choice prohibits the government from limiting the amount of money criminal defendants can pay their lawyers.*

The reasonable fee rules are either unenforced or questionably enforced because they are not designed to limit lawyer's fees or incomes per se, but to ensure that lawyers do not take advantage of clients, and that clients understand the nature of the legal services they are buying. The mismatch between the purpose of the rules and their language should be remedied by making clear that lawyers are obligated to talk with their clients about their legal options and offer

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some estimate of what they might cost. But fees negotiated after appropriate disclosure should not subject an attorney to discipline.

INTRODUCTION

For as long as lawyers have been regulated, the law has prohibited them from charging clients "unreasonable" fees. The restriction against charging unreasonable fees is usually understood to mean that a lawyer can be disciplined for charging a client too much money, not that the lawyer lied, cheated or stole (wrongdoing covered by other rules), but simply that the bill was too high under the circumstances. Although complaints about fees are a major cause of client dissatisfaction, the reasonable fee rules have gone almost entirely unenforced. Lawyers are frequently sanctioned for procedural irregularities in billing, but it is not clear that any civil lawyer has ever been sanctioned simply for charging an excessive fee.

Only two published cases involve a lawyer disciplined solely for charging excessive fees; both involve lawyers representing criminal defendants.¹ The cases are remarkable simply because of their rarity and because the lawyers involved seemed unlikely candidates for punishment. One lawyer, Laurence S. Fordham, had been an editor of the *Harvard Law Review*, a law clerk for the United States Supreme Court, the managing partner of a leading Boston law firm and was a member of the Harvard Law School faculty. The other, Luis Kutner, had been a faculty member at Yale Law School, learned criminal practice at the foot of Clarence Darrow, used his skills to achieve the release of 1000 criminal defendants and political prisoners during his career, was responsible for innovations in the legal system such as the living will, and helped establish Amnesty International. Both clients involved were completely exonerated of all criminal charges. In each case, it seems that the lawyer's true offense was doing white-collar-style work for blue-collar clients—and charging for it.

The reasonable fee limitation has been unenforced or enforced perversely because the substance of the rule is not connected to the purpose behind it. The justification for regulating fees is not that lawyers should make modest incomes or that clients should be protected from their own improvidence. Instead, the purpose of regulation is to prevent lawyers from taking advantage of client ignorance about the market for legal services and about the appropriateness of particular

¹ See *infra* notes 130–210 and accompanying text.

legal strategies. At present, the rules do not accomplish this well, requiring only very limited discussion about the fees clients will be required to pay. This Article proposes that the purpose behind the rule can be achieved directly, by eliminating the reasonable fee rule and replacing it with a requirement, which does not now exist, that lawyers provide their clients with specific information about what they are likely to be charged at the beginning of the representation.

As Part I explains, a common law limitation on "unconscionable" attorneys' fees was replaced in 1969 by the *ABA Model Code of Professional Responsibility's* rule against "clearly excessive" fees. The *Model Code* was supplanted in 1983 by the *ABA Model Rules of Professional Conduct*, which said that lawyers could not charge "unreasonable" fees.² Notwithstanding decades of regulation, although lawyers are frequently disciplined for improprieties in connection with fees, such as misleading a client about how much a matter will cost, doing unnecessary work or lying about work performed, the authors have found no clear evidence that even one civil lawyer has ever been disciplined simply for charging a fee which was too high.³ The only lawyers convicted of charging excessive fees have been representing clients in "retail" criminal matters—street crimes or driving offenses where both the going rates and perceived prestige of the practice areas are modest.⁴

Part I suggests that it should not be surprising that civil attorneys are never disciplined (and criminal attorneys are almost never disciplined) simply because their fees are too high. In several ways, the current law regarding attorneys' fees is unhelpful. Each succeeding regime of regulation changed the language which previously had been used to express the idea that attorneys may not charge unreasonable fees, yet none of them explained whether the new term was meant to establish a new standard for reasonableness of fees.⁵ Thus, lawyers and disciplinary authorities are left to wonder just how excessive or unreasonable a fee must be before it is prohibited and subject to disciplinary action. Perhaps more fundamentally, the test employed by the ABA codes to measure reasonableness is so vague that it is virtually useless. The test invokes no fewer than eight multi-part factors—and the list is expressly non-exclusive. Accordingly, on almost any given set of facts, application of the factors to a fee could sustain a

² See *infra* notes 38–73 and accompanying text.

³ See *infra* notes 18–37 and accompanying text.

⁴ See *infra* notes 130–272 and accompanying text.

⁵ See *infra* notes 38–73 and accompanying text.

reasonable argument that the fee is justified and a plausible argument could also be made that the fee should have been different.⁶

Additionally, Part I suggests that the rules are unsatisfactory not just because they are loosely drafted or imprecise, but because they are not directly connected to the real harm they are designed to prevent.⁷ The rules are not designed to impose some upper limit on the amount a skilled and energetic lawyer can earn; lawyers who earn six, seven or eight-figure incomes through zealous advocacy within the bounds of the law are honored, not disciplined.⁸ The reasonable fee rules are not even aimed at the size of fees in individual matters as such. Instead, the rules are intended to promote fairness to the client in setting fees and billing. They do so, however, in an indirect and imperfect manner; nowhere do the rules require lawyers to consult with clients to ensure that clients understand the financial implications of fee arrangements.

Part II describes the harm caused by the disconnection between the purpose and text of the rule. It is true that the purpose of the rule is to regulate the procedure by which the fees are set. As such, the rule is generally invoked not because the fee is too high, but because it is unfairly set. Even so, as now constituted, the rule creates two serious problems. One problem is that it leads to underenforcement of the rule, or, at least, underachievement of the purpose of the rule, because it does not give clear direction to the lawyers affected and the authorities who must enforce it about the principle at stake. There is a substantial gap between something approaching comprehensive disclosure, and the kind of dishonesty and overreaching which result in discipline. Left unprotected are clients who are surprised by the amount of the fees, and understandably angry at lawyers who cannot be disciplined because they acted in good faith and did not violate any rule.⁹

⁶ See *infra* notes 74–99 and accompanying text.

⁷ See *infra* notes 100–17 and accompanying text.

⁸ See, e.g., Brigid McMenamin, *The Best-Paid Lawyers*, *FORBES*, Nov. 6, 1995, at 145; John E. Morris, *The British Are Gaining*, *AM. LAW.*, Nov. 1998, at 14 (listing top 25 firms by annual profits per partner, ranging from \$2.2 million to \$780,000); see also Lisa G. Lerman, *Blue-Chip Billing: Regulation of Billing and Expense Fraud by Lawyers*, 12 *GEO. J. LEGAL ETHICS* 205, 219 (1999) ("Financial success has become the dominant value for many lawyers. . . . Pre-occupation with profit is most intense in some of the most respected law firms in the United States."); Judith L. Maute, *Balanced Lives in a Stressful Profession: An Impossible Dream?*, 21 *CAP. U. L. REV.* 797, 798 (1992) (noting, but criticizing, "the current view which typically measures success by income").

⁹ See *infra* note 130 and accompanying text.

Another problem created by the imprecision of the rule is that it has lead to unwarranted disciplinary prosecutions in a context which is likely to reduce client access to counsel. Part II examines the exceptional disciplinary cases which imposed liability solely on the basis of the excessive amount of the fee.¹⁰ These cases are controversial, notorious and unjustifiable in result. First, given the elasticity of the standards used for determining a reasonable fee, there is a strong argument that the fees were reasonable under the eight-part test.¹¹ For example, while the Supreme Judicial Court of Massachusetts disciplined an attorney for charging \$50,000 in a "routine" drunk driving case, that attorney was an experienced, expert litigator with a national reputation. Through diligence and ability, he won an acquittal for his client in the face of a very strong government case. There, he persuaded the trial court to suppress an incriminating Breathalyzer test using a novel legal argument.

Enforcement of the reasonable fee rules in criminal cases will hurt clients, not help them. Because the court held that a client could not consent to pay a fee that a tribunal later might determine was unreasonable, clients are no longer free to choose expert, expensive representation in subject matter areas with relatively low "going rates." Part II suggests that the object lessons of these cases, if heeded, will have unfortunate consequences for clients seeking representation. The cases in which lawyers were convicted of charging unreasonably high fees were criminal cases of a kind that a working-or middle-class person might face. Fee restrictions in relatively low prestige practice areas will discourage lawyers with other career options from entering non-white-collar criminal defense. Moreover, under the current rule, a lawyer is required to turn down an engagement involving an "unreasonable" fee, even if the client, after being fully informed, still urgently wants the lawyer's services. Therefore, in two ways, the disciplinary prosecutions may act to deprive people of ordinary means of the ability to hire counsel of choice.¹²

Part III offers another reason why the cases disciplining criminal defense attorneys for charging excessive fees were wrongly decided—they violate the Sixth Amendment of the United States Constitution.¹³ The Sixth Amendment guarantees the right to counsel in all criminal prosecutions. In recent years, this clause has been examined to de-

¹⁰ See *infra* notes 131–272 and accompanying text.

¹¹ See *infra* notes 211–16 and accompanying text.

¹² See *infra* notes 217–72 and accompanying text.

¹³ See *infra* notes 273–317 and accompanying text.

termine the extent that it guarantees indigents free counsel.¹⁴ The original purpose of the clause, however, was to establish the right of persons to hire their own counsel, precisely the right that fee restrictions impair.¹⁵ The right to counsel of choice is not unlimited; courts have held that a defendant has no right to insist on unlicensed counsel or counsel with a conflict of interest.¹⁶ Nevertheless, the government has no legitimate interest in preventing client access to lawyers simply because they are skilled enough to command high rates or committed enough to work many hours in their clients' defense.

Part IV concludes that the remedy for the mismatch between the purpose of the rule and its language is for the ABA and the states to adopt a rule requiring counsel to offer clients information about fees.¹⁷ This remedy will promote the fair treatment of clients, by requiring that they receive relevant information about the fees they will be charged, which the rule does not currently require. It will also avoid the problem of depriving them of the opportunity to retain counsel of their choice.

I. ETHICAL LIMITATIONS ON ATTORNEYS' FEES

In express terms, the ethical rules of every state prohibit accepting an unreasonable or excessive fee. Yet no definitive evidence has been found that any civil lawyer has ever been disciplined exclusively for charging a fee the court deemed excessive, in the absence of some other form of misconduct.¹⁸ Thus, Professor Charles Wolfram has noted that "disciplinary cases resulting in findings of impermissible fees have most often dealt with the process by which the offending

¹⁴ See *infra* notes 274-75 and accompanying text.

¹⁵ See *infra* notes 274-81 and accompanying text.

¹⁶ See *infra* notes 282-87 and accompanying text.

¹⁷ See *infra* notes 318-34 and accompanying text.

¹⁸ Given the "[h]undreds, if not thousands, of decisions from disciplinary panels and courts" dealing with excessive fees, there may be some such cases out there, but the authors could find none. *LAWYERS MANUAL ON PROFESSIONAL CONDUCT* (ABA/BNA) § 41:314 (1994) [hereinafter *LAWYERS MANUAL*]; see, e.g., Dale R. Agthe, Annotation, *Attorneys Charging Excessive Fee as Ground for Disciplinary Action*, 11 A.L.R.4th 133 (1981) (citing hundreds of cases). Some cases, such as *Florida Bar v. Moriber*, 314 So. 2d 145, 149 (Fla. 1975), state in dicta that an attorney can be disciplined for charging an excessive fee, even in absence of fraud or dishonesty, when some sort of affirmative misconduct is involved. Other cases offer too few details to state definitively whether they impose discipline based solely on the size of the fee. See, e.g., *In re Isaacs*, 541 N.Y.S.2d 60 (App. Div. 1989); *Private Reprimand No. PR-87-14*, 5 Mass. Att'y Disc. Rep. 501, 502 (1987); *In re Discipline of an Att'y*, 2 Mass. Att'y Disc. Rep. 115, 117 (1980).

lawyer set the fee."¹⁹ Professors Deborah Rhode, Geoffrey Hazard and William Hodes have also observed that discipline for charging excessive fees is rare.²⁰ Decisions cited in the relevant *American Jurisprudence* entry seem typical of this body of law. This treatise asserts that "[a]n attorney may be subject to discipline for charging excessive fees for legal services."²¹ The footnote and pocket part cite two dozen cases, but with a single exception,²² the cases do not really support the proposition.²³ The cases cited involve illegal fees;²⁴ attempts to collect more than agreed;²⁵ fees charged for work which was unneces-

¹⁹ CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 515 (student ed. 1986). Similarly, the Supreme Court of West Virginia surveyed a number of cases and concluded that "cases in which disciplinary sanctions were imposed for charging or collecting an illegal or clearly excessive attorney's fee involve circumstances indicating the attorney's bad faith or intent to evade a fee-limiting statute." Committee on Legal Ethics of the W. Va. State Bar v. Coleman, 377 S.E.2d 485, 492 (W. Va. 1988); see also Agthe, *supra* note 18, at 139 ("Frequently, the charge against an attorney that he has violated a provision against the charging of excessive fees occurs in the context of other charges of professional misconduct. . . . Since courts at times administer discipline on a collection of charges . . . it is not always clear whether the charging of an excessive fee would, of itself, have resulted in the same discipline." (citing Nebraska State Bar Ass'n v. Richards, 84 N.W.2d 136 (Neb. 1957))).

²⁰ Professors Hazard and Hodes assert that "only a truly outrageous fee—one approaching fraud—was a matter for professional censure." 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.5:201, at 111 & n.1 (2d ed. 1990 & Supp. 1998) (citing Florida Bar v. Winn, 208 So. 2d 809 (Fla. 1968) (holding fee excessive where attorney, in violation of a contract, claimed against sums he had no part in recovering)). Professor Rhode has observed that "[c]ourts are reluctant to second-guess fee agreements, and clients are likely to get relief only in egregious cases." Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 714 (1994); see also RESTATEMENT OF THE LAW GOVERNING LAWYERS § 46 cmt. at 157 (Proposed Final Draft No. 1 1996) [hereinafter RESTATEMENT] ("In many jurisdictions, authorities have been reluctant to discipline lawyers" for charging unreasonably high fees.).

²¹ See 7 AM. JUR. 2d *Attorneys at Law* § 63 (1997).

²² See *In re Kutner*, 399 N.E.2d 963 (Ill. 1979); see also discussion *infra* Part II.B.

²³ See, e.g., *In re Burgess*, 270 S.E.2d 436 (S.C. 1980) (involving multiple forms of misconduct, but the basis for the conclusion that the fee was unreasonable is not clear from the opinion).

²⁴ See *Tauver v. State Bar of Cal.*, 688 P.2d 911, 917–18 (Cal. 1984) (holding that in addition to other misconduct, the attorney claimed a fee that was illegal and "not supported by any written evidence of a fee agreement"); *In re Giordano*, 229 A.2d 524, 531 (N.J. 1967) (holding that, in addition to other misconduct, attorney charged his client an usurious rate of interest); *Hudock v. Virginia State Bar*, 355 S.E.2d 601, 603–04 (Va. 1987) (holding that attorney demanded fee in excess of that approved by government authority, in violation of statute).

²⁵ See *In re Struthers*, 877 P.2d 789, 795–96 (Ariz. 1994) (concluding that, in addition to other misconduct, attorney took his share of a contingent fee based on total claim, not what was actually recovered, and improperly sought "double recovery of fees" by collecting both court awarded fees and a contingency fee); *Florida Bar v. Hollander*, 607 So. 2d 412, 415 (Fla. 1992) (disciplining attorney who terminated representation without cause and

sary,²⁶ not in fact performed²⁷ or already paid for;²⁸ lying to or stealing from clients;²⁹ and fees set by the attorney in self-dealing transactions.³⁰ Some of the cases do not involve attorney discipline under the excessive fee rules at all³¹ and most if not all could have been

then attempted to "collect twice for the same work" by demanding both quantum meruit compensation and a percentage of any recovery by a new attorney); *Kentucky Bar Ass'n v. Newberg*, 839 S.W.2d 280, 280-81 (Ky. 1992) (censuring lawyer who collected contingent fee from government benefits, when representation was in connection with civil rights claim that resulted in no recovery).

²⁶ See *In re Kunkle*, 218 N.W.2d 521, 535-36 (S.D. 1974) (concluding that, in addition to other misconduct, attorney delayed case by performing unnecessary work to claim greater fees).

²⁷ See *People v. Walker*, 832 P.2d 935, 935-37 (Colo. 1992) (disciplining attorney for falsifying bills); *In re Scimeca*, 962 P.2d 1080, 1083 (Kan. 1998) (concluding that in addition to other misconduct, lawyer charged for work not done); *In re Genser*, 589 N.Y.S.2d 566, 567 (App. Div. 1992) (concluding that in addition to other misconduct, lawyer charged fee but "failed to perform any legal services on his client's behalf"); *Cleveland Bar Ass'n v. Character-Floyd*, 699 N.E.2d 922, 923 (Ohio 1998) (concluding that in addition to other misconduct, lawyer's time records failed to substantiate hours charged to client in matter which also had been neglected); *State ex rel. Okla. Bar Ass'n v. Whiteley*, 792 P.2d 1174, 1174-75 (Okla. 1990) (involving attorney who stipulated to discipline because, in addition to other misconduct, attorney failed to perform work on the matter for which he had accepted a fee); *Office of Disciplinary Counsel v. Knepp*, 441 A.2d 1197, 1198-99 (Pa. 1982) (concluding that in addition to other misconduct, attorney charged a substantial sum for representation in connection with an estate and then neglected the matter).

²⁸ See *Attorney Grievance Comm'n of Md. v. Korotki*, 569 A.2d 1224, 1232 (Md. 1990) (involving attorney who demanded higher percentage of contingent recovery for handling appeals, when he was already obligated to handle appeals by original contract); *In re Yacobi*, 860 P.2d 811, 814 (Or. 1993) (concluding that in addition to other misconduct, lawyer demanded additional payment for work covered by a flat fee, which had already been paid in full).

²⁹ See *Cushway v. State Bar*, 170 S.E.2d 732, 733-34 (Ga. 1969) (concluding that in addition to other misconduct, lawyer unilaterally converted trust property to pay fees which had not been agreed upon); *In re Gerard*, 634 N.E.2d 51, 53-54 (Ind. 1994) (disciplining attorney on a reciprocal basis for constructive fraud committed in Illinois, who failed to explain, in contingent fee case, that right to recovery was uncontested) (citing *In re Gerard*, 548 N.E.2d 1051 (Ill. 1989) (noting that attorney took more than the contractual one-third fee)); *Committee on Legal Ethics of the W. Va. State Bar v. Tatterson*, 352 S.E.2d 107, 114 (W. Va. 1986) (involving attorney who "misrepresented the difficulty in obtaining the life insurance proceeds" in order to induce client to agree to a contingent fee in what was in fact an uncontested matter).

³⁰ See *In re Vitko*, 519 N.W.2d 206, 208 (Minn. 1994) (involving attorney who, in addition to other misconduct, deceived his client into making him trustee of irrevocable trust and then paid himself substantial fees from trust assets); *In re Forester*, 530 N.W.2d 375, 385-86 (Wis. 1995) (concluding that in addition to other misconduct, lawyers used their positions as trustees to insinuate themselves into the business in which the trust held stock and paid themselves large fees).

³¹ See *State ex rel. Neb. State Bar Ass'n v. Holscher*, 230 N.W.2d 75, 79 (Neb. 1975) (disciplining attorney under Disciplinary Rule ("DR") DR 7-102(A)(5) for making false statement in connection with billing for services); *Columbus Bar Ass'n v. Zauderer*, 687

punished under other rules prohibiting fraud and misrepresentation.³²

If these cases are representative, then the excessive fee rules, for all practical purposes, are dead.³³ Nonetheless, many clients are furi-

N.E.2d 410, 413 (Ohio 1997) (disciplining attorney for failing to maintain records of funds coming into his possession under DR 9-102(B)(3)); Cincinnati Bar Ass'n v. Nienaber, 628 N.E.2d 1340, 1341 (Ohio 1994) (disciplining attorney for billing client for personal vacation, which was a violation of DR 7-102(A)(5)).

³² Similarly, the ABA/BNA *Lawyer's Manual* identifies six circumstances in which lawyers have been disciplined for charging excessive fees: accepting a contingent fee where there is in fact little risk, exceeding a statutory fee limit, refusing to return unearned fees or otherwise imposing a penalty on a client for exercising their right to fire an attorney, padding bills, failing to account for changed circumstances, and charging high fees relative to the value of the services provided. See *LAWYERS MANUAL*, *supra* note 18, § 41:314-317. All of the cases cited in the last category involved bad faith or other kinds of misconduct. See *People v. Underhill*, 708 P.2d 790, 790-91 (Colo. 1985) (concluding among other misconduct, attorney continued to represent client and collect excessive fee after suspension); *Florida Bar v. Mirabole*, 498 So. 2d 428, 429 (Fla. 1986) (holding \$24,000 bill excessive where \$3000 at stake); *Korothi*, 569 A.2d at 1232 (concluding attorney demanded compensation for work already obliged to perform); *Mahoning County Bar Ass'n v. Pagak*, 528 N.E.2d 948, 950 (Ohio 1988) (concluding that, in addition to other misconduct, attorney coercively demanded additional compensation based on changes in case that involved no extra work); *Myers v. Virginia State Bar*, 312 S.E.2d 286, 292 (Va. 1989) (concluding that in addition to other misconduct, attorney accepted fee in excess of that authorized by court and lied to client about it); *West Va. State Bar Comm'n on Legal Ethics v. Gallaher*, 376 S.E.2d 346, 348, 350 (W. Va. 1988) (holding 50% contingent fee excessive where there was no written agreement, fee was set unilaterally after settlement and the case settled without consultation with client).

The contingent fee line of cases could in principle also be regarded as a counterexample. They seem, however, to impose discipline not simply because the lawyers involved received a large recovery in relation to the work performed, but rather because the fee exceeded a percentage rule established by law, or because there was at least an implicit misleading of the client by failing to disclose, when establishing the fee, that there was in fact no contingency or that it was likely to be far cheaper to pay on an hourly basis. See *supra* note 29 and accompanying text. See also *Florida Bar v. Moriber*, 314 So. 2d 145, 145 (Fla. 1975) (concluding that the contingent fee was excessive where there was no contingency and asset at issue had passed to client by operation of law); *Harmon v. Pugh*, 248 S.E.2d 421 (N.C. Ct. App. 1978) (reducing contingent fee award but imposing no discipline); *In re Stafford*, 216 P.2d 746, 751-52 (Wash. 1950) (involving attorney who, among other misconduct, charged a 50% fee for arranging delivery of funds which different client had hired him to deliver).

