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In Search of Greener Pastures: Do Solicitation Rules and Other Ethical Restrictions Governing Departing Partners Really Make Sense Today

Judy Royer May

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Comment

IN SEARCH OF GREENER PASTURES: DO SOLICITATION RULES AND OTHER ETHICAL RESTRICTIONS GOVERNING DEPARTING PARTNERS REALLY MAKE SENSE TODAY?

I. INTRODUCTION

The legal profession, while once a gentlemanly tradition, has dramatically changed in the past century. For instance, in 1908, when the American Bar Association (ABA) promulgated the Canons of Professional Ethics in an effort to establish standards for the practice of law, competition was considered "an activity of merchants rather than [attorneys and other] professionals." Today, however, lawyering is a lucrative and vigorously competitive business. Clearly, business development within the

1. See Henry S. Drinker, Legal Ethics 211 (1953) (describing legal profession as "cherished tradition, the preservation of which [was] essential to the lawyer's reverence for his calling").


There has been considerable commentary examining attorneys' need to generate business. See, e.g., Lewis B. Greenblatt, How to Handle Defections, Nat'l L.J., Aug. 5, 1991, at 20 (stating that inability of attorneys to acquire equity "creates the need for them to economically exploit their talents and business connections as much as possible during their highest income-producing years"); Rita Henley Jensen, Attorney Goodwill Increases, Nat'l L.J., Dec. 23, 1991, at 1 ("In some states, a lawyer's or a law firm's reputation is now worth cold cash."); Partnership Points: Splitting the Take, Ill. Legal Times, June 1990, at 1 ("Bringing in business is the

(1517)
legal profession has changed considerably since the turn of the century.\textsuperscript{5} In light of these changes, certain aspects of the Canons and their progeny may not be fitting to the modern practice of law.\textsuperscript{6}

The strained economic times of the 1980s and early 1990s brought with them heightened competition in all types of businesses—including the practice of law.\textsuperscript{7} As law firms began demanding more time and effort from their employees,\textsuperscript{8} a lawyer's sense of loyalty to one firm diminished or faded altogether.\textsuperscript{9} Today, in fact, it is commonplace for associates as well as partners to leave their law firms in the hopes of finding greater opportunity elsewhere.\textsuperscript{10}

The single most important contribution lawyers can make to their firms and to their own money-making success is...\textsuperscript{5, 6, 7, 8, 9, 10}

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5. See Robert Whitfield, \emph{Old Business Development Methods Don't Work Today: A Management Plan Eases Firms into Marketing Program}, ILL. LEGAL TIMES, Dec. 1993, at 13 (contrasting business development from two generations ago with those of today and finding that law firms no longer can "wait for the telephone to ring" with new business).


7. See Robert Whitfield, \emph{How to Manage a Legal Career in the Tumultuous 1990s}, ILL. LEGAL TIMES, Oct. 1994, at 10 (noting that throughout 1990s, "[t]he genteel tradition in the legal profession had ended" and that contemporary legal profession is one of "brutal competition" and "increasing unpredictability").

8. See Rehnquist, \emph{supra} note 4, at 151-52 (questioning whether law firms' treatment of associates [i.e., requiring in excess of two thousand billable hours annually] is best for associates and, ultimately, society). In his article, the Chief Justice observed that "[y]oung associates in large law firms today apparently work much harder, and under significantly different conditions, than they did twenty-five years ago." \textit{Id.}

9. See Martin D. Pollack, \emph{Withdrawal Today: Big News Becomes Old News}, in \emph{WITHDRAWAL, RETIREMENT & DISPUTES: WHAT YOUR FIRM NEEDS TO KNOW} 1, 3 (Edward B. Berger ed., 1986) (noting that due to attorneys' diminished sense of loyalty, "[t]hese days switching firms is commonplace").