³³ One reason the *American Jurisprudence* cases appear to be representative is that in addition to the many discipline cases read, the members of the Legal Ethics law professors' e-mail listserv were asked if they knew of any cases where a lawyer was disciplined solely for charging an excessive fee. The cases they identified in fact all involved additional forms of misconduct. See, e.g., *State Florida Bar v. Winn*, 208 So. 2d 809, 810 (Fla. 1968) (involving fee agreement giving attorney 50% of any sums he was "instrumental in recovering," but attorney charged for sums which passed to client by operation of law without any effort on his part); *In re Tuley*, 907 P.2d 844 (Kan. 1995) (involving attorney who stipulated that he was guilty of charging unreasonable fee of \$115,000 to settle estate and "admitted that he

ous that their attorneys have charged them large fees.³⁴ Disputes over fees have been "universally recognized as constituting the most serious problem in the relationship between the Bar and the public."³⁵ Moreover, the public's perception that lawyers charge too much for their services reportedly has increased in recent years.³⁶ Furthermore, many lawyers earn extremely large incomes.³⁷ Accordingly, the lack of prosecution demands an explanation, which, upon inspection, is not difficult to find. Both the development of the rules and their content invite lawyers themselves and those evaluating their conduct to assume that any fee complies with the rules in the absence of dishonesty or bad faith. In essence, it is not clear whether the rules provide that a

had no idea of the time he had spent during the affairs of this estate"); *In re Simmonds*, 415 N.W.2d 673, 674-75 (Minn. 1987) (concluding fee unreasonable where part of it was taken in violation of "social security regulations [requiring] governmental approval," and part of expenses charged to client were used "to take a personal vacation"); *Ex rel. Okla. Bar Ass'n v. Weeks*, 969 P.2d 347 (Okla. 1998) (disciplining attorney/law professor for claiming both contingent fee and statutory fee award as provided by contract but in violation of federal law); *Cushman v. State Bar of Texas*, 845 S.W.2d 358, 359-60 (Tex. Ct. App. 1992) (applying reciprocal discipline in case where attorney consented to discipline in the Northern Marianas Islands for quintupling his fee to \$2500 per hour after victory when client had not agreed in writing to contingent fee); *In re Bult*, 469 N.W.2d 653, 654 (Wis. 1991) (disciplining attorney for charging \$5775 in connection with sale of home which netted \$9800 where attorney failed to present time records justifying charges to the client or disciplinary board).

³⁴ See WOLFRAM, *supra* note 19, at 513; Cassandra M. Neely, Case Comment, *Excessive Fees and Attorney Discipline: The Committee on Legal Ethics v. Tatterson*, 90 W. VA. L. REV. 562, 562-63 (1987/1988); Daniel Wise & Charles F. De Jager, *Prices, Quality In General Counsels: Report of Survey on Outside Lawyers*, 210 N.Y. L.J. 1 (1993).

³⁵ SPECIAL COMM. ON RESOLUTION OF FEE DISPUTES OF THE SECTION OF BAR ACTIVITIES, AMERICAN BAR ASS'N, *THE RESOLUTION OF FEE DISPUTES: A REPORT AND MODEL BYLAWS 1* (undated). See also *Oklahoma Turnpike Auth. v. New Life Pentecostal Church*, 870 P.2d 762, 768 n.23 (Okla. 1994) ("No single area of attorney conduct is more susceptible to public scrutiny and criticism than a lawyer's fee contract."); Richard C. Reed, *Foreword to BEYOND THE BILLABLE HOUR: AN ANTHOLOGY OF ALTERNATIVE BILLING METHODS* at iii (Richard C. Reed ed., 1989) (indicating the existence of dissatisfaction by clients regarding hourly billing); Sonia S. Chan, Note, *ABA Formal Opinion 93-379: Double Billing, Padding and Other Forms of Overbilling*, 9 GEO. J. LEGAL ETHICS 611, 612 (1996) (same); Neely, *supra* note 34, at 562. But see Alan Scott Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2005 (1993) (asserting that there is little reliable information on the existence or frequency of fee disputes).

³⁶ See Chan, *supra* note 35, at 612. In fact, it seems that the public's perception of lawyers as unethical is based in part on the billing practices of some of the members of the legal profession. See ABA Comm. on Ethics and Professional Responsibility, *Formal Op. 379* (1993).

³⁷ In one famous instance, lawyers at an elite firm working on a very large commercial matter were paid \$20 million for two weeks work, a minimum of \$5000 per lawyer per hour. See Stephen J. Adler & Laurie P. Cohen, *Even Lawyers Gasp Over Stiff Fees of Wachtell Lipton*, WALL ST. J., Nov. 2, 1988, available in 1988 WL WSJ 453233.

fee has to be merely unreasonable or extremely unreasonable to warrant discipline, and the factors by which either question is evaluated are so broad as to be indeterminate.

A. The Standard for Discipline

At common law,³⁸ only fees so high that they necessarily rested on "fraudulent and dishonest motives"³⁹ or were "so exorbitant and wholly disproportionate to the services performed as to shock the conscience"⁴⁰ were considered appropriate matters for discipline.⁴¹

³⁸ The ABA *Canons of Professional Ethics* of 1908 informed the development of the common law to some degree. See CANONS OF PROFESSIONAL ETHICS (1908). Canon 12 suggested that fees be neither too high nor too low, and gave some factors for evaluating fees. See *id.* Canon 12. Perhaps because the Canons were so vague, and not so widely adopted as positive law as later codes, the Canons seem not to have been the dominant source of law with respect to attorneys' fees, at least in the disciplinary context.

³⁹ *People ex rel. Chicago Bar Ass'n v. Pio*, 139 N.E. 45, 47 (Ill. 1923).

⁴⁰ *Goldstone v. State Bar*, 6 P.2d 513, 516 (Cal. 1931).

⁴¹ As one commentator explained, at common law, "[a] number of cases have recognized that an excessive fee is not enough, in the absence of other factors, to warrant disciplinary action against an attorney, some of the cases also recognizing, however, that where a fee is so clearly excessive in comparison to the services rendered that it could not have been charged in good faith, discipline will be warranted." H.H. Henry, Annotation, *Amount or Character of Compensation as Ground for Disciplinary Action Against Attorney*, 70 A.L.R.2d 962, 965 (1960). See also, e.g., *In re Myrland*, 284 P.2d 56, 60 (Ariz. 1939) (holding that fee must be so excessive and unconscionable as to indicate bad faith); *Herrscher v. State Bar*, 49 P.2d 832, 833-34 (Cal. 1935) (concluding claim of excessiveness of fee alone not sufficient in disciplinary proceeding absent failure of disclosure, fraud or overreaching); *Grievance Comm. v. Ennis*, 80 A. 767, 770 (Conn. 1911) (holding fee not excessive if it is not "extortionate" by way of oppression or illegality); *In re Annabel*, 229 N.Y.S. 385, 386 (App. Div. 1928) (*per curiam*) (noting that fees must be unconscionable, tantamount to a misappropriation of client funds); *In re Greer*, 380 P.2d 482, 486 (Wash. 1963) (*en banc*) (concluding question of "reasonableness" of fee appropriate matter for civil court and question of "unconscionability" of fee appropriate matter for disciplinary proceeding), *overruled by In re Boelter*, 985 P.2d 328, 336 (Wash. 1999); *In re Wiltsie*, 186 P. 848, 848 (Wash. 1920) (reasoning that because the "question [of the propriety of fees] is so much a matter of individual opinion . . . it should not be the basis for disbarment except in the most aggravated and extreme case"); ABA Comm. on Professional Ethics, Formal Op. 320 (1968) ("An attorney has the right to contract for any fee he chooses so long as it is not excessive (see Opinion 190), and this Committee is not concerned with the amount of such fees unless so excessive as to constitute a misappropriation of the client's funds (see Opinion 27)."); ABA Comm. on Professional Ethics and Grievances, Formal Op. 209 (1940); ABA Comm. on Professional Ethics and Grievances, Formal Op. 190 (1939); ABA Comm. on Professional Ethics and Grievances, Formal Op. 27 (1930); HENRY S. DRINKER, *LEGAL ETHICS* 174 (1953) ("There is no ethical question involved unless fees are flagrantly excessive. . . ."); 1 HAZARD & HODES, *supra* note 20, § 1.5:201, at 111 (indicating that before the adoption of the *Model Code*, only outrageous fees, approaching fraud, were appropriate for censure); Neely, *supra* note 34, at 566. Some jurisdictions apparently continue to follow this approach. See, e.g., CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 4-200(B)(2) (1992)

Thus, in *In re Greer*, the Washington Supreme Court disciplined an attorney for charging a contingent fee in a civil case, but basing his share on an amount greater than the sum in fact recovered.⁴² There, the attorney also "reimbursed" himself for expenditures which in fact had not been incurred.⁴³ As to certain other questionable sums charged by the attorney, the court agreed with the disciplinary committee that they were excessive under the circumstances, but not unconscionable, and therefore did not warrant disciplinary proceedings.⁴⁴ It is difficult to see the sanctioned behavior as anything other than fraud, and surely charging such fees is unreasonable, but this approach suggests that fees established and calculated in good faith are inappropriate subjects for discipline.

In another widely cited common law case, *Bushman v. State Bar of California*, the Supreme Court of California imposed discipline because it believed that the attorney had falsified the bill.⁴⁵ The attorney in *Bushman* agreed to defend in a divorce action Barbara Cox, her boyfriend, Ralph Hughes, and her parents, Mr. & Mrs. Stroud.⁴⁶ Because there was no community property, the only substantial issue was custody of Ms. Cox's child, although there was a possibility, which never came to pass, that Hughes would be charged with statutory rape because Ms. Cox was a minor.⁴⁷ Bushman demanded that Ms. Cox, the Strouds and Hughes sign a \$5000 note to secure a fee based on a \$60 hourly rate.⁴⁸ No criminal or other related litigation developed, and after the case settled quickly by stipulation in Ms. Cox's favor, Bushman received a \$360 fee and expense award from the court, payable by Ms. Cox's ex-husband.⁴⁹ Bushman failed to mention to the court

(forbidding "unconscionable fees"); TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 1.04(a) (1991) (an attorney must not charge or collect an excessive or "unconscionable fee"; a fee is unconscionable if, after reviewing all the facts, a competent lawyer could not form the belief that the fee is reasonable); Committee on Legal Ethics of the W. Va. State Bar v. Coleman, 377 S.E.2d 485, 492 (W. Va. 1988) (good faith in setting fee not appropriate for sanction).

⁴² See 380 P.2d at 487.

⁴³ See *id.*

⁴⁴ See *id.* at 485.

⁴⁵ 522 P.2d 312 (Cal. 1974).

⁴⁶ See *id.* at 313.

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *id.* at 313-14.

that he expected further fees.⁵⁰ By contrast, Ms. Cox's ex-husband paid his lawyer a total of \$300 plus costs.⁵¹

Bushman billed his clients an additional \$2800 and claimed that he spent a total of over 100 hours on the case, which would justify a \$6000 bill.⁵² The California Supreme Court was clearly skeptical, noting that "Bushman did not produce any records to substantiate his claim that he had spent 100 hours on the Cox matter,"⁵³ and that "[i]t is of some significance in this connection that [Mr.] Cox's attorney spent slightly more than five hours on the case."⁵⁴ In response to Bushman's argument that the case was complex, the court noted that "[a]n examination of the file in the Cox matter reveals that only a simple, almost routine series of documents was filed by Bushman."⁵⁵ Because the note and retainer agreement "imposed liability on all four as joint and several obligors, without regard to the value of the legal services rendered to each,"⁵⁶ because the value of the services rendered appeared disproportionate to the fee, and because Bushman failed to disclose the fee agreement to the trial court, the court concluded that Bushman's "course of conduct . . . contained an element of fraud or overreaching warranting disciplinary action."⁵⁷

The common law also recognized a middle ground, which continues to be applied under the codes. Some were judged by courts not to be so unreasonable as to create grounds for discipline, but too large to be enforceable.⁵⁸ As the *Restatement of the Law Governing Lawyers* ("Restatement") explains: "For a variety of reasons, discipline might

⁵⁰ See *Bushman*, 522 P.2d at 314.

⁵¹ See *id.*

⁵² See *id.*

⁵³ *Id.*

⁵⁴ *Id.* at 315.

⁵⁵ *Bushman*, 522 P.2d at 315.

⁵⁶ *Id.* at 315.

⁵⁷ See *id.* at 315-16.

⁵⁸ See, e.g., *McKenzie Constr., Inc. v. Maynard*, 758 F.2d 97, 100-01 (3d Cir. 1985). The court in *McKenzie* noted that "[t]he ethical rules spring from the belief that certain kinds of behavior cannot be tolerated by a society of professionals." *Id.* Thus, under the language of DR 2-106(B), the court determined that it may often be unfair to sanction an attorney for an objectively "unreasonable" fee which is not "clearly excessive." See *id.* at 101. In contrast, matters involving the civil enforcement of fees "should [not] be based on as stringent a showing," rather, according to the court, should be determined under an "equity and fairness" standard. See *id.*; cf. *United States v. Strawser*, 581 F. Supp. 875, 877 (C.D. Ill. 1984) (finding \$47,500 fee for negotiating two fairly simple guilty pleas to drug charges was excessive considering, *inter alia*, that attorney possessed no extraordinary ability and in fact rendered average services), *aff'd*, 800 F.2d 704 (7th Cir. 1986).

be withheld for charging a fee that would nevertheless be set aside as unreasonable in a fee-dispute proceeding."⁵⁹

Although the common-law approach was informed to some extent by the ABA *Canons of Professional Ethics* of 1908 ("*Canons*"), the first true ABA code was the *Model Code of Professional Responsibility* ("*Model Code*"),⁶⁰ promulgated in 1969. The *Model Code* was replaced in 1983 by the *Model Rules of Professional Conduct* ("*Model Rules*").⁶¹ The codes continue to regulate fees.⁶²

⁵⁹ RESTATEMENT, *supra* note 20, § 46 cmt. at 157-58; see also KANSAS RULES OF PROFESSIONAL CONDUCT Rule 1.5(c) ("A lawyer's fee shall be reasonable but a court determination that a fee is not reasonable shall not be presumptive evidence of a violation that requires discipline of the attorney."); AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 cmt. at 101 (1979) ("Generally, . . . even a finding that a lawyer has charged an excessive fee does not, in itself, warrant disciplinary action. Other elements of wrongdoing (overreaching, appropriation of the client's funds under the guise of charging a fee, and so forth) have to be present.") (citing 1 STUART M. SPEISER, ATTORNEY'S FEES § 1.37 (1973)).

⁶⁰ The ABA *Model Code of Professional Responsibility*, adopted in 1969, replaced the *Canons*. The ABA Special Committee on Evaluation of Ethical Standards, appointed in August of 1964, recognized a need for change in the *Canons'* statements of what constituted professional responsibility:

The present *Canons* are not an effective teaching instrument and they fail to give guidance to young lawyers beyond the language of the *Canons* themselves. There is no organized interrelationship of the *Canons* and they often overlap. They are not cast in language designed for disciplinary enforcement and many abound with quaint expressions of the past.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY at vi (Preliminary Draft 1969).

The *Model Code* incorporates the substance of the provisions of the *Canons*, and consists of three separate parts: *Canons*, *Ethical Considerations*, and *Disciplinary Rules*. See 1 ROBERT L. ROSSI, ATTORNEYS' FEES § 1:18, at 53 n.78 (2d ed. 1995); SPEISER, *supra* note 59, § 1:36, at 49 n.5. Speiser notes that:

The *Canons* are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. The *Ethical Considerations* are aspirational in character, and represent the objectives toward which every member of the profession should strive. The *Disciplinary Rules* are mandatory in character, and state the lowest level of conduct, below which no lawyer can fall without being subject to disciplinary action.

SPEISER, *supra* note 59, § 1:36, at 49 n.5; see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY preliminary statement (1980). For an exhaustive treatment of the history, purposes and functions of lawyer codes in the United States, see WOLFRAM, *supra* note 19, at 48-63.

⁶¹ On August 2, 1983, the ABA House of Delegates adopted the *Model Rules*, which replaced the separate parts of the *Model Code* with a single set of rules. See ROSSI, *supra* note 60, § 1:18, at 53 n.79. By 1972, a vast majority of jurisdictions had adopted the *Model Code*. See SPEISER, *supra* note 59, § 1:36, at 49 n.5. After the ABA replaced the *Model Code* with the *Model Rules*, most jurisdictions adopted the latter. To date, at least 40 jurisdictions have

Disciplinary Rule ("DR") 2-106(A) of the *Model Code* provides that "[a] lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee."⁶³ DR 2-106(B) explains that "[a] fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."⁶⁴ A footnote to the "clearly excessive" language in DR 2-106 cites pre-Code ABA opinions and other authority using the common-law misappropriation test.⁶⁵ This comment may suggest that despite the differing language, the *Model Code* was intended to continue the pre-Code common-law standard.⁶⁶

Rule 1.5 of the *Model Rules* changed the language again, requiring simply that "[a] lawyer's fee shall be reasonable."⁶⁷ Because the *Model Code* prohibits fees that are "clearly excessive," and the *Model*

adopted the *Model Rules* in whole or in part, including Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawai'i, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin and Wyoming. See 2 HAZARD & HODES, *supra* note 20, § AP4:107, at 1269; Michael Sacksteder, Note, *Formal Opinion 95-390 of the ABA's Ethics Committee: Corporate Clients, Conflicts of Interest, and Keeping the Lid on Pandora's Box*, 91 Nw. U. L. REV. 741, 745 n.12 (1997). Although New York, Oregon and Virginia have retained amended versions of the *Model Code*, their versions incorporate several portions of the *Model Rules*. See *id.* at 745 n.13. In addition, Illinois and North Carolina incorporate substance of both the *Model Code* and *Model Rules*. See *id.* California's rules of professional conduct do not rely on the *Model Code* or the *Model Rules*. See *id.*

⁶² See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1983). See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 379 (1993) ("Implicit in the Model Rules and their antecedents is the notion that the attorney-client relationship is not necessarily one of equals, that it is built on trust, and that the client is encouraged to be dependent on the lawyer").

⁶³ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(A) (1980).

⁶⁴ *Id.* DR 2-106(B).

⁶⁵ *Id.* DR 2-106(A) at n.88.

⁶⁶ This, however, may not be the case; the footnotes are not necessarily authoritative interpretations of the Code. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble at n.1 (1980). Nevertheless, there is no hint that the *Model Code* intended to break with the past, and the similarities in terms suggest continuity. For example, DR 2-106 prohibits "clearly excessive" fees; the footnote cites a common-law case which also uses the "clearly excessive" standard. See *id.* DR-106(A) at n.88 (citing *State ex rel. Nebraska State Bar Ass'n v. Richards*, 84 N.W.2d 136, 143 (Neb. 1957)). Moreover, in opinions applying the *Model Code*, the ABA continued to cite common-law authority. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1461 (1980) (relying on Formal Op. 27 (1930)).

⁶⁷ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1983).

Rules requires that fees be "reasonable,"⁶⁸ some have argued that the *Model Rules* adopts a stricter test under which a high fee is more likely to be found unreasonable.⁶⁹ Moreover, under the *Model Code*, the assessment of the excessiveness of the fee is to be determined from the standpoint of the "lawyer of ordinary prudence."⁷⁰ The *Model Rules* omits this language from the provisions of Rule 1.5, and thus apparently adopts the point of view of the "ordinary prudent person." This change also may hint at more rigorous regulation.⁷¹

A "clearly excessive" fee under DR 2-106(A), however, was defined as one that was more than reasonable.⁷² Accordingly, under both the *Model Code* and the *Model Rules*, the test seems to be whether or not the fee is reasonable. If the word "reasonable" means the same thing in the *Model Rules* and the *Model Code*, it may be that the newer *Model Rules* continue the lawyer-friendly common-law standard of the *Model Code*.⁷³

⁶⁸ Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(A) (1980) with MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1983).

⁶⁹ See *In re Dorothy*, 605 N.W.2d 493, 499 (S.D. 2000) ("Under Rule 1.5, the benchmark for triggering judicial review of fees has been lowered and its scope broadened Thus, for disciplinary action to be imposed, it is now only necessary that a fee be unreasonable in proportion to the services performed."); Geoffrey C. Hazard, Jr. & W. William Hodes, *A Look at the Ethical Rules; Fee Shifting in the Federal Courts*, in *BEYOND THE BILLABLE HOUR*, *supra* note 35, at 123, 124; see also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1509 (1984) (indicating that the intent in changing the language from the *Model Code's* "clearly excessive" standard to the *Model Rules'* test of reasonableness was "to impose a stricter standard on lawyers who would charge too much"). But see Rhode, *supra* note 20, at 714 (asserting that the change in terminology from the *Model Code* to the *Model Rules* has not had a significant impact upon the outcomes of reported cases).

⁷⁰ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B) (1980) (emphasis added).

⁷¹ It is a common presumption when interpreting statutes that a change in language implies a change in the meaning. See *United States v. Wilson*, 503 U.S. 329, 336 (1992) (noting "the familiar maxim that, when Congress alters the words of a statute, it must intend to change the statute's meaning") (citing *Russello v. United States*, 464 U.S. 16, 23-24 (1983)).

⁷² See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(A), (B) (1980).

⁷³ See, e.g., *In re Gerard*, 634 N.E.2d 51, 53 n.5 (Ind. 1994) (noting that the Indiana version of DR 2-105 "contains virtually identical provisions" as the Indiana version of MR 1.5 which replaced it). See *Holmes v. SIPC*, 503 U.S. 258, 268 (1992) ("we can only assume [Congress] intended [words] to have the same meaning that courts have already given them"); *Jeffers v. United States*, 432 U.S. 137, 150 n.14 (1977) ("When the phrase 'in concert' has been used in other statutes, it has generally connoted cooperative action and agreement. [citations omitted] This suggests that Congress intended the same words to have the same meaning [in the statute in question]."); *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199 (1912) ("it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed").

The official comments to both the *Model Rules* and the *Model Code* fail to explain whether their language modified the previously prevailing substantive standard (in the process effectively overruling all of the cases decided under the prior regime), and if so, how. The codes therefore may present a mysterious standard to attorneys and disciplinary authorities, encouraging the former to measure reasonableness by what a client is willing to pay and the latter to assume that an honest bargain is not unreasonable.

B. *The Non-Exclusive, Eight-Factor Test For Reasonableness*

A critical portion of the *Canons* was retained with modifications in the *Model Code*, namely, in the factors used to measure the reasonableness of a fee. The *Model Rules*, in turn, adopted the *Model Code*'s factors verbatim.⁷⁴ Both the *Model Code* and the *Model Rules* employ an elaborate eight-part test, which includes:

- (1) The time and labor required, the novelty and difficulty of the legal questions involved, and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) Whether the fee is fixed or contingent.⁷⁵

This test is non-exclusive; lawyers and courts are free to consider other factors. Other recognized factors include the client's ability to

⁷⁴ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B) (1980); CANONS OF PROFESSIONAL ETHICS Canon 12 (1908).

⁷⁵ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a)(1)-(8) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B)(1)-(8) (1980).

pay a fee,⁷⁶ and the principle that a sophisticated client's arms-length agreement is virtually unassailable.⁷⁷ In the absence of fixed fee schedules, it is difficult to use these factors to reach definitive results.⁷⁸ Rarely will all of the factors point in the same direction; the rules give no guidance as to how ambiguous situations should be resolved. Understandably, most lawyers and disciplinary authorities assume that, in a gray area, an honest bargain should be respected.⁷⁹

⁷⁶ See, e.g., *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973); *State ex rel. Hodge v. Town of Turtle Lake*, 526 N.W.2d 784, 787 (Wis. 1994); see generally WOLFRAM, *supra* note 19, at 521.

⁷⁷ See *Ryan v. Butera, Beausang, Cohen & Brennan*, 193 F.3d 210, 218 (3d Cir. 1999) (upholding non-refundable one million dollar fee, even though attorneys discharged after ten weeks because "the fact that the client[] received some intangible benefits [i.e., having counsel of choice available] in retaining the attorneys meant that the [district court] could conclude that the compensation . . . was not so high as to be inequitable and unfair"); *Ackermann v. Levine*, 788 F.2d 830, 843 (2d Cir. 1986); *Puerto Rico v. Heckler*, 745 F.2d 709, 338 (D.C. Cir. 1984) (Ginsburg, J.) (stating that the "[i]ndicia of overall reasonableness [of the fee include that party was] a sophisticated client"); *Shapiro, Lifschitz & Schram v. R.E. Hazard, Jr.*, 24 F. Supp. 2d 66, 77 (D.D.C. 1998) (finding that as a matter of law, fees were not unreasonable because clients were "sophisticated commercial parties who could have retained any firm" and no claim of fraud or duress was made); *Alexander v. Inman*, 974 S.W.2d 689, 694 (Tenn. 1998) (listing client sophistication as a factor); *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 554 (Tex. 1998) (finding that "[a] fee that a client as sophisticated as Pennzoil considers reasonable is not clearly excessive simply because a lawyer believes it could have been less"); RESTATEMENT, *supra* note 20, § 46 cmt. at 160 ("Fees agreed to by clients sophisticated in entering into such arrangements . . . should almost invariably be found reasonable."); WOLFRAM, *supra* note 19, at 520 ("If the client is a large corporation and is represented in setting the fee by independent counsel who is protecting the corporation's interests, it is doubtful that any fee negotiated and agreed to by the client, no matter how large, would be considered excessive.") (citing *Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866 (9th Cir. 1979)).

⁷⁸ There are instances when decisionmakers have no choice but to calculate an appropriate fee, including calculating a quantum meruit or statutory fee award, or when approval of a fee is required by law, as in a class action settlement. See, e.g., *Robinson v. City of Edmond*, 160 F.3d 1275, 1281 (10th Cir. 1998) (concluding that when awarding fees pursuant to statute, "the object is to simulate the market where a direct market determination is infeasible") (quoting *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992)); see also *In re Hillsborough Holdings Corp.*, 127 F.3d 1398, 1404 (11th Cir. 1997). These situations are difficult and challenging, but they require the decision maker to calculate a reasonable fee, not the entire range of reasonable fees.

⁷⁹ See ROBERT H. ARONSON, ATTORNEY-CLIENT FEE ARRANGEMENTS: REGULATION AND REVIEW 7 (1980). Professor Aronson asserts that legal representation will often be "priceless" to the client receiving the benefit of the services. See *id.* For example, can the value of an acquittal on criminal charges be measured? If loss of liberty through incarceration was at stake, a very strong argument could be made that the value of good legal representation contributing to the preservation of such liberty is in fact priceless. See *id.* At the very least, depending upon the personal importance of legal representation to the client, the services will have a different value for some clients than for others. See *id.* One of the components of legal representation is the lawyer's ability to provide the client access to "justice." According to Professor Aronson, "the nonmonetary nature of 'justice' may preclude accurate

Few defend the *Model Code* and *Model Rules* factors as useful tools of analysis or deny they provide little guidance in identifying the "clearly excessive" or "unreasonable" attorneys' fees that warrant discipline.⁸⁰ Professor Hazard has observed that application of "[a]ny eight-factor test produces a wide range of outcomes, particularly [where, as here] some of those factors are indeterminate."⁸¹ Professor Wolfram, likewise, observed that:

the single standard of an excessive fee, as stated in all of the lawyer codes, is necessarily vague because of the greatly varied settings in which fees are charged, and thus uncertain in its application.⁸²

valuation of lawyers' services." *Id.* Moreover, pursuant to the concept of *res judicata*, each individual lawsuit is perceived to be unique, further complicating the goal of accurate valuation of the services contributed to that lawsuit. *See id.*

⁸⁰ *See* Hazard & Hodes, *supra* note 69, at 124. Professors Hazard and Hodes assert that under the *Model Code*, the eight factors are "not objective determinates but subjective factors." *Id.* Also, Professor Wolfram notes that the *Model Code* factors are indeterminate. *See* WOLFRAM, *supra* note 19, at 517. The ABA itself has acknowledged that DR 2-106 "does not prescribe the manner in which those factors are to be applied." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 329 (1972); *see also* WILLIAM G. ROSS, *THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS* 40 (1996) (stating factors provide "only an amorphous outline for measuring the reasonableness of a fee"); ROY D. SIMON, JR. & MURRAY L. SCHWARTZ, *LAWYERS AND THE LEGAL PROFESSION* 549 (3d ed. 1994) ("In short, the factors seem to be overlapping, and basically say you can charge what the market will bear."); Stephen Gillers, *Caveat Client: How the Proposed Final Draft of the Restatement of the Law Governing Lawyers Fails to Protect Unsophisticated Consumers in Fee Agreements with Lawyers*, 10 *GEO. J. LEGAL ETHICS* 581, 600 (1997) ("Reasonableness is a remarkably elastic concept."); John J. Marquess, *Legal Audits and Dishonest Legal Bills*, 22 *HOFSTRA L. REV.* 637, 638 (1994) (calling factors "nonsense" that do not tell the lawyer "anything"); Lee A. Watson, Note, *Communication, Honesty, and Contract: Three Buzzwords for Maintaining Ethical Hourly Billing*, 11 *GEO. J. LEGAL ETHICS* 189, 197 (1998) (stating ethical codes "require reasonable billing but fail to offer a definition for reasonableness").

⁸¹ *See* GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 97 (1978); *see also* ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 cmt. at 101 (1979) ("The implication appears to be that a consideration of the guides will lead a lawyer to formulate reasonable fees. The wording of the text, however, denies this. . . . [T]he Code . . . did not proscribe any reasonable application of the factors that were to be considered as guides in the setting of fees.").

⁸² WOLFRAM, *supra* note 19, at 516; *see also* ARONSON, *supra* note 79, at 3 ("[T]he nature of the lawyer's product and the bar's perception of its role in society combine to make rational valuation of the individual attorney's services practically impossible."); JETHRO K. LIEBERMAN, *CRISIS AT THE BAR* 108 (1978) (stating that EC 2-17 contains the only discussion of the propriety of fees in the Ethical Considerations, and it is too general; DR 2-106 is also of little help); ROSS, *supra* note 80, at 39, 40 (observing that because the *Model Rules* do not specifically address time-based billing, many lawyers faced with ethical concerns in this area may consult other attorneys rather than the *Model Rules*); Jeffrey L. Tolman, *Learning From How Others Bill*, in *BEYOND THE BILLABLE HOUR*, *supra* note 35, at 69 (sug-

Court decisions regarding legal fees offer little guidance because their facts vary widely.⁸³

The specific factors are also deeply questionable. Professor Aronson is suspicious of factor two, loss of other employment by virtue of accepting a particular matter. In this regard, Professor Aronson argues that "overreliance on time lost per se penalizes competent attorneys who most need to earn fair value for their services but whose youth, inexperience, or transience puts them at a disadvantage in attracting clients."⁸⁴

The focus on the going rate reflected in factor three has a dubious pedigree; it dates to the price-fixing era, since repudiated by the United States Supreme Court.⁸⁵ Some commentators suggest that factor three continues to justify overbilling practices so long as they are common.⁸⁶ It would also have odd consequences if it were actually enforced. In a market which no longer relies on fixed prices, there will usually be a distribution of fees, and someone will always have the highest fee. If the highest chargers are at risk for discipline, they will tend to go into another area of practice or lower their fees. Consequently, another attorney or group of attorneys will be at the top and the cycle will continue, imposing constant downward pressure on fees.

gesting that determining what constitutes a "fair and reasonable bill is the second most difficult aspect of practicing law," and that "[c]ollecting the bill is the first"); Neely, *supra* note 34, at 563 (concluding that case law, ethical canons, and disciplinary rules are unproductive in determining excessiveness of fees); see generally Steven R. Salbu, *Law and Conformity, Ethics and Conflict: The Trouble with Law-Based Conceptions of Ethics*, 68 IND. L.J. 101, 102 (1992) ("Codes of ethics provide a sadly diluted notion of what ethics entails, how ethical decisions are made, and the nature and degree of individual responsibility involved in the process of examining one's choices.").

⁸³ See, e.g., *Florida Bar v. Moriber*, 314 So. 2d 145, 148 (Fla. 1975) ("Few, if any, areas of attorney discipline are as subject to differing interpretations as the matter of what constitutes an excessive attorney's fee."); *State ex rel. Lee v. Buchanan*, 191 So. 2d 33 (Fla. 1966) (holding that statute criminalizing "unreasonable" attorney's fees in adoption cases is unconstitutionally vague); ARONSON, *supra* note 79, at 12, 15 (asserting that "the standard of 'reasonableness' used by the courts suffers from the imprecision of 'proximate cause' and 'prudent person' that often results in tort cases standing on their own facts and the [juries'] moods" and "virtually no case law has developed interpreting" DR 2-106).

⁸⁴ ARONSON, *supra* note 79, at 35.

⁸⁵ See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-93 (1975) (stating fee schedule promulgated by local bar association constituted illegal price fixing).

⁸⁶ See, e.g., Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-By-Case Enforcement*, 53 WASH. & LEE L. REV. 1339, 1353 (1996) (noting that rules can justify common but unfair practice of charging excessive contingent fee); Gillers, *supra* note 80, at 596 ("The fee can . . . be higher than a strictly economic calculation of market value because the market may support fees based on client ignorance.").

This movement has not occurred, but it might if the rules were enforced. This result may help explain why they are not.

The fourth factor, the results obtained, seems entirely reasonable if the fee is contingent, but that circumstance is covered by factor eight. If the fee is non-contingent, why should the results obtained matter? Concretely, why should lawyers who work honestly and diligently on the basis of a fixed fee or an hourly rate be subject to discipline if they lose, when their fee for entirely identical services would be deemed reasonable if they win?⁸⁷

The other consideration in factor four, the amount involved, assumes that the only value is money. Concerns such as avoiding a death sentence or prison term; preventing deportation from the United States; obtaining custody or visitation of one's children; retaining a particular job or office; protecting the sentimental value of particular real estate or personal property, or an individual's reputation; and standing on matters of principle, do not count at all. Presumably this is an oversight, but it is a serious one. It also seems to give the attorney an almost proprietary interest in every case; it suggests that an attorney "may be able to do a small amount of work with great reward."⁸⁸ Other than to the extent that a lawyer is entitled to take into account his or her potentially greater liability when handling a relatively large matter, "the quality of the representation in terms of the time, effort, and expertise expended would seem to be a better basis for valuation."⁸⁹

The fifth factor, time limits imposed by the client, seems irrelevant, given that actual time spent is considered by factor one and an inability to accept other business is accounted for by factor two. Professor Wolfram asks which way factor six points: "It is not apparent whether longevity in a client-lawyer relationship is meant to justify a higher or only a lower fee."⁹⁰

Professor Aronson criticizes factor seven, the experience, reputation and expertise of the attorney.⁹¹ He suggests that "this factor, too, would appear to be more appropriately subsumed under a general consideration of the quality of work, and its importance should be

⁸⁷ This assumes a single factor can be outcome determinative in at least some cases. If it cannot, however, then it is not really a factor at all.

⁸⁸ ARONSON, *supra* note 79, at 42.

⁸⁹ *Id.*

⁹⁰ WOLFRAM, *supra* note 19, at 520.

⁹¹ See ARONSON, *supra* note 79, at 44.

greatly diminished when the case does not require the attorney's unique skills."⁹²

The process is made more difficult because lawyers are of necessity responsible for the initial evaluation of the reasonableness of their fees.⁹³ The codes use factors including the attorney's skill, ability and reputation. Since most lawyers probably believe that the services they render are of high quality and that they are esteemed by their colleagues and the community, the attorney's services always justify a large fee.⁹⁴

The factors also fail to make clear when the reasonableness of the fee is to be measured. The second factor, the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer, contemplates evaluation at the beginning of the representation because it is based on a prediction about the future.⁹⁵ On the other hand, the results obtained, the second part of factor four, cannot be known until the end of the representation.

It also seems that the rules were designed for civil cases rather than criminal cases. The first part of factor four, the amount involved, would not take into account the possibility of imprisonment or execution in evaluating the reasonableness of a fee. The rules also envision the possibility of a contingent fee, which is prohibited in criminal cases by both ABA codes.⁹⁶

⁹² *Id.*

⁹³ See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Preamble (noting that "difficult issues of professional discretion can arise," which must be resolved through "exercise of sensitive professional and moral judgment" and that "compliance with the Rules, as with all law in an open society, depends primarily on understanding and voluntary compliance").

⁹⁴ See HAZARD, *supra* note 81, at 101 ("A lawyer conceives of himself as worth a good wage."). See also 1 Timothy 5:18 ("The laborer is worthy of his reward."); Luke 10:7 (similar).

⁹⁵ See MODEL RULES OF PROFESSIONAL CONDUCT Preamble ("[A]ssessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question.").

⁹⁶ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(D)(2) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(C) (1980). In addition, the process of setting attorneys' fees in criminal matters is different than the process of setting fees in noncriminal matters. See JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 7:1, at 152 (2d ed. 1996). Rarely do noncriminal practitioners understand the peculiarities of setting fees in the criminal setting. Fees for representation in criminal cases might legitimately exceed fees for representation in civil cases for several reasons. See *id.* First, the amount of "downtime" (e.g., waiting in court, waiting for hearings, etc.) for criminal defense lawyers is higher than for noncriminal attorneys. See *id.* Second, criminal lawyers must spend more time investigating and contemplating the adversary's case. See *id.*

The *Restatement* implicitly criticizes the eight-factor test by citing it and then recasting it as "really" getting at three questions which are not explicitly mentioned:

Those [eight] factors might be viewed as responding to three questions. First, when the agreement was made, did the lawyer afford the client a free and informed choice? . . . Second, does the agreement provide for a fee within the range commonly charged by other lawyers in similar representations? . . . Third, was there a subsequent change in circumstances that made the fee agreement unreasonable?⁹⁷

The first and third of these questions have much to commend them, but they are not hinted at in the eight factors as written.

In sum, the factors as written may well include some which lawyers would want to use in deciding whether to accept an engagement at a particular price, and which clients would wish to consider when deciding how much to spend on a lawyer for a particular matter. Therefore, these factors may help explain, after the fact, why particular lawyers and clients agreed to particular fees in particular matters. But it will be very difficult to use these factors to distinguish between fair and unfair fees in the absolute sense because they are driven in large part by the personal values of particular attorneys and clients.⁹⁸

Perhaps the most telling proof of the futility of evaluating the reasonableness of fees is the ABA's own conduct. Although the ABA has burdened lawyers and disciplinary authorities with the task of analyzing the reasonableness of legal fees in the context of an unhelpful scheme, the ABA has refused to weigh in on the matter. The prestigious ABA Ethics Committee offers written opinions with respect to specific ethical questions which, when published, constitute influential sources of authority. As early as 1930—nearly four decades before the *Model Code* adopted the eight-factor test—the Committee established a policy of refusing to offer opinions on the reasonableness of fees in the absence of fraud or overreaching.⁹⁹

Finally, criminal defense lawyers deal in higher stakes than noncriminal lawyers, including loss of liberty, or even loss of life. See *id.*

⁹⁷ *RESTATEMENT*, *supra* note 20, § 46, cmt. at 159–60.

⁹⁸ See ARONSON, *supra* note 79, at 56 ("Examination of these individual components of service valuation shows that often their validity and value depend on whether worth is determined from the attorney's or the client's perspective, and that reliance on one type of criteria may restrict or eliminate meaningful examination of another.").

⁹⁹ See ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 101–02, 104–05 (1979) (quoting ABA Comm. on Professional Ethics and Grievances, Formal Op. 27 (1930)).

C. *The Purpose of the Reasonable Fee Regulations*

The problems with the *Model Code* and *Model Rules* that have led to their desuetude are deeper than that they are badly drafted or too complicated. Because the *Model Code* and *Model Rules* are intended to be construed in accordance with their purpose,¹⁰⁰ it would be helpful to know why they exist. Articulated rationales for fee regulation break down into two broad categories—maintaining access to the legal system on behalf of the poor and prevention of abuse of the trust which clients naturally repose in counsel. Only the second rationale is legitimate, and even it does not justify regulating the amount of attorneys' fees.

1. Access to the Legal System for the Poor

One rationale for regulating fees, ultimately chimerical, rests on the impact of excessive or unreasonable fees on public access to the legal system.¹⁰¹ For example, Ethical Consideration ("EC") 2-17 explains: "A lawyer should not charge more than a reasonable fee, for excessive cost of legal services would deter laymen from utilizing the legal system in protection of their rights."¹⁰² Former clients who were charged excessive unreasonable fees and their friends may be deterred from hiring lawyers again, but other than to the extent that a high fee results from deception or fraud, the argument is unpersuasive. Unfortunately, there is no ethical rule that legal services have to be made available at a price the public is able to pay.

Moreover, if this consideration is addressed to individual lawyers, the rationale would seem rarely to apply because an individual lawyer's rates do not affect access to the legal system as a whole. If, for example, Alan Dershowitz or Robert Bennett charge far more than most lawyers, then the prospective client can simply hire one of the other lawyers, and there is no diminution of access to the legal system. Although the client may prefer to retain Dershowitz or Bennett at a lower price, there is no ethical precept which says the lawyers who are most desirable because they are the most able and effective have to be available to the average person at an affordable price. Many of the finest law firms in America charge rates which preclude all but the wealthiest individuals and corporations from retaining them, yet no

¹⁰⁰ See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983).

¹⁰¹ See, e.g., *In re Smith*, 572 N.E.2d 1280, 1288 (Ind. 1991); ARONSON, *supra* note 79, at 6.

¹⁰² MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-17 (1980).

serious claim exists that, ipso facto, every dollar they bill is in violation of the rules.¹⁰³

Alternatively, perhaps the principle is addressed to the profession as a whole; that is, perhaps the reasonable fee limitation is designed to encourage lawyers as a group not to raise their prices to a level which the average person cannot afford. Of course, that has already happened, with no response from the ABA. Most individuals with legal needs do not receive legal assistance to resolve them because of their limited resources, not because prices have been fixed. Because the ethics system does not propose that lawyers as a whole meet the legal needs of the nation, the fact that a lawyer's fee is out of reach of a layperson does not suggest that it is excessive.

The treatment of pro bono work in the *Model Code* and *Model Rules* confirms that the ethics provisions were not designed to make sure that lawyers' fees are within the reach of the average person. Under the *Model Code*, EC 8-3 recommended that "persons unable to pay for legal services should be provided needed services."¹⁰⁴ This recommendation was merely precatory and unconnected to any requirement or even suggestion that lawyers do pro bono work or accept some clients at reduced fees. Model Rule 6.1 encourages lawyers to perform fifty hours annually of pro bono work, but this service is not required.¹⁰⁵ The fact that pro bono work is necessary at all is a tacit acknowledgment that even with fees being kept at a "reasonable" level by Model Rule 1.5 and DR 2-106, there will be substantial unmet legal needs; put another way, many people are unable to pay even reasonable fees.¹⁰⁶ Because this principle is so limited, it does not support the idea that fees should be low in any given case on pain of discipline.

The *Restatement*, the American Law Institute's latest analysis of this problem, makes clear that concern for access to the poor is makeweight, not an actual rationale for limitations on attorneys' fees. The *Restatement* grandly proclaims that "the availability of legal services is often essential if people of limited means are to enjoy legal rights. Those seeking to vindicate their rights through the private bar

¹⁰³ Moreover, since lawyers are free to deprive individuals of their services by refusing to work for them, or by practicing a specialty like environmental law, which may not be useful to most individuals, or by leaving the profession entirely, it is hard to see why lawyers should not be equally free to withhold their services through price.

¹⁰⁴ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-3 (1980).

¹⁰⁵ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983).

¹⁰⁶ See *id.* Rule 1.5; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1980).

should not be deterred by the risk of unwarranted fee burdens."¹⁰⁷ This is a fine aspiration, but the *Restatement* makes clear that there is no impropriety in "a lawyer's insistence that a needy client pay for the lawyer's services at the lawyer's usual rates."¹⁰⁸

2. Abuse of Fiduciary Relationship

Courts have also suggested that fee regulation is warranted to protect the competent administration of justice,¹⁰⁹ to uphold and preserve the integrity of the profession¹¹⁰ and to deter other attorneys from engaging in improper fee charging activities.¹¹¹ What these concerns boil down to is not that handsome fees are to be avoided, but rather that lawyers should not take advantage of their clients. Thus, "[a] lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures," explain the comments to the *Model Rules*.¹¹² The comments also say that a low estimate should not be offered "when it is foreseeable that more extensive services probably will be required," and that "when developments occur during the course of representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided."¹¹³

¹⁰⁷ RESTATEMENT, *supra* note 20, § 46, cmt. at 158.

¹⁰⁸ *Id.* at 157.

¹⁰⁹ See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975); *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 383 (1963); *Cohen v. Hurley*, 366 U.S. 117, 123-24 (1961), *overruled on other grounds by* *Spevack v. Klein*, 385 U.S. 511, 513 (1967); *In re Smith*, 572 N.E.2d 1280, 1288 (Ind. 1991).

¹¹⁰ See *Smith*, 572 N.E.2d at 1288; *Louisiana State Bar Ass'n v. Pugh*, 508 So. 2d 1350, 1355 (La. 1987); *In re Hansen*, 586 P.2d 413, 415 (Utah 1978).

¹¹¹ See ARONSON, *supra* note 79, at 5.

¹¹² MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 cmt. (1983).

¹¹³ *Id.* The *Model Code* also contains many statements suggesting that the purpose of the reasonable fee rules is disclosure, in order to prevent overreaching. For example, EC 2-19 explains that a lawyer should

reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee. . . . A lawyer should be mindful that many persons . . . may have had little or no experience with fee charges or lawyers, and for this reason he should explain fully . . . the reasons for the particular fee arrangement . . .