10. LEONA M. VOGT, \emph{FROM LAW SCHOOL TO CAREER: WHERE DO GRADUATES GO AND WHAT DO THEY DO?} 28 (1986). Although the number of associate departures are undocumented, Vogt examined random surveys of departures and concluded that the average law school graduate remains in her or his first job only two to five years. \textit{Id.}

Likewise, Chief Justice Rehnquist, addressing partner mobility, noted that "[p]artners in law firms have become increasingly 'mobile,' feeling much freer than they formerly did and having much greater opportunity than they formerly did, to shift from one firm to another and take revenue-producing clients with them." Rehnquist, \emph{supra} note 4, at 152; see also CHARLES W. WOLFRAM, \emph{MODERN LEGAL ETIQUETTE} § 16.2.3 (1986) ("Although employed rarely or never in some large firms, lateral hires of partners or senior associates from other firms has become somewhat more common.").

Furthermore, as noted by one article in the Georgetown Journal of Legal Ethics:

\begin{quote}
Both clients and lawyers have increasingly become willing to break long-standing ties to law firms. At the same time, those firms have had to grap-\end{quote}
Such departures, commonly referred to as “split-offs,” “breakups” and “lateral hires,” often result in bitter disputes over client solicitation issues, especially when breakaway partners take a portion of the firm’s clientele. Increased lawyer mobility has created difficulties in attempting to

... with skyrocketing costs associated with computerization, inflated rents and salary wars for top law school graduates. These changes have ushered in the “Era of the Rainmaker.”


For purposes of this Comment, however, the terms “split-offs,” “breakups” and “lateral hires” will be used interchangeably to indicate attorney departure and, in the case of a departing partner, to indicate firm dissolution.


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12. See, e.g., Eleanor Kerlow, *Messy Breakup Takes Nasty Turn*, Legal Times, June 13, 1988, at 3 (describing how battle over division of assets, clients and files between two well-known labor lawyers took on “the air of a contentious divorce after dissolution of their partnership”); Tamar Lewin, *When Law Partners Split Up*, N.Y. Times, Nov. 26, 1984, at D1 (“Some of the most bitter fights before the courts these days are litigation over clients, funds and even office space that both the firm and the departing partner or partners claim.”); Douglas Linton, *Loyal No Longer*, Manhattan Law., Apr. 1, 1991, at 3 (interviewing former partner who took estimated $5 million in client business after leaving firm).
monitor attorney conduct, especially in the area of client solicitation. As a result of the increased incidence of law firm dissolution, a tension has developed between ethical responsibilities and issues of profit-making. Blind adherence to the traditional rules of ethics set forth in the Canons and, subsequently, the Model Code and the Model Rules, threatens to jeopardize the many interests involved.

The economic viability of firms from which attorneys depart, the free flow of information to clients regarding selection of counsel, and, ultimately, the prestige of the profession are all affected by the current confusion over the proper interpretation of ethical rules applicable to departure-based solicitation and the enforceability of restrictive covenants in attorney partnership agreements. Given speculation that attorney mobility has caused little development in rules regarding departure-based solicitation. The prevalence of firm breakups has caused commentators to re-examine the related issue of attorneys' responsibilities toward other attorneys as well as their legal and ethical obligations toward clients upon firm dissolution or breakup. See, e.g., Michael R. Robinson, When the Party is Over: Rights of Departing Attorneys to the Clients of Their Former Firm, ILL. B.J. 552, 552 (1987) (reviewing tort, constitutional and ethics considerations regarding departing attorneys' right to contact their clients).

Additional consequences of attorney mobility are the increasing destabilization and the decreasing professionalism found within the profession. See, e.g., Greenblatt, supra note 4, at 20 (stating that lateral movement of upper-level attorneys presents greatest economic challenge to law firms today). Partner withdrawal involves numerous ethics provisions. MODEL CODE OF PROFESSIONAL RESPONSIBILITY 1980 [hereinafter MODEL CODE], DR 6-101 (Competence), DR 2-110 (Withdrawal from Employment); MODEL RULES OF PROFESSIONAL CONDUCT 1992, [hereinafter MODEL RULES], Rule 1.1 (Competence), Rule 1.3 (Diligence), Rule 1.4 (Communication), Rule 1.16 (Declining or Terminating Representation).