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19 (1980).

Similarly, EC 2-20 states that a contingent fee is permissible where a "client who, after being fully informed of all relevant factors, desires that arrangement." *Id.* EC 2-20; see also *id.* EC 2-17 ("an excessive charge abuses the professional relationship between lawyer and client").

These concerns are matters of good faith and communication which may have nothing to do with the overall amount of a fee. The *Restatement* is correct when it suggests that the fundamental rationale for the reasonable fee rules is that "[c]ourts are concerned to protect clients, particularly those who are unsophisticated in matters of lawyers' compensation, *when a lawyer has overreached*."¹¹⁴ Several states' ethical codes suggest this point directly.¹¹⁵

If overreaching is the problem the rules are designed to avoid, the absence of "excessive fee" cases where there is no fraud, misrepresentation or other misconduct becomes readily explainable. A lawyer who does not overreach will find it difficult to get a competent client to agree to a fee which is disproportionate, from the client's point of view, to the value of the services the client expects to receive.¹¹⁶ Many disciplinary cases do not turn on application of the factors, instead imposing discipline for some identifiable act of wrongdoing, such as lying to the client, which the court concludes renders the fee unrea-

¹¹⁴ RESTATEMENT, *supra* note 20, § 46, cmt. at 158 (emphasis added).

¹¹⁵ The Texas disciplinary rules prohibit unconscionable fees, measure fairness from the time the contact was made and evaluate unconscionability by two important factors: "The first is overreaching by a lawyer; particularly of a client who was unusually susceptible to such overreaching. The second is a failure of the lawyer to give at the outset a clear and accurate explanation of how a fee was to be calculated." Carl M. Selinger, *Inventing Billable Hours: Contract v. Fairness in Charging Attorney's Fees*, 22 HOFSTRA L. REV. 671, 677 (1994) (citing TEXAS RULES OF PROFESSIONAL CONDUCT Rule 1.04 cmts. 7 & 8); see also ALABAMA RULES OF PROFESSIONAL CONDUCT Rule 1.5(a)(9) (listing as a factor "whether there is a written fee agreement signed by the client"); RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA Rule 4-200(B)(11) (stating factors in evaluating reasonableness of fee include "[t]he informed consent of the client to the fee"); HAWAII RULES OF PROFESSIONAL CONDUCT Rule 1.5(a)(9)-(10) (listing "the relative sophistication of the lawyer and the client; and the informed consent of the client to the fee agreement"); MAINE CODE OF PROFESSIONAL RESPONSIBILITY Rule 3.3(a)(9) (listing as a factor "[t]he informed written consent of the client as to the fee agreement"); VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(a) ("A lawyer's fee shall be reasonable and adequately explained to the client."); WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT Rule 1.5(a)(8) ("Whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.").

¹¹⁶ Laurence Johnson offered the hypothetical of the rich eccentric who was willing to pay a six-figure hourly fee. See Letter from Laurence M. Johnson (Oct. 22, 1999) (on file with the authors). Professor Gillers asks in his casebook whether a \$2 billion fee in a serious criminal matter would be excessive. See STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 139-40 (5th ed. 1998). These examples suggest both that, in extreme circumstances, upholding a bargained-for fee agreement might be problematic and that those circumstances are so unlikely to occur that the rules need not account for them.

sonable regardless of the result that would be reached through application of the factors.¹¹⁷

D. Overreaching and the Amount of Fees

The rationale for scrutinizing the amount of fees is to determine whether the charges represent an abuse of trust by the lawyer taking advantage of the client. This is essentially a question of sophistication and information. Although bar admission requirements do restrain clients in their choice of counsel, there are so many licensed lawyers that for practical purposes there is no legal cartel; a client with a legal problem and money to pay can choose to retain any among a number of attorneys of varying costs and qualifications.¹¹⁸ Accordingly, if it is not worth it to a particular client to hire an expensive lawyer for a particular problem, that client does not have to do so. Because in certain respects a contract for legal services is like any other business

¹¹⁷ See, e.g., NATHAN M. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* 267 (1996) (commenting that fees are excessive when based on improper billing practices); Edmund B. Spaeth, Jr., Comment, 138 U. PA. L. REV. 795, 795 (1990) ("A lawyer who agrees to bill on a time-spent basis, and then pads the bill, is not charging a 'reasonable' fee . . ."). Professor Lisa Lerman has written several detailed studies of improper billing practices. See, e.g., Lerman, *supra* note 8; Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 661, 705-20 (1990). Cf. Kevin Hopkins, *Law Firms, Technology and the Double Billing Dilemma*, 12 GEO. J. LEG. ETHICS 93 (1998).

¹¹⁸ See, e.g., *In re Reconversion Techs., Inc.*, 216 B.R. 46, 57 (Bankr. N.D. Okla. 1997) ("Sophisticated clients in today's business world will not long remain with firms who do not trim the fat from their fee statements; the market is simply too competitive."); Geoffrey Furlonger, *Time for Business-Lawyers to Stop Billing Time?*, in *BEYOND THE BILLABLE HOUR*, *supra* note 35, at 93, 96 ("given the abundance of lawyers in the United States, if a client is unable to negotiate what it considers to be a reasonable fee with one law firm, it presumably will negotiate a lower fee with another firm"; suggesting that a client who has been given information and the opportunity to negotiate, and who accepts a fee, "tacitly acknowledges the reasonableness of the fee"); Richard C. Reed, *How Did We Get to Where We Are—And What Are We Going to Do About It?*, in *BEYOND THE BILLABLE HOUR*, *supra* note 35, at 3, 4-6 (noting the change in modern law practice due in part to the increase in the numbers of lawyers); Gabriel J. Chin, *Do You Really Want a Lawyer Who Doesn't Want You?*, 20 W. NEW ENG. L. REV. 9, 19-20 (1998) (suggesting that legal marketplace is competitive); Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. REV. 723, 730-31 (1994) (noting that the pool of lawyers in the United States has more than doubled in the last 20 years to 850,000, that the ratio of lawyers to the general population is more than twice its historical average and that there are three times as many lawyers per capita in the United States than in any other society); Dorothy Fischer, *A Glut of Lawyers in Mercer?*, *MERCER BUS.*, Nov. 1, 1996, at 16 (asserting that attorneys nationwide have become a "glut on the job market"); Jack Sirica, *Smaller Pool of Aspiring Lawyers*, *NEWSDAY*, Nov. 18, 1996, at C6 (asserting that the drop-off in applications for admission to law school is due, in part, to the saturation of the job market for attorneys).

contract, courts often permit lawyers and their clients leeway in their agreements.¹¹⁹

At the same time, the special nature of the attorney-client relationship may warrant pausing before holding that anything a particular attorney and client agree to will be enforced.¹²⁰ The attorney stands in a fiduciary relation to the client,¹²¹ and there is an inherent conflict between an attorney's desire to earn as much as possible, and the client's desire for excellent representation at the lowest possible cost.¹²²

¹¹⁹ See *United States v. Fidelity Phila. Trust Co.*, 459 F.2d 771, 777 (3d Cir. 1972) (holding that if fee is fixed prior to rendering of attorney's services, a court need not inquire into reasonableness of fees); *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 90 (1st Cir. 1969) (determining that prior fee arrangement must be accorded great weight and that court's supervisory power over attorneys' fees is reserved for exceptional circumstances); *Baumrin v. Cournoyer*, 448 F. Supp. 225, 228 (D. Mass. 1978) (holding that a court may not diminish the effectiveness of a valid contract for legal fees); *Jersey Land & Dev. Corp. v. United States*, 342 F. Supp. 48, 54 (D.N.J. 1972) (noting that a court has "the inherent equitable power to pass upon the reasonableness of counsel fees charged" where a valid contract exists); *Plunkett & Cooney, P.C. v. Capitol Bancorp Ltd.*, 336 N.W.2d 886, 889-90 (Mich. Ct. App. 1995) (holding it inappropriate to calculate damages on a quantum meruit basis where fixed fee agreement explicitly provides for agreed-upon value of services); *Wolfe v. Morgan*, 524 P.2d 927, 931 (Wash. Ct. App. 1974) (determining that bargained for attorneys' fee should be given great weight in judging reasonableness, except where contract is unconscionable). But see, e.g., *Trinkle v. Leeney*, 650 N.E.2d 749, 754 (Ind. Ct. App. 1995) (holding that measure of reasonable fee is not necessarily determined by terms of attorney-client contract).

¹²⁰ See, e.g., *United States v. Goldfarb*, 421 U.S. 773, 792 (1975); *In re Smith*, 572 N.E.2d 1280, 1288 (Ind. 1991); *Cohen v. Radio-Electronics Officers Union*, 679 A.2d 1188, 1195-96 (N.J. 1996); *In re Hansen*, 586 P.2d 413, 416 (Utah 1978); *Heinzman v. Fine, Fine, Legum & Fine*, 234 S.E.2d 282, 285-86 (Va. 1977); see also ARONSON, *supra* note 79, at 6 (recognizing that lawyers owe a special ethical duty to society because they represent the means of access to the judicial system); Rau, *supra* note 35, at 2009 (noting that fee arrangements between lawyers and clients are subject to public regulation and supervision).

¹²¹ See, e.g., *Radio-Electronics*, 679 A.2d at 1195 (noting that responsibility to regulate conduct of attorneys extends to attorney-client fee arrangements in order to preserve fiduciary duties attorneys owe clients); see also Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 70 (1989) (noting that the ethical duty prohibiting attorneys from charging clearly excessive fees derives from attorneys' fiduciary obligations to clients); see generally 7 AM. JUR. 2d, *Attorneys at Law* § 137 (1997).

¹²² See, e.g., *In re Myers*, 663 N.E.2d 771, 774 (Ind. 1996); see also Ross, *supra* note 80, at 42; WOLFRAM, *supra* note 19, at 513; Brickman, *supra* note 121, at 47-48; Hazard & Hodes, *supra* note 69, at 123; William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1, 24-25 (1991); Chan, *supra* note 35, at 621-22; Note, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352, 358 n.36 (1982). Indeed, Ethical Consideration 2-17 of the Model Code recognizes the inherent tension between lawyers and their clients in charging fees:

The question of overreaching will not always be answerable simply by looking at the objective circumstances and the amount of the fee without also examining the client's purposes. There are many reasons that a client might engage a lawyer to provide services at a cost some might regard as unreasonable. A \$500,000 bill for litigating a \$5000 claim, for example, might appear to be a clear case of mulcting a client. Actual client problems, however, can be much more complicated. Even looking at the matter strictly on financial terms, a client may rationally conclude that a six-figure expense is justified if losing the case could set up an adverse precedent which would cost it much more in the long run, that the collateral estoppel or regulatory effects of a loss could be catastrophic, or that it would be worthwhile to send a "millions for defense, not one penny for tribute" message to a business partner or competitor.¹²³ Even non-financial considerations, such as the reputation of an individual or business, or the sentimental, religious or moral importance of the controversy, may justify a rational client in spending substantial sums on what appears to a third party to be a small matter.¹²⁴

In a criminal case, a client also may be willing to spend a fortune to avoid conviction on a minor crime. For some clients, acquittal may be a matter of principle. Others may have governmental, political or military career plans which could be destroyed by a criminal conviction.

The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-17 (1980) (footnotes omitted); see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 379 (1993).

¹²³ See, e.g., Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 857 (1992) ("From the beginning, the cigarette companies decided that they would defend every claim, no matter what the cost, through trial and any possible appeals. Concomitantly, the companies decided that they would, as a first line of defense, spare no cost in exhausting their adversaries' resources short of the courthouse door.").

¹²⁴ An accusation of physician malpractice or an act which is morally abhorrent, such as sexual harassment, might understandably be resisted even if the monetary amount in controversy was relatively small.

tion. A client may know that some prisoners return from even a short sentence infected with HIV.¹²⁵

Most small legal matters will warrant nothing more than small legal expenditures. The ethical rules and principles of agency, however, assign to the client the evaluation of the goals of the representation and the expenditures justified to achieve them. Neither courts nor lawyers have the authority to apply their own values to measure the importance of the case and, therefore, to dictate whether a case will be litigated expensively or cheaply.¹²⁶

The line of cases involving sophisticated clients makes clear that the reasonable fees rules are really aimed at preventing overreaching by achieving its opposite, the informed consent to fees. Many cases and the *Restatement* suggest that an arms-length fee agreed to by an experienced client is reasonable per se.¹²⁷ This is not because such fees are always reasonable based on application of the eight factors; it is likely that many would arguably be unreasonable under the factors.

¹²⁵ See, e.g., Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 YALE L. & POL'Y REV. 195 (1999); David M. Siegal, Note, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter*, 44 STAN. L. REV. 1541 (1992); Richard D. Vetstein, Note, *Rape and AIDS in Prison: On a Collision Course to a New Death Penalty*, 20 SUFFOLK U. L. REV. 863 (1997); cf. *Farmer v. Brennan*, 511 U.S. 825, 843 (1994) (holding that prisons and jails can sometimes be liable for sexual assaults occurring therein).

¹²⁶ Cf. Committee on Legal Ethics of the W. Va. State Bar v. Tatterson, 352 S.E.2d 107, 113 (W. Va. 1986) ("If an attorney's fee is grossly disproportionate to the services rendered and is charged to a client who lacks full information about all of the relevant circumstances, the fee is 'clearly excessive' . . . even though the client has consented to such fee.") (emphasis added) (citing *In re Kennedy*, 472 A.2d 1317, 1322, 1330-31 (Del. 1984) (involving attorney who, among other misconduct, charged contingent fee when there was no contingency)).

¹²⁷ See *supra* note 77. Another example is *In re Potts*, 718 P.2d 1363, 1372 (Or. 1986), where the court found that lawyers had, among other misconduct, charged an excessive fee of \$9000 for alleged legal services, unsupported by time records and which included services to the client such as car repairs and personal advice. The client had asked earlier about what the fee would be but received no answer from counsel. See *id.* at 1366-67. The court closed the opinion with a reminder not that fees should be reasonable, but rather that "[m]aking certain that an early clear understanding regarding fees is reached with the client aids the attorney-client relationship and lets the client know what to expect." *Id.* at 1372. Once again, the problem was not the size of the fee per se, but client communication and agreement about what services would be performed and at what price. See *id.* For this reason, other courts have been critical of attorneys who unilaterally set fees late in the case, creating a situation where the client has no opportunity to elect to retain a different lawyer, negotiate a lower fee or forego a legal solution to the matter. See, e.g., *Muskingum Bar Ass'n v. Tanner*, 278 N.E.2d 21 (Ohio 1972); *In re Kinast*, 357 N.W.2d 282, 284-85 (Wis. 1984); see also *Kentucky Bar Ass'n v. Graves*, 556 S.W.2d 890, 892 (Ky. 1977) (charging overhead expenses and extravagant meals to client warranted discipline, "especially in the absence of a specific agreement with respect to those particular expenses").

Rather, such fees are deemed reasonable because the clients knew what they wanted and bargained for it. Similarly, courts often mention the ignorance of clients in holding fees to be unreasonable.¹²⁸ The *Restatement* confirms the idea that what fee regulation is aimed at is the process by which the fee was set.¹²⁹

II. THE CRIMINAL FEE CASES

The purpose of the reasonable fee rules is to prevent overreaching and these rules are applied in cases where the client has in fact been overreached. If this is the case, then what is the problem?

One problem is underachievement of the goals of the rule. The mismatch between the purpose and the text means that the majority of lawyers who want to be fair and honest in dealing with their clients receive insufficient guidance. By suggesting that what is at stake is substantive reasonableness, when it is really communication, the rules miss an opportunity to educate lawyers about desirable behavior. There are undoubtedly many surprised and angry clients in the gap between full communication and the level of overreaching which would warrant discipline.¹³⁰

¹²⁸ See, e.g., *Dunn v. H.K. Porter Co.*, 78 F.R.D. 41, 45 (E.D. Pa. 1977) (refusing to approve class action fee award; "absent a showing that the clients were sophisticated commercial persons who were aware of the consequences of their decisions, we find this fee excessive"), *rev'd on other grounds*, 602 F.2d 1105 (3d Cir. 1979).

¹²⁹ The *Restatement* explained that the first question was:

when the agreement was made, did the lawyer afford the client a free and informed choice? Relevant circumstances include whether the client was sophisticated in entering into such arrangements, whether the client was a fiduciary whose beneficiary deserves special protection, whether the client had a reasonable opportunity to seek another lawyer, whether the lawyer adequately explained the probable cost and other implications of the proposed fee agreement . . . whether the client understood the alternatives available from this lawyer and others, and whether the lawyer explained the benefits and drawbacks of the proposed legal services without misleading intimations.

RESTATEMENT, *supra* note 20, § 46, cmt. at 159-60.

¹³⁰ As Professor Selinger noted, for example:

[T]he ethics rules that govern lawyers' fees have never really made clear to what extent the propriety of a fee charged to a client should be evaluated according to contract/free market principles and to what extent according to principles of fairness. The upshot of this uncertainty has been, I fear, that some lawyers have felt free to use fairness arguments to excuse blatant contractual violations and others to use contract arguments to excuse a lot of unfairness.

Another form of harm comes from overenforcement. In a pair of remarkable and influential cases, lawyers handling criminal cases were disciplined by distinguished state supreme courts for charging excessive fees.¹³¹ These cases suggest that the rules hold out the prospect of serious harm to the interests of clients.

The cases are troubling for two reasons. First, application of the eight-factor test does not inevitably lead to the conclusion that the fees were excessive; to the contrary, there is a strong argument that they were reasonable. Second, application of the unreasonable fee rule in routine criminal cases may tend to make high quality counsel less available because lawyers will know that if they want to be able to charge what the market will bear, they must practice in a different field.

A. In re Fordham

In 1996, in *In re Fordham*, the Massachusetts Supreme Judicial Court publicly censured an attorney for charging a "clearly excessive fee" in violation of Supreme Judicial Court Rule 3:07, DR 2-106.¹³² The highly publicized case arose out of the prosecution of defendant and client Timothy Clark for operating a motor vehicle under the influence of alcohol ("OUI") and other charges.¹³³ There, Clark had

Selinger, *supra* note 115, at 672; see also HAZARD, *supra* note 81, at 98 (noting that the "Code's formula provides sustaining authority" for high fee awards in a patronage system); John M.A. DiPippa, *Lawyers, Clients, and Money*, 18 U. ARK. LITTLE ROCK L.J. 95, 119 (1995) ("Using the reasonableness or clearly excessive standard does not adequately protect the client's interests and allows lawyers to engage in what amounts to misrepresentation" in the context of non-refundable fees, areas where such practices are common); Watson, *supra* note 80, at 195 (noting that code factors, "particularly the amount customarily charged, undoubtedly will encourage double-billing and padding in areas where it is already the custom to do so"); Chan, *supra* note 35, at 619 (noting that malleability of factors means that there are "many different ways to justify different overbilling practices as reasonable using the factors").

¹³¹ See *In re Fordham*, 668 N.E.2d 816 (Mass. 1996), *cert. denied*, 519 U.S. 1149 (1997); *In re Kutner*, 399 N.E.2d 963 (Ill. 1979).

¹³² See 668 N.E.2d at 825. S.J.C. Rule 3:07, DR 2-106, was identical to DR 2-106 of the *Model Code of Professional Responsibility*. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1983).

¹³³ See Associated Press, *Lawyer Gets Censured for Working Too Long on Case*, ST. LOUIS POST-DISPATCH, Aug. 14, 1996, at 6A; Gail Diane Cox, *Fie on Fees: Excessive Fees are Attached Across the Board*, NAT'L L.J., Nov. 4, 1996, at A1; Cornelia Wallis Houchar, *Decisions Cast a Shadow Over CLE Talks, Legal Fees*, CHI. DAILY L. BULL., Oct. 4, 1996, at 6; Maria Shao, *SJC Disciplines Attorney for Excessive Fees*, BOSTON GLOBE, Aug. 13, 1996, at D1; Loren Singer, *Massachusetts Lawyer Sanctioned for Billing Too Many Hours of Actual Work*, WEST'S LEGAL NEWS, Aug. 16, 1996, available in 1996 WL 461297; David L. Yas, *Attorney Disciplined for 'Excessive' DUI Fee; Bill for Handling 'Routine' Case Topped \$50K*, MASS. LAW. WKLY., Aug. 19,

been stopped by the Acton, Massachusetts police in March 1989, who found a half-empty quart of vodka in his car.¹³⁴ Clark, who admitted that he had been drinking,¹³⁵ failed a field sobriety test and then registered a 0.10 and a 0.12 on the Breathalyzer machine at the police stationhouse, exceeding the statutory limit.¹³⁶

Recognizing that they faced a strong prosecution case, Clark and his family interviewed a number of attorneys, who explained that the case was not promising, that Clark should plead guilty and that they would do what they could for a flat fee of three to ten thousand dollars.¹³⁷ Clark was unwilling to plead guilty.¹³⁸

Clark's father met Fordham when he installed a burglar alarm in Fordham's house.¹³⁹ After some discussion, Fordham offered the services of his own small firm.¹⁴⁰ Fordham discussed the fees for his services at the first meeting, making clear that he would bill at an hourly rate rather than charging a flat fee.¹⁴¹ Fordham also explained that he had never represented a client in an OUI case or in any criminal case

1996, at 1; David L. Yas, *Some Lawyers Say Flat Fees Preferable in Criminal Cases*, MASS. LAW. WKLY., Sept. 9, 1996, at A1.

¹³⁴ See *Fordham*, 668 N.E.2d at 818.

¹³⁵ See Brief of Respondent at 3, *In re Fordham*, 668 N.E.2d 816 (Mass. 1996) (No. SJC 06951).

¹³⁶ See *Fordham*, 668 N.E.2d at 818.

¹³⁷ See *id.*; Petition for Certiorari at 54a, *Fordham v. Massachusetts Bar Counsel*, 519 U.S. 1149 (1997) (No. 96-946) (reprinting hearing committee's finding of fact that client "did not want to plead guilty . . . even though he had been advised to do so by the other attorneys they consulted before Fordham.").

¹³⁸ See *Fordham*, 668 N.E.2d at 820.

¹³⁹ See *id.* at 818-19.

¹⁴⁰ See *id.* at 819.