While, in many instances, identical ethical concepts apply to both partners and associates, permissible conduct with respect to solicitation may, in fact, differ based upon the status of the attorney. See Johnson, supra note 11, at 14-15 (discussing differences between duties of partners and associates upon firm dissolution). This Comment limits its focus to issues surrounding partner withdrawal. For a general discussion of associate departures, see generally Johnson, supra note 11. Chief Justice Rehnquist, recognizing the correlation between the "increase in ethical difficulties" and the "structural changes in the profession" during the past few decades, stated that, "it is only natural . . . that as the practice of law . . . has become organized on more and more of a business basis, . . . this practice should on occasion push towards the margins of ethical propriety." Rehnquist, supra note 4, at 154.

For a discussion of how a literal reading of the ethical rules may defeat the goal of providing clients with the freedom of informed choice regarding selection of counsel, see infra notes 163-71 and accompanying text.


Generally Johnson, supra note 11, at 10 (recognizing "an almost total lack of guidance" around ethics at attorney departure).
mobility will only continue to rise, these issues must be addressed before further damage befalls the legal profession.\textsuperscript{18}

Law firms have attempted to deal with the concerns associated with partner departure by incorporating restrictive covenants\textsuperscript{19} in partnership agreements.\textsuperscript{20} The restrictions imposed by such covenants range from relatively minor financial disincentives to absolute prohibition from practicing law within a certain geographical area for a stated time period.\textsuperscript{21} The vast majority of courts, however, have refused to enforce restrictive covenants in lawyer partnership agreements.\textsuperscript{22} These courts have applied a virtual per se rule banning the use of restrictive covenants based on a strict and somewhat constrained interpretation of the ethical rules applicable to attorneys.\textsuperscript{23} By doing so, the courts have not considered the practicality of such a rule in light of the unique issues confronting the modern legal practitioner.

\textsuperscript{18} See Mark A. Cohen, \textit{Lawyers Warned on Fiduciary Duty to Ex-Firms}, MASS. LAW. Wkly., May 10, 1993, at 3, (predicting that attorney mobility will continue to grow as result of changing perception of law from craft to business); Graham, supra note 10, at 2 (stating that lawyers “have discarded qualms about hiring lateral partners”). But see Robert L. Nelson, \textit{The Changing Structure of Opportunity: Recruitment and Careers in Large Law Firms}, 1983 AM. B. FOUND. RES. J. 109, 125 (noting that turnover among partners is low).

\textsuperscript{19} E. ALLAN FARNSWORTH, \textit{CONTRACTS} § 5.3, at 356 (2d ed. 1990). Restrictive covenants have long been disfavored by United States courts. \textit{Id}. Reflecting the courts’ general disfavor of restrictive covenants, the Restatement (Second) of Contracts permits such restraints only in limited circumstances. \textit{See} \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 187, 188 (1981) (discussing non-ancillary and ancillary restraints on competition); \textit{see also} FARNSWORTH, supra at 356 (stating that restrictive covenants will be upheld only if reasonable).

Restrictive covenants (also called noncompetition restrictions) are enforced if they are deemed to be reasonable. FARNSWORTH, \textit{supra}. Several factors must be considered in making this determination, including the legitimate interests of the promisee, the burden on the promisor and the interests of the public. \textit{Id}.

\textsuperscript{20} Steven Brill, \textit{The Partner Breakup Follies}, AM. LAW., Mar. 1988, at 3 (reporting that approximately half of firms contacted for article on partnership withdrawals incorporated some type of restrictive covenant in their partnership agreements); Penasack, \textit{supra} note 6, at 891. The fact that many firms rely on restrictive covenants suggests that many partners consider the covenants to be a reasonable and efficient means to allocate assets and liabilities upon dissolution of the partnership. Brill, \textit{supra}. It may likewise suggest that the reason for such widespread use of restrictive covenants is ignorance of ethical standards banning them. \textit{Id}.