¹⁴¹ See *id.* at 819. There is some dispute as to whether Fordham actually quoted an hourly rate at his first meeting. According to the Brief of the Bar Counsel, Clark's father testified that Fordham told him that his rate was \$200 per hour for his time and \$100 per hour for the time of his associates. See Brief of the Bar Counsel at 5, *In re Fordham*, 668 N.E.2d 816 (Mass. 1996) (No. SJC 06951). Fordham testified, however, that he did not state a per hour rate because he did not know what his rate would be. See *id.* But see *Associated Press*, *supra* note 133, at 6A (indicating that according to Clark's father, Fordham told him that the total cost for the case would be between \$5000 and \$7000). "Flat rate" billing entails an agreement between the attorney and the client for a single fee for services rendered, regardless of the actual amount of time that the attorney spends on the case. See Tolman, *supra* note 82, at 69. In addition to flat-rate and hourly billing there are several other methods by which attorneys may bill their clients. See *id.* For example, attorneys may bill on an "equity basis," by which the attorney calculates the fees at the end of the representation pursuant to the eight factors outlined in the *Model Code* and the *Model Rules*. See *id.* An attorney may also bill on a "cost-plus" basis, in which the attorney bills based on his overhead costs, plus a reasonable profit. See *id.* Under the "punitive" billing method, the attorney bills in an amount that, in effect, punishes the client for repeatedly engaging in activity that the lawyer advises the client to avoid. See *id.*

for that matter, that he had never tried a case in the state district court system¹⁴² and that he would need to undertake a great deal of work to prepare for the case.¹⁴³ He also said that he was experienced, hard-working and, according to Clark's father, stated that he charged \$200 per hour.¹⁴⁴ The Clarks, for their part, made clear that they would not consider a guilty plea.¹⁴⁵ The Clarks chose Fordham because of Fordham's reputation and credentials.¹⁴⁶

As he promised, Fordham proved to be hard-working. He and his associates worked 227 hours on the case and billed the client more than \$50,000.¹⁴⁷ Fordham and the disciplinary prosecutor stipulated that the hours billed actually represented the amount of time spent on the case,¹⁴⁸ and that "Fordham acted conscientiously, diligently, and in good faith in representing Timothy and in his billing in [the] case."¹⁴⁹

During the course of his representation, Fordham filed four pre-trial motions on Clark's behalf.¹⁵⁰ The district court allowed two of the four motions, one of which was described as presenting "a creative, if not novel, approach."¹⁵¹ The novel motion sought suppression of the results of the Breathalyzer tests,¹⁵² based on a regulation which deemed Breathalyzer tests inadmissible unless they were "within" 0.02 of each other. Fordham produced a memorandum, supported by the affidavit of a mathematician, that a difference of 0.02 was not "within" 0.02.¹⁵³ The motion was granted, the Breathalyzer results suppressed, the case was tried and Clark was found not guilty.¹⁵⁴

Fordham billed Clark five times during the seven months the case was pending.¹⁵⁵ Clark's father paid Fordham a total of \$10,000, but refused to make any additional payments.¹⁵⁶ After his acquittal,

¹⁴² See *Fordham*, 668 N.E.2d at 819.

¹⁴³ See *Associated Press*, *supra* note 133, at 6A.

¹⁴⁴ See *supra* note 141.

¹⁴⁵ See *Fordham*, 668 N.E.2d at 820-21.

¹⁴⁶ See *id.* at 819.

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*

¹⁴⁹ *Id.*

¹⁵⁰ See *Fordham*, 668 N.E.2d at 819.

¹⁵¹ See *id.* at 819, 821-22 (quoting findings of the hearing committee).

¹⁵² See *id.* at 819.

¹⁵³ See *id.* (citing MASS. REGS. CODE tit. 501, § 2.56(2) (1994)).

¹⁵⁴ See *id.*

¹⁵⁵ See *Fordham*, 668 N.E.2d at 819.

¹⁵⁶ See *id.*

the ungrateful Clark family filed a complaint with the Board of Bar Overseers ("Board") concerning Fordham's fee.¹⁵⁷

What made this lawyer think he could spend this kind of time on a loser of a case? Even the court acknowledged that Fordham was a "seasoned and well-respected" Boston attorney with "impressive credentials."¹⁵⁸ In fact, Fordham was a *magna cum laude* graduate of Harvard Law School, where he was an editor of the *Harvard Law Review*, a Supreme Court clerk and former managing partner at Foley, Hoag & Eliot, a leading Boston law firm.¹⁵⁹ A member of the American Law Institute, ironically, he sat on the Massachusetts Bar Association's Committee on Professional Ethics and taught professional responsibility at Harvard Law School.¹⁶⁰

Complaints against lawyers in Massachusetts are prosecuted before the Board by the Office of Bar Counsel. The chair of the Board dismissed Bar Counsel's petition for discipline against Fordham which alleged that Fordham violated DR 2-106.¹⁶¹ After Bar Counsel appealed, the full Board referred the matter to a hearing committee, which recommended against discipline.¹⁶² The full Board accepted the recommendation and dismissed the petition.¹⁶³ Bar counsel again appealed, this time to the Supreme Judicial Court of Massachusetts.¹⁶⁴

The Supreme Judicial Court found that the Board erred in determining that Fordham's fee was not clearly excessive.¹⁶⁵ The court examined the factors listed in DR 2-106(B),¹⁶⁶ addressing, first, factor one, which requires examining "[t]he time and labor required, the

¹⁵⁷ See *Associated Press*, *supra* note 133, at 6A.

¹⁵⁸ See *Fordham*, 668 N.E.2d at 819-20.

¹⁵⁹ See ASSOCIATION OF AM. LAW SCHOOLS, *DIRECTORY OF LAW TEACHERS* 297 (1977).

¹⁶⁰ See *id.*

¹⁶¹ See *Fordham*, 668 N.E.2d at 818.

¹⁶² See *id.*

¹⁶³ See *id.* The Board dismissed the petition based on several factors. First, the Board noted that "[b]ar counsel and Fordham stipulated that Fordham acted conscientiously, diligently, and in good faith in his representation of the client and in his billing on the case." *Id.* at 820. Further, the Board noted that although Fordham lacked experience in criminal cases and spent over 200 hours on the case, in part to educate himself on the law of OUI defense, Fordham was a "seasoned and well-respected civil lawyer." *Id.* The Board also noted that Clark entered into the fee arrangement with "open eyes" after consulting with lawyers with more experience in OUI defense. See *id.* Finally, the Board found that the Clarks were not interested in considering a plea, and that they ultimately received an acquittal for Timothy. See *id.* at 820-21.

¹⁶⁴ See *id.*

¹⁶⁵ See *id.* at 821.

¹⁶⁶ See *supra* note 75 and accompanying text for the eight factors listed in the *Model Code* and the *Model Rules*.

novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly."¹⁶⁷ Based upon the testimony of four expert OUI witnesses,¹⁶⁸ the court determined that "the number of hours devoted to Timothy's OUI case by Fordham and his associates was substantially in excess of the hours that a prudent experienced lawyer would have spent" and could not be justified.¹⁶⁹ Moreover, the court found that Fordham's inexperience with criminal defense matters could not justify the amount charged.¹⁷⁰ The court cited EC 6-3 as a guiding principle that "a lawyer generally should not accept employment in any area of the law in which he is not qualified."¹⁷¹

¹⁶⁷ See *Fordham*, 668 N.E.2d at 821; see also S.J.C. RULE 3:07, DR 2-106(B)(1).

¹⁶⁸ The hearing committee considered the testimony of 10 expert witnesses, six of whom submitted statements in the form of affidavits and four of whom appeared in person to testify before the committee. See Respondent's Brief at 6, *Fordham* (No. SJC 06951). The Supreme Judicial Court addressed only the testimony of the four experts who testified in person before the committee. See *Fordham*, 668 N.E.2d at 821-22. Two of those experts were called by bar counsel and two were called by the respondent. See *id.* The court noted that the two experts called by Fordham testified that the fee charged was not clearly excessive. See *id.* at 822. One of the experts, however, testified that he had never spent more than 40 hours on an OUI case. See *id.* The other testified that she may have known of a case in which the attorney spent close to 100 hours, but in any event, she had never heard of an attorney charging a fee in excess of \$10,000 for a bench trial. See *id.* Both attorneys indicated that the circumstances of the case were not unusual, but that the theory that Fordham employed for the suppression of the Breathalyzer tests was novel. See *id.* The experts for bar counsel both indicated that the circumstances of the case were not difficult or unusual, and that the fee charged by Fordham was excessive. See *id.* at 821. Bar counsel's experts did testify, however, that Fordham's theory for the suppression of Breathalyzer results was novel, justifying more time, but not justifying nearly the time charged by Fordham. See *id.*

¹⁶⁹ See *Fordham*, 668 N.E.2d at 822.

¹⁷⁰ See *id.* at 822-23 (citing *In re Estate of Larson*, 694 P.2d 1051 (Wash. 1985)).

¹⁷¹ *Id.* at 823 (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-3 (1983)). Although Ethical Consideration 6-3 suggests that "a lawyer generally should not accept employment in any area of the law in which he is not qualified," the Ethical Consideration makes clear that the attorney "may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-3(1983); see *id.* DR 6-101(A)(1)(1983) (prohibiting an attorney from handling "a legal matter which he knows or should know that he is not competent to handle"); see also *Larson*, 694 P.2d at 1059 ("[C]lients should not be expected to pay for the education of a lawyer when he spends excessive amounts of time on tasks which, with reasonable experience, become matters of routine."). There was no indication that the court considered Fordham to have violated DR 6-101(A)(1) by undertaking the representation. The court merely used the Ethical Consideration as guidance in determining that Fordham's inexperience could not justify the high fee charged to Clark. See *Fordham*, 668 N.E.2d at 822-23.

The court next compared the fee charged with the fees customarily charged in the locality for the same or similar services.¹⁷² The court determined that the hearing committee failed to make any finding with regard to this factor.¹⁷³ Based on the testimony of the expert witnesses, the court determined that the fees for services in OUI cases ranged from \$1000 to \$35,000.¹⁷⁴

Finally, the court rejected the hearing committee's findings that the fee was not clearly excessive because Clark entered into the agreement with "open eyes," the fee fell within a "safe harbor" and Clark acquiesced in the fee by not strenuously objecting to the bills. Despite the fact that Clark was made fully aware of Fordham's lack of experience and need to "become familiar with the law in that area," and although Clark had the opportunity to interview other attorneys who were experts in OUI defense, the court determined that other factors were more significant.¹⁷⁵ For example, the court emphasized that the hearing committee found that "Clark did not appear to have understood in any real sense the implications of choosing Fordham."¹⁷⁶ Moreover, "Fordham did not give Clark any estimate of the total expected fee or the number of \$200 hours that would be required."¹⁷⁷ Thus, the court determined that Clark did not enter into the arrangement with "open eyes."¹⁷⁸

Critically, the court held that client consent was irrelevant to the question of whether the fee was reasonable.¹⁷⁹ "Bar counsel notes, and we agree, that '[t]he test as stated in . . . DR 2-106(A) is whether the fee "charged" is clearly excessive, not whether the fee is accepted as valid or acquiesced in by the client.'"¹⁸⁰

¹⁷² See *Fordham*, 668 N.E.2d at 822-23; see also S.J.C. RULE 3:07, DR 2-106(B) (3).

¹⁷³ See *Fordham*, 668 N.E.2d at 823.

¹⁷⁴ See *id.* One of the witnesses testified that customary flat fees in OUI defense cases ranged from \$1000 to \$7500, and that he had never before heard of a fee in excess of \$15,000. See *id.* Another witness testified that the customary fee ran from \$1500 to \$5000, and that he had never seen a fee over \$10,000 for an OUI bench trial. See *id.* A third witness testified that Fordham's fee was higher than any fee that she had ever encountered for similar services, that \$10,000 was the highest fee she had ever heard of (through a "rumor") and that the average fee for an OUI bench trial was about \$2000. See *id.* The final witness testified that he had heard of \$35,000 fees for defending OUI charges. See *id.*

¹⁷⁵ See *id.* (quoting findings of the hearing committee).

¹⁷⁶ *Id.* (quoting findings of the hearing committee).

¹⁷⁷ *Id.* (quoting findings of the hearing committee).

¹⁷⁸ See *Fordham*, 668 N.E.2d at 823-24.

¹⁷⁹ See *id.* at 824.

¹⁸⁰ *Id.* at 824.

If Fordham had been up on the latest Massachusetts cases, he might have thought he had little to worry about—just a few years before, the Supreme Judicial Court refused to interfere with a \$975,000 fee in an “open and shut” personal injury suit.¹⁸¹ In that case, the plaintiff's injury was catastrophic, liability undisputed and the defendant, Browning-Ferris Industries, financially capable of satisfying a judgment of any amount. The law conditioned a fee award on court approval, and the trial court refused to sanction a seven figure fee when the \$3,000,000 settlement had been achieved quickly; \$695,000, it said, was more appropriate.¹⁸² The Supreme Judicial Court reversed, holding that a negotiated fee was not subject to judicial interference.¹⁸³ Notwithstanding this precedent, Fordham found himself sanctioned.¹⁸⁴

B. In re Kutner

In *In re Kutner*,¹⁸⁵ the Illinois Supreme Court publicly censured an attorney for charging an excessive fee. *Kutner* involved facts somewhat similar to those in *Fordham*.¹⁸⁶ Mr. Kutner agreed to consult with William Fisher, who had been charged with battery by his sister-in-law on August 14, 1973.¹⁸⁷ Fisher had a special interest in hiring Kutner; apparently, Fisher's mother was aware of Kutner's reputation.¹⁸⁸ Fisher consulted with Kutner on August 28, 1973, for a \$250 fee.¹⁸⁹ Kutner explained that he would charge a \$5000 fee, in advance, for the whole case.¹⁹⁰ This was more than Fisher could afford to pay.¹⁹¹ A few days later, however, Fisher managed to borrow the money and Kutner took

¹⁸¹ See *Gagnon v. Shoblom*, No. 88-2105 (Mass. Super. Ct. Hampden Co., Feb. 20, 1990), *rev'd*, 565 N.E.2d 775 (Mass. 1991); see generally Lester Brickman, *A Massachusetts Debacle: Gagnon v. Shoblom*, 12 CARDOZO L. REV. 1417 (1991).

¹⁸² See *Gagnon*, 565 N.E.2d at 776.

¹⁸³ See *id.* at 777.

¹⁸⁴ See *Fordham*, 668 N.E.2d at 825; see also, e.g., *First Nat'l Bank v. Brink*, 361 N.E.2d 406, 411-12 (Mass. 1977) (upholding fee based on success of litigation which was more than seven times what hourly charges would have been, in spite of the absence of fee agreement); *Rubin v. Taylor*, 294 N.E.2d 544, 547 (Mass. App. 1973) (upholding large hourly fee in spite of limited success where lawyer warned client of possibility of lack of success and client decided to proceed).

¹⁸⁵ 399 N.E.2d 963 (Ill. 1979).

¹⁸⁶ See *id.*

¹⁸⁷ See *id.*

¹⁸⁸ See *id.* at 964.

¹⁸⁹ See *id.*

¹⁹⁰ See *Kutner*, 399 N.E.2d at 964.

¹⁹¹ See *id.*

the case.¹⁹² Kutner sent a colleague to attend a preliminary court date.¹⁹³ In court, the sister-in-law appeared and asked the judge to drop the charges, and the judge obliged.¹⁹⁴

Fisher regretted paying so much and sought to recover part of his fee, but Kutner declined.¹⁹⁵ A hearing board evaluating a complaint by the Illinois Attorney Registration and Disciplinary Commission ("ARDC") recommended that the complaint be dismissed, but the Review Board disagreed, as did the Illinois Supreme Court, and Kutner was found liable for charging an excessive fee.¹⁹⁶ The ARDC's expert proposed that a fee of \$750 to \$1250 would have been reasonable, that it was the custom to return a portion of the fee if the case was disposed of early and that the case was not particularly complex.¹⁹⁷

Justice Clark dissented:

While it is our duty to scrutinize lawyer-client dealings where an injustice has been done, I do not think we should pierce the veil of lawyer-client relations where no fraud or other wrongdoing has been shown. A client who voluntarily agrees to pay what he thinks a lawyer's services are worth should not be heard to complain when, after the lawyer has begun to prepare the case, the charges are dismissed. My opinion might be different had coercion, overreaching or deception been shown here. But those elements simply are not present.¹⁹⁸

The problem, according to Justice Clark, is that the value of legal services is difficult to measure.¹⁹⁹ "The majority has engaged in a subjective process by which it places an arbitrary value on legal services . . . its opinion says that a lawyer can voluntarily enter into an agreement with a client, based on the mutual agreement of the parties as to the worth of attorney's services, only to be second-guessed later on."²⁰⁰ Accordingly, the question should be left to individual clients.²⁰¹ "The

¹⁹² See *id.*

¹⁹³ See *id.*

¹⁹⁴ See *id.*

¹⁹⁵ See *Kutner*, 399 N.E.2d at 964.

¹⁹⁶ See *id.*

¹⁹⁷ See *id.* at 966.

¹⁹⁸ *Id.* at 967 (Clark, J., dissenting).

¹⁹⁹ See *id.*

²⁰⁰ *Kutner*, 399 N.E.2d at 967 (Clark, J., dissenting).

²⁰¹ See *id.*

negotiation of a fee should be left to the parties. A person may be willing to pay more for the services of a particular attorney at a particular time, when, however, under different circumstances, the attorney's time would not be as valuable."²⁰²

Just as in the *Fordham* case, there are reasons why a rational client would be willing to pay a premium price for the services of an attorney. Indeed, Kutner's record may be even more distinguished than Fordham's. Kutner entered the University of Chicago at fifteen years of age, clerked for Clarence Darrow, studied under Harold Lasswell and received his law degree at age twenty-one.²⁰³ He is credited with winning the release of more than 1000 prisoners around the world in the course of his career,²⁰⁴ including an African-American man who spent twenty years in prison after being framed for rape by the Ku Klux Klan.²⁰⁵ A one-time member of the faculty at Yale Law School,²⁰⁶ Kutner wrote numerous books and articles about various aspects of law,²⁰⁷ and represented notables including Ernest Hemingway, Pope Pius XII, the Dalai Lama, Ezra Pound, and Cardinal Joseph Mindszenty, prisoner of the Hungarian Communist regime.²⁰⁸ Kutner was nominated several times for a Nobel Peace prize and co-founded Amnesty International.²⁰⁹ He also developed the concept of the living will.²¹⁰

C. Were the Fees Unreasonable?

In *Kutner* and *Fordham*, the decisionmakers themselves were divided on whether any impropriety had occurred, suggesting that these

²⁰² *Id.* at 968.

²⁰³ See Charles McWhinnie, *Luis Kutner, 84; Lawyer Fought for Human Rights*, CHI. SUN TIMES, Mar. 3, 1993, at 66; *Obituary*, CHI. DAILY L. BULL., Mar. 3, 1993, at 1.

²⁰⁴ See *Obituary*, *supra* note 203, at 1.

²⁰⁵ See *United States ex rel. Montgomery v. Ragen*, 86 F. Supp. 382, 390-91 (N.D. Ill. 1949).

²⁰⁶ See ASSOCIATION OF AM. LAW SCHOOLS, DIRECTORY OF LAW TEACHERS 153 (1949).

²⁰⁷ See, e.g., THE HUMAN RIGHT TO INDIVIDUAL FREEDOM: A SYMPOSIUM ON WORLD HABEAS CORPUS (Luis Kutner ed., 1970) (contributors included Justices Brennan and Douglas).

²⁰⁸ See McWhinnie, *supra* note 203, at 66.

²⁰⁹ See *Obituary*, *supra* note 203, at 1.

²¹⁰ See, e.g., Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 808 n.23 (1993) (citing Luis Kutner, *Due Process of Euthanasia: The Living Will, A Proposal*, 44 IND. L.J. 539 (1969) as "the genesis of the living will idea").

were close cases.²¹¹ Indeed, it is not difficult to apply the factors and reach the conclusion that the fees were entirely justified, at least assuming that the reputation and freedom of the defendants were highly valuable.

In both cases, factor four, the amount involved and the results obtained, weighs in the lawyers' favor. The result was a complete victory for both clients on the criminal charges. If the amount involved is read as the importance of the case, then what is at stake is being deemed a criminal, a circumstance which could have significant financial, social, emotional and physical consequences for the clients. Additionally, factor seven, the experience, reputation and ability of the lawyer performing the services, justifies a high fee. It is hard to imagine two lawyers with better credentials and experience, if not necessarily in criminal law, at least in high-stakes litigation. Furthermore, factor three, the fee customarily charged in the locality for similar services, weighs in favor of the lawyers if the "similar services" are excellent litigation assistance in large, high-cost cities like Boston and Chicago. In that instance, the fees are entirely reasonable.

Factor one, the time and labor required, the novelty and difficulty of the legal questions involved and the skill requisite to perform the legal services properly, also arguably weighs in Fordham's favor, given that it was necessary for Fordham to investigate an area of law which had not received the kind of expert scrutiny he proposed to put into it.²¹² Factor one does not cut in Kutner's favor to the same extent. Kutner, however, was working on the basis of a flat fee. In this way Kutner's conduct is supported by the *Restatement*, which explains that the reasonableness of the fee must be evaluated in light of the agreement and expectations of the parties, including their allocation of risk. "A contingent-fee agreement . . . allocates to the lawyer the risk that the case will require much time and produce no recovery and to the client the risk that the case will require little time and produce a substantial recovery. Events within that range of risks, such as a high recovery, do not make unreasonable an agreement that was reasonable when made."²¹³ Similarly, a flat fee allocates to the lawyer the risk that the case will take much time, in exchange for a sum certain,

²¹¹ Cf. *Attorney Grievance Comm'n v. Wright*, 507 A.2d 618, 620 (Md. 1986) (holding that the prosecution failed to satisfy its burden of proof because six experts were evenly divided over whether fee was reasonable).

²¹² See *In re Fordham*, 668 N.E.2d 816, 821-22 (Mass. 1996).

²¹³ RESTATEMENT, *supra* note 20, § 46, cmt. at 161.

and allocates to the client the risk that the case will take little time, in exchange for assurance of representation for the entirety of the case.

This conclusion is supported by the Illustration to Section 46, which involves "Bank Clerk," charged with embezzlement, represented by "Lawyer" for a flat \$15,000 fee. If "[t]he next day another employee confesses to having taken the money, and the prosecutor (not knowing of Lawyer's retention by Bank Clerk) immediately drops the charges against Bank Clerk," some refund is due.²¹⁴ On the other hand, the mere fact that the case settles quickly pursuant to a guilty plea "would not render unreasonable an otherwise proper \$15,000 flat fee. A negotiated disposition without trial is a common event that parties are assumed to contemplate when they agree that the lawyer will receive a flat fee."²¹⁵ In short, among the various permitted systems of charging are hourly, contingent and flat fees. They are acceptable if fair when made, unless some unexpected event vitiates the agreement. Just as the lawyer is not permitted to look back from the conclusion of the representation and say "I wish I had charged by the method which gave me the greatest recovery," the client may not in-

²¹⁴ *Id.*

²¹⁵ *Id.* at 162. Of course, the illustration involves a settlement achieved by Lawyer on behalf of Bank Clerk, and, although in *Kutner* it is possible that the judge dismissed the case, and the prosecutor did not appeal, partly or entirely because a distinguished lawyer like Kutner was on the case, it is by no means certain. On the other hand, in the *Restatement's* illustration, it may well be that a more inexpensive lawyer or bank clerk acting alone could have achieved the same deal, yet the lack of evidence of causation does not vitiate the entitlement to the fee. Perhaps it is for this reason that the first example in the illustration relies on the fact that the prosecutor dropped the charges without knowing of Lawyer's retention by Bank Clerk to support the conclusion that Lawyer is due no fee. Once a lawyer formally becomes involved, it is always possible that the result is due, in part, to that involvement. This, indeed, was a foundation of Kutner's defense, that his client wanted to make the case go away by hiring a distinguished lawyer. See Reply Brief of Respondent at 3, *In re Kutner*, 399 N.E.2d 963 (No. 51608) (noting that Kutner's "prestige and commitment to a jury trial would be conveyed to the Complainant through [the client's] brother; and undoubtedly this would dissuade her from pressing the assault and battery case, which is precisely what happened"); *id.* at 5 (stating that the client "insisted that he wanted [Kutner] to impress his sister-in-law so she would dismiss the Complaint, which is what actually happened").

It also must be acknowledged that both *Fordham* and *Kutner* involved client complaints. Client grievances are common in criminal cases, probably because when clients lose, they are understandably reluctant to pay even for excellent services, and when they win, they find it hard to understand why they should pay for avoiding having an injustice visited upon them. Therefore, the fact that both clients wish they could have paid less for their victories is not necessarily dispositive. Cf. MICHAEL DORMAN, *KING OF THE COURTROOM* 213 (1969) (noting that clients' "gratitude . . . [o]ften . . . fades within hours of the jury's pronouncement of the words 'not guilty'").

sist that the only reasonable billing method is the one which, from hindsight, results in the lowest charge.²¹⁶

D. Class Structure in the Bar: Criminal Lawyers

In *Kutner* and *Fordham*, the clients were aware of available, less expensive alternatives. The courts seem to have said that the clients had no choice but to take them, or at least that *Kutner* and *Fordham* should not have charged much more than the cheap lawyers on pain of discipline. The major conceptual flaw in the opinions is that they fail to recognize that lawyers differ in ability, that better lawyers can sometimes achieve better results, and that better lawyers sometimes cost more than average ones.

The United States Supreme Court has rejected virtually every premise upon which the *Kutner* and *Fordham* decisions rest. It could be argued that there was no need to hire leading lawyers, because average lawyers would have done just as well. In 1963, the Court in *Gideon v. Wainwright* answered this by explaining that "there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses."²¹⁷ Of course, the best lawyer is not always the most expensive. Yet, the Supreme Court in 1989 in *Caplin & Drysdale v. United States* recognized that "the quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy."²¹⁸ Therefore, the idea that there is some relationship between the amount the lawyer is

²¹⁶ The Illinois Supreme Court in *Kutner* dismissed out of hand *Kutner's* appeal to "the law of fixed fees" by pointing out that "the time required to perform a legal task is a factor." 399 N.E.2d at 966. Thus, the court seemed to suggest that there was no difference for purposes of reasonableness analysis between a fee calculated on an hourly rate or one based on a flat fee. If flat fees are to be permitted at all, this cannot be correct. Indeed, in a later case, the court acknowledged that the fact that the fee in *Kutner* was calculated based on flat rate, among other circumstances, justified the minimal punishment *Kutner* received. See *In re Gerard*, 548 N.E.2d 1051, 1064 (Ill. 1989).

²¹⁷ 372 U.S. 335, 344 (1963).

²¹⁸ 491 U.S. 617, 630 (1989) (quoting *Morris v. Slappy*, 461 U.S. 1, 23 (1983) (Brennan, J., concurring in the result)); see also, e.g., JAMES W. COLEMAN, *THE CRIMINAL ELITE: THE SOCIOLOGY OF WHITE COLLAR CRIME* 178 (3d ed. 1994) ("Many former defendants have openly admitted that their ability to 'hire the best' was the decisive factor in their case. . ."); Jorge L. Carro & Joseph V. Hatala, *Recovered Memories, Extended Statutes of Limitations and Discovery Exceptions in Childhood Sexual Abuse Cases: Have We Gone Too Far?*, 23 PEPP. L. REV. 1239, 1266 (1996) (asserting that in some cases, "who wins may be determined only by who hires the best attorney(s)"); Carolyn Jin-Myung Oh, *Questioning the Cultural and Gender-Based Assumptions of the Adversary System: Voices of Asian-American Law Students*, 7 BERK. WOMEN'S L.J. 125, 164 (1992) (noting criticism that the justice system is "stacked in favor of the people who have the most assets, who can hire the best attorney").

being paid and the quality of the representation, though certainly not true in every case,²¹⁹ is well recognized.

The courts in *Fordham* and *Kutner* insisted that the cases were routine.²²⁰ Arguably, the routine nature of the actions should limit the permissible fee. The Supreme Court has recognized, however, that a relatively small penalty does not necessarily mean that the legal issues in the case are simple. In *Argersinger v. Hamlin*,²²¹ the Court recognized a right to counsel even in misdemeanor cases where imprisonment was possible, rejecting the notion that counsel was unnecessary in cases likely to be simple.²²²

We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more. . . . The trial of vagrancy cases is illustrative. While only brief sentences of imprisonment may be imposed, the cases often bristle with thorny constitutional questions.²²³

Many cases are intrinsically neither routine nor complex; much depends on whether the lawyers involved find the complexities and novelties which turn a routine loser into a viable case.²²⁴ Of course, an OUI, an assault or even a drug trafficking charge may well be viewed as routine from the perspective of a trial or appellate judge who participates in disposing of dozens or hundreds of such cases per year.

²¹⁹ For example, indigent criminal defendants represented without charge by the Public Defender Service of Washington, D.C. or the Legal Aid Society of New York, or civil rights litigants represented by the NAACP Legal Defense and Education Fund or the Southern Center for Human Rights may well receive service of a quality difficult to duplicate in the market.

²²⁰ See *Kutner*, 399 N.E.2d at 966; *In re Fordham*, 668 N.E.2d 816, 821 (Mass. 1996) (crediting testimony that there were "no unusual circumstances" in the case).

²²¹ 407 U.S. 25 (1972).

²²² See *id.* at 33.

²²³ *Id.* (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972)).

²²⁴ Many United States Supreme Court cases have involved "routine" misdemeanor convictions. See, e.g., *Nichols v. United States*, 511 U.S. 738 (1994) (uncounselled misdemeanor conviction can be used to increase punishment at subsequent trial); *United States v. Munoz-Flores*, 495 U.S. 385 (1990) (misdemeanor fine did not violate constitutional requirement that revenue-raising bills originate in the House of Representatives); *Butterworth v. Smith*, 494 U.S. 624 (1990) (misdemeanor statute prohibiting disclosure of public records unconstitutional); *Hunter v. Underwood*, 471 U.S. 222 (1985) (disenfranchisement for misdemeanor offense of moral turpitude unconstitutional under the circumstances); *Jones v. Helms*, 452 U.S. 412 (1981) (misdemeanor conviction for abandoning children did not unconstitutionally infringe right to travel).

The fact that the system treats some kinds of criminal cases as routine does not mean that it is either strategic or mandatory for defendants and their attorneys to do the same.²²⁵

The Supreme Court is correct in the assertion that the quality of lawyering makes a difference. Many courts have recognized that "[l]awyers are not fungible."²²⁶ Those in the best position to know, law firms and sophisticated individuals, are willing to pay premium prices to hire firms such as Covington & Burling, or Skadden, Arps, Slate, Meagher & Flom, or Foley, Hoag & Eliot; those firms in turn willingly pay premium prices to hire the individual attorneys they deem most promising, even though in both instances there are cheaper alternatives. As Professor Hazard put it, "in high level law practice relatively small differences in competence can make a substantial difference in the results achieved for a client, just as small differences in ability make a big difference in result in competitive sports."²²⁷ Part of the difference may be "snob appeal," and some clients may irrationally pay more than necessary.²²⁸ A large part of the explanation, however,

²²⁵ See, e.g., JAY G. FOONBERG, FINDING THE RIGHT LAWYER 201 (1995) ("All criminal accusations should be taken most seriously.").

²²⁶ *Barham v. State*, 641 N.E.2d 79, 82 (Ind. Ct. App. 1994); see also *Robins v. United States*, 404 U.S. 1049, 1052 (1972) (Brennan, J., joined by Douglas & Marshall, JJ., dissenting from denial of certiorari); *United States v. Rankin*, 779 F.2d 956, 959 (3d Cir. 1986) (relying on notion that "lawyers are not 'fungible'" to support conclusion that refusal to grant continuance violated defendant's right to counsel); *Boulas v. Superior Court*, 233 Cal. Rptr. 487, 491 (Ct. App. 1986) (noting that "[c]riminal defense lawyers are not fungible").

²²⁷ HAZARD, *supra* note 81, at 102; see also FOONBERG, *supra* note 225, at 115; ROBERT L. NELSON, PARTNERS WITH POWER 143 (1988) ("Much of the associate's work, such as research, drafting, and reviewing documents, requires general skills and intelligence. Yet there is enormous variation in the quality with which those tasks are performed . . .").

²²⁸ See ARONSON, *supra* note 79, at 4; Lionel R. Barrett, *The Ten Commandments of Setting and Collecting Attorneys' Fees in Criminal Cases*, THE CHAMPION, Aug. 1983, at 3, quoted in HALL, *supra* note 96, § 7:2, at 157. In the hiring context, at one time gender, race, appearance and social background mattered as much or more than academic record and ability. See S. S. Samuelson & L. Fahey, *Strategic Planning for Law Firms: The Application of Management Theory*, 52 U. PITT. L. REV. 435, 445 (1991). Studies have indicated that clients, or potential clients, do not seek out attorneys based on the cost of their services. Clients choose attorneys based on their perceptions of the attorney's competence and on their perceptions of the attorney's interest in their case. Clients want the best attorneys that they can afford, not the least expensive. See ABA SEC. OF CRIM. JUST., *Exploring the Labyrinth of Fee Setting*, in HOW TO SET AND COLLECT ATTORNEY FEES IN CRIMINAL CASES 13, 14 (1985). Moreover, as illustrated by Professor Jethro Lieberman in his book *Crisis at the Bar*, this sort of counterintuitive rationale may often be taken a step further in order to justify, in the minds of both attorneys and their clients, fees that seem unrelated to value. See LIEBERMAN, *supra* note 82, at 107-08. Lieberman notes a story discussed in Joseph Goulden's *The Superlawyers*. See JOSEPH C. GOULDEN, THE SUPERLAWYERS 100-02 (1972). According to Goulden's story, in 1959 the Revlon Corporation was under investigation as a sponsor of

is that good "[l]egal services cost a lot because good legal services are in high demand and limited supply."²²⁹

Excellence does not necessarily mean having a great deal of experience in a particular area of the law. Of course the ideal lawyer is one who is exceedingly brilliant and specializes in handling precisely the type of matter in the very court where the action is pending. If this lawyer is unavailable, few sensible clients would choose an experienced plodder over the brilliant generalist; it is widely recognized that the most important factor which makes a lawyer excellent is good judgment.²³⁰ As the Comments to the *Model Rules* explain: "Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge."²³¹ All other things being equal, it would be foolish to pass over a lawyer who had the knack of finding a way to win in favor of one who was very experienced but had an average record of success. As Dean Anthony Kronman lyrically explained:

The purpose of a legal education is not to produce experts, as many nonlawyers wrongly believe. It is to train law stu-

the discredited television show, the "\$64,000 Question." See *id.* at 100-01. Charles Revson, the head of Revlon, was originally represented by Max Kampelman, a politically connected Washington lawyer, who subsequently referred Revson to Clark Clifford, another well-connected attorney. See *id.* Clifford charged Revson \$25,000 for only a "handful" of hours spent on the case, achieving no particular result on Revson's behalf. See *id.* at 101. According to Lieberman, the justification for the \$25,000 fee was Clifford's reputation. See LIEBERMAN, *supra* note 69, at 108. Clifford's reasoning behind the \$25,000 fee for his reputation, which was, in the end, of little use to Revson, was as follows:

When Revson gets the bill, he'll cuss and call me a son of a bitch and the whole business. But he'll pay it. And next year, when he's down in Miami Beach playing gin rummy with his buddies, he'll talk about his 'friend Clark Clifford' and his 'lawyer Clark Clifford,' and how much the so-and-so charged him—and it'll be worth \$25,000 to him.

Id. (quoting GOULDEN, *supra*, at 101-02). Thus, apparently to some, a high fee itself embodies certain value.

²²⁹ HAZARD, *supra* note 81, at 101.

²³⁰ See, e.g., Michael Livingston, *Confessions of an Economist Killer: A Reply to Kronman's "Lost Lawyer"*, 89 NW. U. L. REV. 1592, 1614 (1995) (noting that even for "tax and other business lawyers . . . creativity and judgment are already as important as technical skill"); James B. Loken, *A Tribute to Anne Simonett*, 21 WM. MITCHELL L. REV. 347, 347 (1995) ("[T]he great lawyers all have those qualities of good judgment, common sense, and what we loosely refer to as people skills."); Irwin P. Stotzky, *James Mofsky's Moral Vision*, 45 U. MIAMI L. REV. 11, 12 (1990) (noting that the departed attorney had "the one absolutely essential quality of a great lawyer—good judgment").

²³¹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 cmt. (1983).

dents, as the saying goes, to think like lawyers. . . . The clever lawyer, who possesses a huge stockpile of technical information about the law and is adept at its manipulation, but who lacks the ability to distinguish between what is important and what is not and who cannot sympathetically imagine how things look and feel from his adversary's point of view, is not a good lawyer. He is, in fact, a rather poor lawyer who is more likely to do his clients harm than good. The good lawyer—the one who is really skilled at his job—is the lawyer who possesses the full complement of emotional and perceptual and intellectual powers that are needed for good judgment, a lawyer's most important and valuable trait.²³²

Dean Kronman's view is supported by a great deal of evidence. Many of the best lawyers are not narrow experts specializing in repeated treatment of routine matters, but are generalists, or have a fairly broad specialty. For example, the Solicitor General's office is composed of generalists, and every distinguished judge by necessity has worked on a variety of subject matter areas. Perhaps more importantly, many or most lawyers who might plausibly be on a list of the best in modern American history—Floyd Abrams,²³³ Louis Brandeis,²³⁴ Johnnie Cochran,²³⁵ Clarence Darrow,²³⁶ John W. Davis,²³⁷ Jo-

²³² Anthony T. Kronman, *Chapman University School of Law Groundbreaking Ceremony*, 1 CHAPMAN L. REV. 1, 4-5 (1998).

²³³ See, e.g., *Varity Corp. v. Howe*, 516 U.S. 489 (1996) (ERISA); *Time Warner Cable v. Bloomberg L.P.*, 118 F.3d 917 (2d Cir. 1997) (cable television franchise contract); *Tilton v. Capital Cities/ABC, Inc.*, 115 F.3d 1471 (10th Cir. 1997) (libel); *Johnson v. State*, 547 So. 2d 59 (Miss. 1989) (criminal).

²³⁴ See, e.g., *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 (1912) (tort); *Muller v. Oregon*, 208 U.S. 412 (1908) (women's wage and hour regulation); *Murphy v. Massachusetts*, 177 U.S. 155 (1900) (criminal).

²³⁵ See, e.g., *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613 (10th Cir. 1998) (personal injury); *In re Pratt*, 82 Cal. Rptr. 2d 260 (Ct. App. 1999) (criminal); *Colome v. State Athletic Comm'n*, 55 Cal. Rptr. 2d 300 (Ct. App. 1996) (boxing license); *Cobb v. University of S. Cal.*, 38 Cal. Rptr. 2d 543 (Ct. App. 1995) (discrimination/breach of contract).

²³⁶ See, e.g., *Wheeler v. Chicago & W. Ind. R.R. Co.*, 108 N.E. 330 (Ill. 1915) (co-counsel with Edgar Lee Masters in personal injury case); *Western Town Lot Co. v. Pettigrew*, 168 N.W. 30 (S.D. 1918) (title to land); *Scopes v. State*, 289 S.W. 363 (Tenn. 1927) (criminal conviction for teaching evolution); *State v. Winters*, 145 A. 413 (Vt. 1929) (first degree murder).

²³⁷ See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (supporting segregation in education); *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954) (administrative law/water rights); *Far E. Conference v. United States*, 342 U.S. 570 (1952) (antitrust); *People v. Kressel*, 277 N.Y.S. 168 (App. Div. 1935) (criminal).

seph Flom,²³⁸ Ruth Bader Ginsburg,²³⁹ Joe Jamail,²⁴⁰ Arthur Liman,²⁴¹ Thurgood Marshall,²⁴² Gerry Spence,²⁴³ Lawrence Tribe,²⁴⁴ Edward Bennett Williams,²⁴⁵ Charles Alan Wright²⁴⁶—are or were generalists, or had fairly broad specialties like litigation; few were specialists in some narrow, technical field where they handled a high volume of repetitive cases.²⁴⁷ Thus, telling certain clients that their class excludes them from access to high-priced legal talent is not necessarily the

²³⁸ See, e.g., *United States v. Dennis*, 183 F.2d 201, 205 (2d Cir. 1950) (criminal), *aff'd*, 341 U.S. 494 (1951); *American Cyanamid Co. v. Elizabeth Arden Sales Corp.*, 331 F. Supp. 597, 599 (S.D.N.Y. 1971) (breach of contract); *Rushton Co. v. F.W. Woolworth*, 135 F. Supp. 17, 18 (S.D.N.Y. 1955) (copyright).

²³⁹ Although the cases that Justice Ginsburg handled in practice have an anti-sex discrimination theme (if the published opinions are typical), they draw on the application of a variety of subject matter areas. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977) (Social Security benefits); *Kahn v. Shevin*, 416 U.S. 351 (1974) (tax); *Missouri v. National Org. for Women*, 620 F.2d 1301 (8th Cir. 1980) (antitrust).

²⁴⁰ See, e.g., *Ferrero v. United States*, 603 F.2d 510 (5th Cir. 1979) (personal injury); *Youngblood v. United States*, 507 F.2d 1263 (5th Cir. 1975) (per curiam) (tax); *Pennzoil Co. v. Texaco Inc.*, 729 S.W.2d 768 (Tex. Ct. App. 1987) (tortious interference with contract); *InterFirst Bank-Houston v. Quintana Petro. Corp.*, 699 S.W.2d 864 (Tex. Ct. App. 1985) (breach of fiduciary duty by trustees).

²⁴¹ See, e.g., *United States v. D'Amato*, 39 F.3d 1249 (2d Cir. 1994) (criminal); *In re American Express Co. Shareholder Litig.*, 39 F.3d 395 (2d Cir. 1994) (shareholder derivative action); *Chase Manhattan Bank v. T&N PLC*, 905 F. Supp. 107 (S.D.N.Y. 1995) (asbestos); *Agee v. Paramount Communications, Inc.*, 869 F. Supp. 209 (S.D.N.Y. 1994) (copyright).

²⁴² See, e.g., *Lyons v. Oklahoma*, 322 U.S. 596 (1944) (criminal); *Smith v. Allwright*, 321 U.S. 649 (1944) (voting rights); *Alston v. School Bd.*, 112 F.2d 992 (4th Cir. 1940) (discriminatory teacher salaries); *James v. Marinship Corp.*, 155 P.2d 329 (Cal. 1944) (labor).

²⁴³ See, e.g., *Pickering v. USX*, 801 F. Supp. 1501 (D. Utah 1992) (ERISA); *United States v. Marcos*, SSSS 87 CR. 598 (JFK), 1990 WL 29368 (S.D.N.Y. Mar. 9, 1990) (criminal); *Dworkin v. L.F.P., Inc.*, 839 P.2d 903 (Wyo. 1992) (libel/First Amendment).

²⁴⁴ See, e.g., *United States v. Gallo*, 859 F.2d 1078 (2d Cir. 1988) (criminal); *Grendle's Den, Inc. v. Goodwin*, 495 F. Supp. 761 (D. Mass. 1980) (First Amendment); *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420 (Tex. 1997) (product liability); *In re Initiative Petition No. 349*, 838 P.2d 1 (Okla. 1992) (abortion rights).

²⁴⁵ See, e.g., *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585 (1985) (antitrust); *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n*, 836 F.2d 599 (D.C. Cir. 1988) (FCC regulations); *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987) (libel); *United States v. Posner*, 694 F. Supp. 881 (S.D. Fla. 1988) (criminal tax).

²⁴⁶ See, e.g., *Ruhrgas v. Marathon Oil*, 119 S. Ct. 1563 (1999) (federal civil procedure); *Bush v. Texas*, 372 U.S. 586 (1963) (criminal); *Hopwood v. Texas*, 999 F. Supp. 872 (W.D. Tex. 1998) (affirmative action).

²⁴⁷ Of course, senior partners at elite firms may have only intermittent involvement in cases which bear their name as counsel, but this proves the point. Because judgment may be the most important quality in the law, it may be useful to have a brilliant lawyer involved, even at a high price, just for a few hours of participation in overall strategy or key decisions. It also suggests that a lawyer with good judgment can apply it beyond a narrow subspecialty of law.

product of a wise and benign paternalism, preventing the poor from frittering away their savings on trifles. Instead, it can deny them access to some of the most sophisticated and successful practitioners.

In addition to the quality of the attorney, another major factor in the cost of legal services is the level of effort the lawyer puts into it. For example, even a nationally famous lawyer may be able to offer modestly priced representation in a large and complex matter if that lawyer's work is limited, say, to writing a letter to the adversary in an attempt to resolve the dispute. Performing complete discovery and taking that same case to trial might cost a hundred or a thousand times more. While any lawyer can quickly and cheaply lose even the most difficult case, finding a way to win a difficult case takes time, which costs money. In *Fordham*, the attorneys the client first contacted proposed to lose quickly and cheaply; the so-called "specialists" who quoted low fees viewed the case as a loser and advised the defendant to plead guilty.²⁴⁸ This may be a reasonable choice for some defendants, but the *Fordham* decision means that it is the only choice.

There is another approach to litigation, one which involves leaving no potentially helpful fact uninvestigated, no promising legal angle unresearched. As Professor Hazard put it,

[i]f . . . legal services . . . are hand-tailored to individual situations, they will be expensive for the same reason that surgery, portraiture, custom haberdashery, and haute cuisine are expensive. If legal services can be purchased in a form that is standardized, they can be made cheaper, for the same reason that fluoride dental therapy, rack suits, and McDonald's hamburgers are inexpensive.²⁴⁹

An excellent lawyer spending a lot of time on a case has a better chance of winning than a lawyer of average ability spending less time, who in turn is likely to do better than a bargain basement lawyer trying the case by the seat of the pants.²⁵⁰

²⁴⁸ See Brief of Respondent at 27 n.6, *In re Fordham*, 668 N.E.2d 816 (Mass. 1996) (No. SJC 06951).