\textsuperscript{22} For a discussion of the majority view of restrictive covenants in lawyer partnership agreements, see \textit{infra} notes 130-39 and accompanying text.

\textsuperscript{23} For a list of cases employing this rationale, see \textit{infra} note 123 and accompanying text.
Notwithstanding the overwhelming majority view of adherence to a virtual per se ban on attorney restrictive covenants, a persuasive minority position is evolving. This minority view, which refuses to impose an artificial distinction between attorneys and other professionals, equitably balances the interests of the client, the law firm and the public, concluding that some restrictive covenants are enforceable. Indeed, one court indicated that the abolition of the per se rule was entirely appropriate given the "sweeping changes" in the legal profession. Such a view, upholding restrictive covenants, offers a pragmatic as well as an ethical solution to the problems associated with law firm dissolution and partner breakups.

This Comment critically analyzes the ineffectiveness of the various ethical obligations imposed upon departing attorneys concerning client solicitation in light of the evolution occurring within the legal profession. Part I discusses pertinent ethical rules, highlights leading cases and scrutinizes the proffered rationales underlying each decision. Given the current reality that a law firm operates, in large part, as a business, Part II questions the continuing viability of the rigid departing partner solicitation rules and virtual per se prohibition of restrictive covenants in attorney partnership agreements. Ultimately, this Comment concludes that, given the increased economic and competitive pressures of the modern law practice, the professional rules of conduct must be re-examined, giving careful attention to an attorney's interest in practicing law and, of course, to a client's right to a truly informed choice of counsel.

24. See, e.g., Howard v. Babcock, 863 P.2d 150, 160 (Cal. 1993) (holding that "an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm in a limited geographical area ... is not void on its face as against public policy"); Haight, Brown & Bonesteel v. Superior Court, 234 Cal. App. 3d 963, 971 (1991) ("We find no reason to treat attorneys differently from professionals ... for example, by holding that lawyers may not enter into non-competition agreements."). For a discussion of the emerging minority view, see infra notes 140-56 and accompanying text.

25. See, e.g., Petition of Felmeister & Isaacs, 518 A.2d 188, 204 (N.J. 1986) ("Everything we know about the administration of justice and the representation of clients convinces us that rational selection of counsel serves not only the client's interest, but [also] the public interest.").

26. For a discussion of the minority's equitable balancing, see infra notes 140-56 and accompanying text.

27. Howard, 863 P.2d at 160.

28. Id. (arguing that typical balancing test applicable to other professions is appropriate for attorneys).

29. For a discussion of relevant ethical rules and leading cases interpreting them, see infra notes 33-160 and accompanying text.

30. For a discussion and analysis of the feasibility of applying a per se ban on restrictive covenants in attorney partnership agreements, see infra notes 161-88 and accompanying text.

31. For a proposed re-examination of relevant ethical rules, see infra notes 187-88 and accompanying text.
II. BACKGROUND

A. Ethical Obligations Governing Attorney Solicitation

Much of the commentary surrounding solicitation has had all the trappings of a medieval morality play. Lawyers generally emerge as either heroes or villains in plots that rarely thicken enough to admit any narrative complexity. All too often, the result has been a rhetorical standoff that fails to capture the competing values at issue.32

Legal ethics is in somewhat of a state of transition. No uniform set of rules governs the entire legal profession. In the early 1970s, the ABA's 1969 Model Code of Professional Responsibility (Model Code) served as the basis for rules in virtually every jurisdiction.33 In 1983, however, the Model Rules of Professional Conduct (Model Rules) superseded the Model Code as a statutory model.34 Although more than half of the states have adopted the Model Rules, many did so only after substantial modification.35 As a result, the applicable set of ethical rules differs greatly, depending on the jurisdiction and the specific subject matter.36 Discussion of the ethical rules, therefore, requires consideration of the Model Code, the Model Rules and local variations.