²⁴⁹ HAZARD, *supra* note 81, at 105.

²⁵⁰ The legendary Percy Foreman reportedly represented more than 1000 accused murderers, of whom fewer than 55 spent even one day in prison. See DORMAN, *supra* note 215, at xi-xii. One way he achieved this record of success was through preparation.

Almost any expert questioned about Foreman invariably mentions one elementary ingredient of his style: when he enters the courtroom, he knows more about the case than anyone else. It is this knowledge—the result of hour upon hour of behind-the-scenes preparation—which enables Foreman

The classic example of one model of law practice is civil practice at elite law firms for corporate clients; able and energetic attorneys work tirelessly to achieve the goals of their clients and are well-compensated for their labors. An elite firm "charges top-dollar prices to corporations for high-quality, custom service."²⁵¹ Firms engage in "aggressive pursuit of client interests."²⁵² In sum, "the large firm expresses the attempt to combine status, expertise, and efficiency in order to provide business with the highest quality legal representation."²⁵³ As a result, their clients can expect the best possible results.

By contrast, at its worst, criminal practice may offer none of these benefits to clients. For decades, criminal defense has not been regarded as a prestigious or desirable practice area.²⁵⁴ It also tends not

to be such a tiger at cross-examination. His quick mind helps, of course. But far more important is his awareness of the background of every witness, every officer, every attorney, every judge, every juror involved in the case. Such awareness, coupled with a sixth sense that is the hallmark of every fine trial lawyer, enables him to gauge almost instinctively when to hammer, when to coddle, when to feign boredom.

Id. at 133-34. Compare Joel F. Henning, *Quality Assurance: Much More than Minimizing Malpractice* 4, in *THE QUALITY PURSUIT: ASSURING STANDARDS IN THE PRACTICE OF LAW* (Robert Michael Greene ed., 1989) ("The standard of excellence means working with each client to create and carry out strategies for succeeding in the client's arena—not the lawyer's.") with Maute, *supra* note 8, at 799 ("Lawyers who depend on high volume for routine matters frequently run all cases through the same mill, providing minimal genuine representation. . . . [T]he legal system literally disenfranchises the poor and working poor, who must stand in line for limited patchwork representation by overworked legal services lawyers or public defenders."), and Chan, *supra* note 35, at 627 ("[B]ecause the key benefit of flat fees is 'the institution of standardized, pre-packaged groupings of cases and controversies,' the grouping of cases and homogeneity of treatment will diminish the frequency of individualized and nuanced presentations of fine legal points.") (quoting Sarah Evans Barker, *How the Shift From Hourly Rates Will Affect the Justice System*, 77 JUDICATURE 201, 202 (1994)).

²⁵¹ NELSON, *supra* note 227, at 214.

²⁵² *Id.* at 269.

²⁵³ *Id.* at 286.

²⁵⁴ For example, one historian reports that in Massachusetts "as early as 1891 elite lawyers began a headlong rush to abandon criminal practice." Alan Rogers, "A Sacred Duty": *Court Appointed Attorneys in Massachusetts Capital Cases, 1780-1980*, 41 AM. J. LEGAL HIST. 440, 441 (1997); see also, e.g., JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 93 (1982) (noting that criminal defense is "low prestige"); Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 245 (1997) ("the professional status of the criminal lawyer tends to be low") (citations omitted); William J. Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181, 211 (1984) (working conditions and pay make criminal practice unattractive to law students); John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOC'Y REV. 751 (1998); Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for*

to pay well. This may mean that the most promising new lawyers choose not to go into the field; those at the low end may be "recent law school graduates looking for experience, and . . . more 'experienced' but marginally competent attorneys who need the income."²⁵⁵

Moreover, the circumstances of most criminal defendants do not lend themselves to satisfying relations with their lawyers; "[c]riminal defendants, except for the organized and white-collar crime elites, lack the money, status or power that makes some lawyers listen to clients."²⁵⁶ That is, they are susceptible to being strong-armed by their lawyers.²⁵⁷ Accordingly, although as a technical matter blue-collar criminal defendants are entitled to the same zealous advocacy as mobsters, white-collar defendants or people with large civil cases, clients who can offer their lawyers little or nothing in the way of fees often get what they pay for.²⁵⁸

Further, "[m]ost defense lawyers practice under fee arrangements—a lump sum fee paid in advance, or a modest salary from a public defender's office—that provide smaller incentives to diligence than hourly or contingent fees."²⁵⁹ One criminal lawyer reports that "a significant percentage of cases can be successfully defended with adequate effort," but that large numbers of clients may make this impos-

Reform, 32 AM. CRIM. L. REV. 743, 810 (1995); Ralph Slovenko, *Attitudes on Legal Representation of Accused Persons*, 2 AM. CRIM. L.Q. 101 (1964) (low pay and low prestige make criminal practice unattractive to students).

²⁵⁵ See Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 33 (1995); see also Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 796 (1994) (noting that the typical criminal defendant "rarely hires the best lawyer").

²⁵⁶ See John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 137 (1995). See generally Michelle S. Jacobs, *Legal Professionalism: Do Ethical Rules Require Zealous Representation for Poor People?*, 8 ST. THOMAS L. REV. 97 (1995).

²⁵⁷ See Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 59 (1998). Professors Uphoff and Wood note that:

[M]any criminal defense lawyers still believe that as the "captain of the ship . . . 'it is counsel, not defendant, who is in charge of the case.'" Most lawyers also believe that they generally have the right to control trial tactics and strategy even in the face of the defendant's contrary opinion or explicit objection."

Id. (citations omitted); see also Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 GEO. J. LEGAL ETHICS 1101 (1996).

²⁵⁸ See, e.g., Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 48 RUTGERS L. REV. 281, 334 (1991) ("The best lawyers come at a certain price, as do the mediocre.").

²⁵⁹ Leubsdorf, *supra* note 256, at 137.

sible.²⁶⁰ The deferential test for ineffective assistance of counsel upholds convictions which follow even extremely poor defense lawyering.²⁶¹ As a consequence, even terrible lawyering is judicially acknowledged as acceptable.

The typical criminal defendant is represented by a mediocre lawyer, who is being paid little for the case. Because the client has no economic leverage, the lawyer may have little reason to consult with the client, and may be willing to spend little time designing and executing the strategy pursuant to which the case can best be defended. As a consequence, cases which could have been won are lost. It is hard to blame Clark and Fisher for refusing to hire lawyers under these circumstances, instead pursuing other alternatives which, they correctly judged, held out greater prospects for success.

Fordham was sanctioned for employing the customs of civil practice in a criminal case. He used the honorable legal techniques of diligence and creativity, and as a result came up with a novel approach which defeated a very strong prosecution case. In exchange for his best efforts, he charged a substantial hourly wage. The winning legal claim was based on nuances of OUI law, with which one might hope OUI specialists would be familiar. Consistent with the minimalist lawyering, however, which sometimes occurs in criminal cases, none of the supposed specialists had even heard of the argument in the context of their own practices.²⁶² Clark correctly concluded that Fordham, with absolutely no experience, was the best OUI lawyer in Boston because he was smart and would try to win the case.

The court faulted Fordham for using an elite civil firm approach in a criminal case, explaining: "Fordham's inexperience in criminal defense work and OUI cases cannot justify the extraordinarily high fee. It cannot be that an inexperienced lawyer is entitled to charge three or four times as much as an experienced lawyer for the same service."²⁶³ What the court failed to mention at this point was that all

²⁶⁰ See John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1221 (1994).

²⁶¹ See, e.g., Dripps, *supra* note 254; William S. Geigner, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL OF RTS. J. 91 (1995); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L. Q. 625 (1986).

²⁶² See, e.g., Brief of Respondent at 26 n.5, *In re Fordham*, 668 N.E.2d 816 (Mass. 1996) (No. SJC 06951) (stating that attorney hired was only attorney consulted who recognized and developed "novel" approach to OUI defense).

²⁶³ *Fordham*, 668 N.E.2d at 822-23.

of the OUI specialists in the case considered the case a loser.²⁶⁴ The lawyers Clark consulted advised him to plead guilty. The prosecution and defense experts at the disciplinary hearing said that if they were handling the case, they would have charged much less, would not have made the winning argument and would have expected to lose the case and see Timothy Clark convicted.²⁶⁵ Since losing quickly and cheaply was the way the lawyers Clark consulted would have chosen to handle the case, that is what the court insisted Fordham should have done, under pain of sanction.

The criminal justice system may customarily treat OUIs and other criminal matters as routine, in Professor Anthony Alfieri's formulation, as part of a "formulaic and mechanical convention devised to process individual cases on a mass scale."²⁶⁶ But the usual treatment should not mean that clients are required to accept minimally adequate assistance if they have a choice.

From the client's perspective . . . the matter is hardly routine. Certainly in the context of a criminal prosecution, even at the misdemeanor level, matters should not be treated as routine. Does the fact that a lawyer has handled twenty worthless check misdemeanor cases one day mean that the twenty-first is entitled to only a perfunctory handling? . . . [I]f clients are presented with the choice of having only minimally adequate service or full service, clients will presumably choose full service.²⁶⁷

The court's opinion suggested that it did not understand how the process of winning works, that is, for example, the process of finding novel legal arguments. The court cited a witness who said that the total time spent on the case, up to trial, including finding and briefing the Breathalyzer argument should have been twenty to thirty hours. But a lawyer trying to win a case rather than just going through the motions cannot skip straight to the winning argument. As Thomas

²⁶⁴ See *id.* at 821-22.

²⁶⁵ See *id.* The Board of Bar Overseers Hearing Committee also found that "[g]iven the evidence against [the client], including the Breathalyzer, a two-thirds empty bottle of Vodka and a failed sobriety test, [acquittal] was a significant result." See Petition for Certiorari at 55a, *Fordham v. Massachusetts Bar Counsel*, 519 U.S. 1149 (1997) (No. 96-946).

²⁶⁶ Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 685 (1987-88); see also James E. Brill, *Frequent Flyer*, 80 A.B.A. J., Mar. 1994, at 85 (noting that lawyers sometimes inappropriately trivialize client's lives by describing legal problems as "simple" or "routine").

²⁶⁷ Jacobs, *supra* note 256, at 101.

Edison said, "[g]enius is one percent inspiration and ninety-nine percent perspiration";²⁶⁸ in order to find the winning point, the lawyer must identify a number of possible issues, research each one of them by reading cases and investigating the facts, and come to a conclusion about which are the most promising. No lawyer in the world could have picked up the O.J. Simpson case file, flipped through it for five minutes, and announced "try to get Chris Darden to make him put on the bloody gloves—that's how to win this case." That is just not how law—or any other creative endeavor—works. Litigation associates in large firms can bill 2500 or 3000 hours per year or more. They work hard, for the most part, not because they are unintelligent or want to run up the client's bill, but because they are trying to find a way to win. How remarkable that the Supreme Judicial Court held that an "inexperienced" lawyer who could win is not entitled to charge three or four times as much as "experienced" lawyers who explained from the first that they could not win, or, what the court really held: that a blue-collar client is simply not entitled to hire a lawyer who has the determination and ability to win a case, that they must hire the cheaper lawyer who has promised to lose.

Disciplining excellent lawyers like Kutner and Fordham will reinforce the status quo. In part these decisions, principal cases in several leading texts,²⁶⁹ do this by sending a message that the criminal problems of ordinary people are unworthy of the attention of elite practitioners. More importantly, good-faith fees in other practice areas are not regulated through discipline as in the criminal area. In other areas, fees and standards are permitted to change over time. It may be, for example, that changes in tax law, family law and available legal vehicles mean that competent preparation of an estate plan for a family in 1999 will be much more complicated, and much more expensive, than would comparable advice in 1979. Practitioners in that field

²⁶⁸ Thomas Alva Edison, *quoted in* BARTLETT'S FAMILIAR QUOTATIONS 555 (Justin Kaplan ed., 16th ed. 1992).

²⁶⁹ See, e.g., GEOFFREY C. HAZARD ET AL., *THE LAW AND ETHICS OF LAWYERING* 490-99 (3d ed. 1999) (excerpting and discussing *Fordham*); JAMES E. MOLITERNO, *CASES AND MATERIALS ON THE LAW GOVERNING LAWYERS* 136 (2000) (excerpting and discussing *Kutner*); DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 686-93 (2d ed. 1995) (excerpting and discussing *Kutner*); JOHN F. SUTTON & JOHN S. DZIENKOWSKI, *CASES AND MATERIALS ON THE PROFESSIONAL RESPONSIBILITIES OF LAWYERS* 371-74 (1989) (excerpting *Kutner*); see also GILLERS, *supra* note 116, at 138-39 (discussing *Fordham*); THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS* 141 (7th ed. 2000) (discussing *Fordham*); MAYNARD E. PIRSIC & KENNETH F. KIRWIN, *CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* 442 n.b (4th ed. 1984) (citing *Kutner*).

who offer more, do more, and *charge* more have no reason to fear discipline. Cases like *Fordham* help ensure that fees in criminal cases stay low, and that the minimalist customs of criminal representation do not change. An attorney who goes beyond bare-bones lawyering in a criminal case risks sanctions. This cannot be the intent of a set of rules designed to guide the ethical behavior of lawyers.²⁷⁰

Attorneys who know that they will be precluded from receiving adequate compensation may refrain from undertaking criminal cases, and, "[o]ver the long haul, the result of lowered compensation levels will be that talented attorneys will 'decline to enter criminal practice. . . . This exodus of talented attorneys could devastate the criminal defense bar.'"²⁷¹ Moreover,

[t]he right to privately chosen and compensated counsel also serves broader institutional interests. "The virtual socialization of criminal defense work in this country" that would be the result of a widespread abandonment of the right to retain chosen counsel . . . too readily would standardize the provision of criminal-defense services and dimin-

²⁷⁰ The preambles to both the *Model Code* and the *Model Rules* set out the overall objectives and design of each code. The *Model Code* urges that

[w]ithin the framework of [fundamental ethical] principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society. . . . Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1980) (endnote omitted) (citing Elliott E. Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 UCLA L. REV. 438, 440 (1965)). The *Model Rules* provide that "[a]s a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession." MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983). Moreover, the preamble to the *Model Rules* states that "[a] lawyer should strive to attain the highest level of skill, to improve the law and the legal profession." *Id.* Under the reasoning of the *Fordham* court, the goals of the *Model Code* and *Model Rules* as outlined in their respective preambles are clearly compromised by, in effect, prompting individuals to forgo "blue chip" representation in favor of bare-bones attorneys.

²⁷¹ *Caplin & Drysdale v. United States*, 491 U.S. 617, 646-47 (1989) (Blackmun, J., dissenting) (citation omitted). In *Caplin & Drysdale*, Justice Blackmun noted that "even the best intentioned of attorneys may have no choice but to decline the task of representing defendants in cases for which they will not receive adequate compensation." *See id.* at 647; *cf. In re Kindhart*, 160 F.3d 1176, 1177, 1178 (7th Cir. 1998) (characterizing sufficiency of bankruptcy fees as "an important matter not only to attorneys, but to the courts and the public," and reversing low fee award because "the consequences of continued unreasonably low fees might affect the rendering of prompt and good legal services").

ish defense counsel's independence. There is a place in our system of criminal justice for the maverick and the risk taker and for approaches that might not fit into the structured environment of a public defender's office, or that might displease a judge whose preference for nonconfrontational styles of advocacy might influence the judge's appointment decisions. . . . There is also a place for the employment of "specialized defense counsel" for technical or complex cases. . . . The choice of counsel is the primary means for the defendant to establish the kind of defense he will put forward.²⁷²

The low quality of counsel and low fees will reinforce each other. As good lawyers disdain criminal practice, the average low quality may lead courts and legislatures to believe that defense lawyers deserve at most low fees. As criminal defense lawyers receive low fees, future lawyers will have even less incentive to enter the area. These unfortunate circumstances may not entirely be the fault of the Illinois and Massachusetts supreme courts, but there is no reason that courts should embrace them as positive law.

III. SIXTH AMENDMENT RIGHT TO RETAIN COUNSEL OF CHOICE

The Illinois and Massachusetts supreme courts have explained to blue-collar criminal defendants that they may not "bid against other [clients] for the services of the ablest and most experienced attorneys, whose expertise may make the difference between success and failure";²⁷³ instead, such defendants are required to hire bargain basement lawyers even if they want and can manage to pay more expensive ones, and even if the lack of expert counsel means they will be convicted of crimes. It is ironic that the leading decisions on unreasonable fees are criminal cases, because depriving defendants of counsel of choice in this particular context is not just unwise and unfair, it is unconstitutional.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."²⁷⁴ This clause is commonly associated with the interpretation guaranteeing indigent defendants the right to ap-

²⁷² *Caplin & Drysdale*, 491 U.S. at 647 (Blackmun, J., dissenting) (citations omitted).

²⁷³ See *In re Boston & Maine Corp.*, 778 F.2d 890, 898 (1st Cir. 1985) (Campbell, C.J., joined by Breyer & Rubin, JJ.) (citations omitted).

²⁷⁴ U.S. CONST. amend. VI.

pointed counsel, recognized in capital cases by the United States Supreme Court's decision in *Powell v. Alabama*.²⁷⁵ Although there exists "neither in the Congress which proposed what became the Sixth Amendment guarantee . . . nor in the state ratifying conventions . . . any indication of the understanding associated with the language employed," it is apparent that the original guarantee was aimed at "assuring that a person wishing and able to afford counsel would not be denied that right."²⁷⁶ Indeed, "[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense."²⁷⁷ The Sixth Amendment was intended to end the English judicial practice of refusing "to permit prisoners in felony cases to obtain the assistance of counsel, retained counsel certainly included."²⁷⁸

²⁷⁵ 287 U.S. 45 (1932). The Court in *Powell* set aside the convictions of eight African-American youths who were sentenced to death for rape in a case that quickly went to trial without the benefit of counsel and ordered the state to appoint counsel on retrial because the youths were unable to afford counsel. See *id.* at 49-50, 71. Although the case was pivotal in expanding the scope of the Sixth Amendment to apply to indigent criminal defendants, the holding of the case was narrow: "[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law. . . ." *Id.* at 71. Ten years after *Powell*, in *Betts v. Brady*, 316 U.S. 455 (1942), the Court limited its application in state trials to cases in which the denial of appointed counsel denied fundamental fairness. In contrast, *Johnson v. Zerbst*, 304 U.S. 458 (1938), required the federal courts to routinely appoint counsel in felony cases. In 1963, the Court, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), overruled *Betts*, holding that the right to appointed counsel existed in every felony case in which the defendant could not afford counsel. Then, in 1972, in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court further clarified the right to appointed counsel to apply to any criminal charge, including misdemeanors, in which a prison term could be imposed.

²⁷⁶ CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1399 (Johnny H. Killian & George A. Costello eds., 1996); see also, e.g., WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 27-33, 89-90 (1955) (discussing history of right to counsel); BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: RIGHT OF THE PERSON 107-08 (1968) (same).

²⁷⁷ *Scott v. Illinois*, 440 U.S. 367, 370 (1979) (citing BEANEY, *supra* note 276, at 27-30).

²⁷⁸ WOLFRAM, *supra* note 19, at 791; see also CONGRESSIONAL RESEARCH SERVICE, *supra* note 276, at 1399 ("[t]he development of the common-law principle in England had denied to anyone charged with a felony the right to retain counsel"). The reason for the harsh English policy "seems to have been general hostility against defendants and, perhaps, some concern that pettifoggery of lawyers would needlessly confound matters." WOLFRAM, *supra* note 19, at 791.

The Supreme Court has recognized the right to hire counsel in several key decisions. In *Powell*, the Court noted that "[i]t is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."²⁷⁹ Similarly, in *Chandler v. Fretag*, the Court acknowledged the "well established" distinction between the right to appointed counsel and the right to obtain one's own counsel.²⁸⁰ The Court determined that, upon a criminal defendant's request for a continuance to obtain counsel, "[r]egardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified."²⁸¹

More recent cases also make clear that defendants have a Sixth Amendment interest in hiring counsel of their choice.²⁸² In 1988, in *Wheat v. United States*, the Court recognized that "the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment."²⁸³ To be sure, the Court held that in some circumstances, a defendant could be denied the right to be represented by the desired counsel.²⁸⁴ The Court reasoned that the purpose of the guarantee of assistance of counsel under the Sixth Amendment is to ensure that criminal defendants receive a fair trial and the focus of the inquiry is on the adversarial process, not necessarily on the accused's relationship with his lawyer.²⁸⁵ The Court noted that:

The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients . . . in court. Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party²⁸⁶

²⁷⁹ 287 U.S. at 53.

²⁸⁰ 348 U.S. 3, 9 (1954).

²⁸¹ *Id.*

²⁸² See generally Eugene L. Shapiro, *The Sixth Amendment Right to Counsel of Choice: An Exercise in the Weighing of Unarticulated Values*, 43 S.C. L. REV. 345 (1992).

²⁸³ 486 U.S. 153, 159 (1988).

²⁸⁴ See *id.*

²⁸⁵ See *id.*

²⁸⁶ *Id.*

Thus, the Court concluded that a criminal defendant did not have a Sixth Amendment right to employ counsel with a conflict of interest, even if the client was willing to waive the conflict for purposes of the case.²⁸⁷

Another recent case, *Caplin & Drysdale v. United States*,²⁸⁸ strongly suggests that fee limits are unconstitutional. The case addressed whether the Sixth Amendment prevented the government from forfeiting a defendant's assets, thereby depriving him of the ability to secure counsel of choice.²⁸⁹ Throughout the litigation, all of the courts seemed to assume that defendants could spend their own funds for their defense.²⁹⁰ A panel of the Fourth Circuit Court of Appeals explained that there is a

right—concededly qualified—to counsel of one's choice. This means, in general, a right to retain private counsel of one's choice out of one's private resources, and up to the limit of those resources, free of government interference. Thus, while it has presumably never been attempted, it seems clear that any legislative attempt by general rule directly to put a cap on what persons accused of crimes could pay privately retained defense counsel, or to dictate the choice of private counsel by special qualification, or however, would be unconstitutional.²⁹¹

The Fourth Circuit en banc concluded that asset forfeiture did not violate the Sixth Amendment, but agreed with the panel that the right to counsel included the right to spend one's own money to hire counsel of choice.²⁹² The Fourth Circuit noted that:

As stated by the . . . panel opinion, [the right to counsel] "means, in general, a right to retain private counsel *out of one's private resources*, free of government interference." . . . The government could not, for example, simply restrain

²⁸⁷ See *id.* at 156-57. The Supreme Court in *Wheat* determined that any "presumption in favor of [a criminal defendant's] counsel of choice" may be overcome upon demonstration of actual or serious potential conflict of the attorney. See *id.* at 164.

²⁸⁸ 491 U.S. 617 (1989), *aff'g In re Forfeiture Hearing as to Caplin & Drysdale*, Chartered, 837 F.2d 637 (4th Cir. 1988) (en banc), *reh'g United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987).

²⁸⁹ See *Caplin & Drysdale*, 491 U.S. at 619.

²⁹⁰ See *id.* at 621-22.

²⁹¹ *Harvey*, 814 F.2d at 923 (citations omitted).

²⁹² See *Forfeiture*, 837 F.2d at 644.

funds to which it claims no legal entitlement so as to force a defendant to accept appointed counsel.²⁹³

The court recognized that preventing defendants from spending their own funds on counsel would implicate the Sixth Amendment, even if defendants could constitutionally be prevented from spending money which belonged to someone else.²⁹⁴ Thus, the court en banc agreed with the panel that defendants had the right to spend their own money on a defense in a criminal case without limit.²⁹⁵

The Supreme Court affirmed the decision of the en banc court, in an opinion which seemed to accept the proposition that defendants have the right to spend their own money for counsel.²⁹⁶ The Court noted that the government did not "deny that the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds" and emphasized that "[t]he forfeiture statute does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing."²⁹⁷ In holding that asset forfeiture did not implicate the Sixth Amendment, the Court explained "[w]hatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond 'the individual's right to spend his own money to obtain the advice and

²⁹³ See *id.* (citing *Harvey*, 814 F.2d at 923 and *United States ex rel. Ferenc v. Briery*, 320 F. Supp. 406 (E.D. Pa. 1970)).

²⁹⁴ See *id.* at 644-45. The court explained:

For this reason, fee forfeiture is not, as the . . . panel has suggested, the constitutional equivalent of a government-imposed cap on spending for defense counsel or a law requiring those charged with certain crimes to rely on appointed counsel. In these situations, the government attempts to restrict the defendant's use of his own undisputed assets Those with their own funds must be given the fair opportunity to secure counsel up to the limit of their funds; those without assets of their own must be satisfied with appointed counsel, over whose selection they may have little influence.

Id.

²⁹⁵ See *id.* at 644.

²⁹⁶ See *Caplin & Drysdale*, 491 U.S. at 624-25.

²⁹⁷ *Id.* Of course, ethical fee limitations do not directly deprive clients of counsel. Lawyers whose skills and reputations allow them to command fees which would exceed the fee cap can simply reduce their rates or work for free. (They may be willing to do so for rich clients who provide other, more lucrative engagements.) Alternatively, high-cost lawyers could simply do a less thorough job. For practical purposes, however, fee caps prevent people from hiring counsel of their choice, as the *Caplin & Drysdale* Court acknowledged when it recognized third-party standing on the part of the law firm. See *id.* at 623 n.3.

assistance of . . . counsel."²⁹⁸ Many other cases suggest that defendants have the right to spend their own money on counsel.²⁹⁹

In short, the California Supreme Court seems to have correctly stated the law when it explained:

The state should keep to a necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, using any legitimate means within his resources and that desire can constitutionally be forced to yield only when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.³⁰⁰

Absent some legitimate purpose that would be served by disqualifying a particular lawyer from participating in a particular case, the Sixth Amendment guarantees a criminal defendant the right to retain counsel of choice.³⁰¹ The situations in which the courts have limited

²⁹⁸ *Id.* at 626 (citing *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 370 (1985)).

²⁹⁹ See, e.g., *Haynie v. Furlong*, 172 F.3d 62, 1999 WL 80144, at *2 (10th Cir. 1999) (concluding that Sixth Amendment right to counsel of choice "is generally cognizable only to the extent defendant can retain counsel with private funds") (citing *United States v. Mendoza-Salgado*, 964 F.2d 993, 1014 & n.12 (10th Cir. 1992)); *United States v. Jones*, 160 F.3d 641, 646-47 (10th Cir. 1998) (concluding that due process grants defendants a post-restraint hearing in some circumstances when the government seizes assets needed to retain counsel); *United States v. Inman*, 483 F.2d 738, 739-40 (4th Cir. 1973) ("The Sixth Amendment right to counsel includes . . . the right of any accused, if he can provide counsel for himself by his own resources or through the aid of his family or friends, to be represented by an attorney of his choosing."); *United States v. Najjar*, 57 F. Supp. 2d 205, 209 (D. Md. 1999) (holding that pretrial restraint of property which was not in fact subject to forfeiture violated the Sixth Amendment); *English v. State*, 259 A.2d 822, 825 (Md. Ct. Spec. App. 1969) ("[W]hen an accused has the means to employ counsel, he should be afforded a fair opportunity to secure counsel of his own choice.") (citations omitted); *State v. Buffalo Chief*, 155 N.W.2d 914, 918 n.3 (S.D. 1968) ("A defendant with means has the right to be represented by a lawyer of his own choice.") (citations omitted).

³⁰⁰ *People v. Holland*, 588 P.2d 765, 770 (Cal. 1978) (quoting *People v. Crovedi*, 417 P.2d 868, 874 (Cal. 1966)).

³⁰¹ See, e.g., *Morris v. Slappy*, 461 U.S. 1, 21-22 (1983) (Brennan, J., concurring) (discussing the import of the constitutional guarantee of the right to assistance of counsel of choice). Some commentators have criticized the current practice of denying an indigent the right to use the funds allocated for his defense to retain counsel of choice. See, e.g., Wayne D. Holly, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent?*, 64 *BROOK. L. REV.* 181, 181 (1998); Peter W. Tague, *An Indigent's Right to the Attorney of His Choice*, 27 *STAN. L. REV.* 73 (1974).

A possible exception is the well-established rule against contingent fees in criminal cases, which has been trenchantly criticized. See Pamela S. Karlan, *Contingent Fees and*

counsel of choice involved efforts to ensure that defendants receive qualified counsel, not to deprive them of it, or to ensure that measures necessary to protect the orderly decisionmaking process exist, such as denying continuances.³⁰² There is no justification for denying a defendant the ability to employ retained, licensed, conflict-free and available counsel, simply because the lawyer is skilled enough to command a high wage.³⁰³

Finally, if fee limitations are consistent with the Sixth Amendment, that would mean that the rich have a greater right to counsel than the poor.³⁰⁴ It is unfortunate that this situation is true as a practical matter, but if the fee cap cases are correct and the ethical codes are a filter through which the Sixth Amendment must be read, then favoritism for the rich becomes a matter of positive law. If the ethical

Criminal Cases, 93 COLUM. L. REV. 595 (1993). Assuming that this rule would be upheld by the Supreme Court, as Professor Karlan explains, it arguably rests on some of the same considerations as *Wheat*. See *id.* at 600. It is true that denying defendants the right to retain counsel on a contingent fee may limit their ability to retain counsel of their choice. See *id.* at 605. Some lawyers might agree to take a case on a very large contingent fee who would not take the same case on an hourly basis. A contingent fee, however, in a criminal case is less likely to be attractive to lawyers or clients because usually no pot of money is created if the contingency comes through. See *id.* at 602-03. Thus, in the criminal context unlike the civil, a poor client generally cannot use the contingency structure to interest a lawyer who would otherwise decline the business. See *id.* Moreover, if a client can actually pay a contingent fee, they can likely pay a substantial hourly wage. Leaving these practicalities aside, a court might reason that contingent fees should be prohibited for the benefit of clients. A lawyer working on a contingent fee might be disinclined to consider a guilty plea to a reduced charge, or to do more than minimal work on the case if it turns out to be a probable loser. See *id.* at 631-32. Under these perfectly foreseeable circumstances, a contingent fee would disadvantage the client.

³⁰² "An accused is not entitled to impose on legitimate interests of the prosecution and the judicial system in order to obtain last-minute continuances to accommodate the schedule of private counsel or to permit a dilatory accused to obtain private assistance for the first time." WOLFRAM, *supra* note 19, at 802.

³⁰³ There may be arguments for limiting defendants from spending their own money which rest on rejection of the role of partisan lawyers in the adversary system, rejection of the adversary system as a whole or concerns about the undue influence of wealth on the justice system. Whatever the merits or lack thereof of these critiques, they are beyond the scope of this Article, as at the moment the United States has an adversary system driven in large part by hired counsel.

³⁰⁴ See *Morris*, 461 U.S. at 21-22 (Brennan, J., concurring). Further, if the concern of the Sixth Amendment is fairness and accuracy, there is no reason to impose fee caps, because fee caps will apply only on one side. Prosecutors are generally attorneys, and thus subject to ethical rules, but they generally do not receive fees based on each case. Accordingly, they are unlikely to face the question of unreasonable fees. They do have choices, however, about the resources to invest into any given case. Although prosecutors have incentives to use care with their limited resources, they never need to worry that spending too much time on a case, or putting their best efforts into it, will be met with discipline.

codes are a filter, a rich person can hire Roy Black on an OUI case, because the factors of "importance" and "ability to pay" will justify a higher fee. If all other facts, however, are the same except that the defendant is a middle- or working-class person who mortgages their home or signs a note to hire Roy Black, Roy Black has to say no, because of the risk of being found guilty of an ethical violation for accepting a large fee from such a person. The state, which is trying to brand one of its people as a criminal, has no business instructing them not to fight back too hard, to say "your life, your freedom or your reputation are unworthy of the best defense you can mount."

In 1985, in *Walters v. National Association of Radiation Survivors*,³⁰⁵ the Supreme Court held that Congress could constitutionally restrict attorneys' fees in connection with application for certain veteran's benefits to ten dollars. At first blush, *Walters* seems to support the notion that the right to pay a fee may constitutionally be restricted; the Court's reasoning, however, in fact suggests that fee limitations in the criminal context would be unconstitutional.³⁰⁶ A majority of the Court determined that the fee limitation did not violate the Due Process Clause because higher fees would frustrate the congressional goal of ensuring that veterans received the bulk of the awards, and would complicate a process intended to be informal and nonadversarial.³⁰⁷

Justice Stevens powerfully argued in dissent that an "individual's right to spend his own money to obtain the advice and assistance of independent counsel," at least in disputes with the Government, is protected by the Due Process Clause.³⁰⁸ But whether *Walters* is correct, the Court recognized that its reasoning would not apply in the criminal context, because "no one would gainsay that criminal proceedings

³⁰⁵ See 473 U.S. 305, 308 (1985).

³⁰⁶ See *id.* at 332-34.

³⁰⁷ See *id.* at 323-26.

³⁰⁸ See *id.* at 370 (Stevens, J., dissenting). According to Justice Stevens,

[i]f the Government, in the guise of a paternalistic interest in protecting the citizen from his own improvidence, can deny him access to independent counsel of his choice, it can change the character of our free society. Even though a dispute with the sovereign may only involve property rights, or as in this case a statutory entitlement, the citizen's right of access to the independent, private bar is itself an aspect of liberty that is of critical importance in our democracy.

Id. at 370-71 (footnotes omitted). Justice Stevens also asserted that "[e]very citizen in this country is presumed to be unrestricted in consulting or employing an attorney on any matter, or in making a decision that legal representation for any purpose is not needed." *Id.* at 371 n.22.

are adversarial in nature."³⁰⁹ The Court took pains to distinguish cases decided under the Sixth Amendment.³¹⁰ Moreover, the majority in *Walters* concluded that the right to counsel could lawfully be restricted in the veteran's benefits context; this determination was necessary only because the Court recognized that a fee cap was a material infringement on the ability to obtain counsel.³¹¹ Because the Court in *Walters* recognized that a fee cap constitutes an interference with counsel, it supports the idea that caps will be impermissible in a situation where the right to counsel exists with full force.³¹²

One commentator has questioned the right to counsel of choice, suggesting that tactical use of disqualification motions and of asset forfeiture, done with the purpose of "disrupting" the relationship between attorney and client was not found by the Court to be "antithetical to the Sixth Amendment right to counsel."³¹³ Although the Court upheld the particular actions at issue in those cases, it did not so completely undermine the right to counsel of choice that the opinions recognize.³¹⁴ The decisions in *Wheat* and *Caplin & Drysdale* suggest that manipulation of forfeiture and disqualification for tactical advantage could be improper.³¹⁵ In *Wheat*, the Court explained:

[P]etitioner of course rightly points out that the Government may seek to "manufacture" a conflict in order to prevent a defendant from having a particularly able defense counsel at his side; but trial courts are undoubtedly aware of this possibility, and must take it into consideration along with all of the other factors which inform this sort of a decision.³¹⁶

Similarly, in *Caplin & Drysdale*, the Court acknowledged the possibility of forfeiture actions aimed at interfering with counsel, but said "[c]ases involving particular abuses can be dealt with individually by the lower courts, when (and if) any such cases arise."³¹⁷

³⁰⁹ *Id.* at 332.

³¹⁰ See *Walters*, 473 U.S. at 332.

³¹¹ See *id.* at 333.

³¹² See *id.*

³¹³ Leroy D. Clark, *All Defendants, Rich and Poor, Should Get Appointed Counsel in Criminal Cases: The Route to True Equal Justice*, 81 MARQ. L. REV. 47, 66 (1997).

³¹⁴ See *Caplin & Drysdale*, 491 U.S. at 635; *Wheat*, 486 U.S. at 163.

³¹⁵ See *Caplin & Drysdale*, 491 U.S. at 635; *Wheat*, 486 U.S. at 163.

³¹⁶ *Wheat*, 486 U.S. at 163.

³¹⁷ *Caplin & Drysdale*, 491 U.S. at 635.

IV. TOWARD A DISCLOSURE STANDARD

A client facing criminal charges or other legal difficulties he or she deems serious should be free to pay his or her lawyer, from his or her own funds, whatever fees he or she chooses, even in situations where a given disciplinary board might feel the life, liberty or property at stake is worth less than the fee involved. But the principle of client choice or freedom of contract in general does not mean that the area should be entirely unregulated. A free market has many advantages, but so do certain checks on the market, such as requiring training and licensing of those who would practice law, and protecting unsophisticated clients from overreaching attorneys.³¹⁸

The rationale for the reasonable fee regulation is really to ensure that clients understand their choices before they make them and that clients buy the services they need, but no more.³¹⁹ The ethical rules do not carry out this purpose well. Timothy Clark may have reason to complain about the financial arrangements between him and his lawyer, because it may well be that he did not give informed consent in the full sense of the term to the fee arrangement.³²⁰ Fordham, however, violated no rules regarding client communication. The *Model Rules* requires certain disclosures to the client. Model Rule 1.5(b) provides that "[w]hen a lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after com-

³¹⁸ But see Roy Ryden Anderson & Walter W. Steele, Jr., *Ethics and the Law of Contract Juxtaposed: A Jaundiced View of Professional Responsibility Considerations in the Attorney-Client Relationship*, 4 GEO. J. LEGAL ETHICS 791, 815 (1991) (arguing for more of a free-market approach to fee contracts and questioning "why a lawyer, acting without deceit, without coercion, and without any other form of untoward conduct is not free to price his legal services at what a client is willing to pay, reasonable or otherwise").

³¹⁹ This Article does not mean to enter into the debate about the possibility of achieving true informed consent in every case through the mechanism of rules and it is no doubt true that inequalities in knowledge and power will make it more difficult for many clients to exercise unconstrained choice. Recognizing the problematic nature of truly informed consent by clients, however, given the inevitability of attorney-client fee negotiations and agreements, this Article suggests an approach which, if it works, will leave the fewest clients surprised. If this approach is the best that can be done, or even is better than the current system, then the fact that it is imperfect is no reason not to consider it.

³²⁰ One article suggested that the failure to communicate was Fordham's true error in the case. See Christine S. Filip & Ann E. Johnston, *Misleading Message May Spark Suit*, 146 PITTSBURGH LEGAL J. 25, 26 (1998) ("While Fordham is not usually cited as a failure-to-communicate case, the issue of effective communication concerning the fee structure is implicit and instructive.").

mening the representation";³²¹ under the *Model Code*, a similar requirement was merely a suggestion.³²² At or near the beginning of the representation, Fordham did explain to the client the basis or rate of the fee—an hourly rate of \$200 per hour.

Although Fordham did everything the rules required, in retrospect, Clark might have expected more. Fordham, for his part, might wish that he had offered a description of the available alternative strategies, their advantages and disadvantages, and offered some idea about what the various approaches would cost before he chose one or decided to approach another attorney.³²³ Informed agreement must take into account the knowledge and experience of the client. Therefore, although Clark had a sense of what other attorneys might charge for the representation, Fordham would be required to explain to a less sophisticated client that choosing him would be more expensive. On the other hand, once a formerly unsophisticated client has become sophisticated through consultation with counsel, there is no reason not to honor client decisions about the representation.

Achieving informed agreement would not require a great deal more than the communication and disclosure that the rules already require, only earlier, and with price tags attached. Under the current rules, lawyers are required to "abide by a client's decisions concerning the objectives of representation."³²⁴ The rules provide that "[a] lawyer may limit the objectives of the representation if the client consents after consultation."³²⁵ Accordingly, under existing law, the client decides what the goal of the case will be. The client also already holds the purse strings; lawyers "should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected."³²⁶ Finally, the lawyer is already obligated to think about the case and consult with the client about how it will be handled. The lawyer must "explain a matter to the ex-

³²¹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(b) (1983); see also *id.* Rule 1.4(a) ("A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."); *id.* Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

³²² See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19 (1980).

³²³ See FOONBERG, *supra* note 225, at 66 (asserting that, in hiring attorneys, "[l]arge corporations often expect even more than a 'consultation.' They will often ask competing law firms to submit strategies and budgets for handling a particular matter.").

³²⁴ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983).

³²⁵ *Id.* Rule 1.2(c).

³²⁶ *Id.* Rule 1.2(c) cmt.

tent reasonably necessary to permit the client to make informed decisions."³²⁷ If the substance of the conversation occurs at the beginning of the representation and the lawyer offers some kind of reasonable estimate of the price of each option, the client will have an informed basis upon which to proceed. In addition, a lawyer must "keep a client reasonably informed about the status of a matter,"³²⁸ which could comfortably be read to require a lawyer to report material changes in an estimate.

One malpractice treatise recommends that attorneys engage in detailed fee discussions with prospective clients,³²⁹ and that the agreements be reduced to writing.³³⁰ If shrewd attorneys will have this discussion in order to protect themselves from fee disputes and malpractice claims, there is no reason not to expect ethical attorneys to have this discussion for the benefit of their clients.

One possible rule would look like this:

Proposed Model Rule 1.5(a). A lawyer shall not:

- (1) Charge or collect a fee which is prohibited by law;
- (2) Charge or collect a fee without permission of any court or other authority from whom permission is required by law, or in an amount that is more than authorized by the court or other authority;
- (3) Charge a fee which exceeds or is otherwise in material breach of the fee agreement with the client; and
- (4) Charge or collect a fee without reasonable consultation with the client at the beginning of the representation and

³²⁷ *Id.* Rule 1.4(b).

³²⁸ *See id.* Rule 1.4(a); *see also In re Dorothy*, 605 N.W.2d 493, 501 (S.D. 2000) (reading MR 1.4 as potentially applicable to billing matters).

³²⁹ *See* 1 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 2.15, at 123 (3d ed. 1989). Although the treatise noted that estimating fees is difficult, it suggested that it was in lawyers' best interest to discuss costs anyway, because it could lead to greater net collections. The treatise stated that

if the original estimates are conveyed properly and updated with some frequency, both the law firm and clients will benefit. Again, any client concerned about paying the fees and expenses will appreciate the effort spent in providing such estimates Given the amount of write-downs and write-offs which most firms experience, effectively discussing fees and expenses and providing frequent updates will probably improve law firm profitability.

Id.

³³⁰ *See id.* § 2.16, at 127; *see also generally* Lawrence A. Dubin, *Client Beware: The Need For a Mandatory Written Fee Agreement Rule*, 51 OKLA. L. REV. 93 (1998) (making the argument, indisputably correct, that all fee agreements should be in writing).

within a reasonable time after any material change. Consultation shall include the amount of the fee if it is fixed, or the manner in which it will be calculated if it is not; the alternative means by which the matter could be handled; the risks and benefits of the alternatives; general estimates as to the costs of the alternatives; and any other matter which, under the circumstances, is reasonably necessary to permit the client to make an informed decision. If the fee is not fixed, the lawyer shall make clear that any general estimates are non-binding and subject to revision.

(5) This rule does not modify any authority granted courts by law to regulate fee agreements and fee awards.

Sections one through three of this proposed Model Rule restate existing law.³³¹ The final sentence makes clear that the rule does not repeal the judiciary's traditional authority to reduce attorney's fees in cases where circumstances make strict enforcement unfair; but where discipline is not warranted. Section four is the heart of the proposal. The first paragraph invokes the concept of consultation, which is already defined by the current *Model Rules* as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."³³² Section four essentially asks lawyers to attach a price tag to advice they are already required to give.³³³

Jurisdictions should consider effectuating the goal of informing clients with even more powerful prophylactics, such as requiring lawyers to advise clients that it is generally prudent to speak with more than one lawyer, just as doctors urge patients to seek a second opinion before making a major decision. There is even precedent in the rules for requiring lawyers to advise clients to seek representation before entering into a transaction with a client; perhaps agreements to large fees should be negotiated by independent counsel.³³⁴ Although no business is eager to tell potential customers to think about taking their patronage elsewhere, there is no reason not to expect attorneys to take reasonable steps to prevent clients and potential clients from

³³¹ See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1983).

³³² MODEL RULES OF PROFESSIONAL CONDUCT Terminology (1983).

³³³ The purpose of the rule is to provide more information to clients, not impose all risk of uncertainty on the attorney. Therefore, it is not necessary that the estimates be binding on the attorney.

³³⁴ Thanks to William Becker for this suggestion.

making unwise decisions because of their inexperience with legal matters. Moreover, these steps will protect the agreements that result because it will suggest that they were made knowingly.

CONCLUSION

The proposed reform will not take money out of clients' pockets; there is no suggestion that the traditional power to cut fees without imposing discipline be eliminated. Courts would retain their current power to reform attorney-client contracts. Rather, what would be lost is the formal disciplinary rule, the black letter principle that attorneys' fees be "reasonable." Critics of the profession might point to such a change and say: "I told you so. There is not even a pretense, lawyers don't even claim their fees should be reasonable." If abandoning the reasonable fee rules is problematic from a public relations perspective, it holds the promise of substantive benefits for clients. Although nothing proposed here will eliminate entirely the frustration some clients have with the legal system or client surprise at bills, it may help. More information will cut off disputes before they happen by helping to ensure that clients hire lawyers with their eyes open, and make better choices about their cases. The profession should be willing to acknowledge the truth about the weakness of the reasonable fee rules and reform them for the benefit of clients.