1. The Model Code

The Model Code does not expressly prohibit all forms of competition among attorneys or prevent an attorney from leaving a firm and, subsequently, taking the firm's clients.37 Courts traditionally, however, have interpreted ethical rules as prohibiting, or at least severely limiting, client
solicitation by attorneys. Consistent with precedent, the Model Code permits law firms and departing lawyers to notify present or former clients of “new or changed associations.” The Model Code requires that such notice be in the form of a “brief professional announcement card” or a similar “dignified” letter. Authorities have made it clear that language

98. 1 Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 486, 512 (1985). Hazard and Hodes recognized that under the Model Code, as interpreted by many courts, attorneys were virtually prohibited from advertising. Id. To that point, they wrote:

The [Model] Code also prohibited statements that were “self-laudatory” and “undignified.” These standards virtually negated the legitimacy of truthful advertising for advertisements are inherently self-laudatory and are “undignified” to those who believe that professionals should not advertise at all. In any event, those standards were disapproved by the Supreme Court in Bates.

Id. For a discussion of the Bates decision, see infra notes 75-86 and accompanying text.

39. Model Code, supra note 14, at DR 2-102. In line with the Model Code, early ABA Ethics Committee opinions permitted departing partners to announce a change of employment. See, e.g., ABA Comm. on Professional Ethics and Grievances, Informal Op. 910 (1966) (declaring that departing attorney may, “upon leaving the firm[,] send announcements to clients with whom he has had personal contact through the firm advising them of the change, without elaboration”).

With respect to the acceptable content of attorney announcements, the Model Code instructed the following:

[The formal announcement] shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice, except as permitted under DR 2-105.

Model Code, supra note 14, at DR 2-102(A)(2).

40. Model Code, supra note 14, at DR 2-201(A). The Model Code further provides that “[a] lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.” Id. at DR 2-101(A); see also Model Code, supra note 14, at DR 2-102 (requiring that professional cards, announcement cards and “similar professional notices” be “in dignified form” in order to avoid discipline).

Based upon the “dignified” standard, the ABA gave its approval of the following letter, comprised of only the most basic facts:

Dear [Client]:

Effective [date], I became the resident partner in this city of the XYZ law firm, having withdrawn from the ABC law firm. My decision should not be construed as adversely reflecting in any way on my former firm. It is simply one of those things that sometimes happens in business and professional life.

I want to be sure that there is no disadvantage to you, as the client, from my move. The decision as to how the matters I have worked on for you are handled and who handles them in the future will be completely yours, and whatever you decide will be determinative.


In upholding the letter, the committee stressed the following factors: “[a.] the
tending to induce a client to discharge a former firm's representation is entirely inappropriate and impermissible under the Model Code's standards.41

2. The Model Rules

The Model Rules do not contain a provision similar to that found in the Model Code.42 Generally, the Model Rules are less restrictive than the Model Code in defining the permissible scope of attorney communications to prospective clients.43 The Model Rules, however, do provide limitations on permissible solicitation.44 For example, Model Rule 7.3 states, in pertinent part, that: "A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."45

The United States Supreme Court interpreted certain Model Rules' restrictions on client solicitation to be unconstitutional.46 For example, the Court ruled that the targeted direct mail provision of Model Rule 7.3 was unconstitutional in Shapero v. Kentucky Bar Ass'n.47 Indeed, decisions such as Shapero indicate support for virtually unrestricted written communications with prospective clients.48

notice does not urge the client to sever relationship[s] with the lawyer's former firm and does not recommend the lawyer's employment . . . and [b.] the notice is brief, dignified, and not disparaging of the lawyer's former firm." Id.

41. See Johnson, supra note 11, at 21 (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1457 (1980)).

42. Id. at 22. Unlike the Model Code, the Model Rules neither distinguish between in-person communications and mailings nor directly limit the content and audience of formal written announcements of attorney withdrawal. Rather, the Model Rules target restrictions primarily at direct contact with potential clients. See MODEL RULES, supra note 14, Rule 7.3 ("A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client . . . when the significant motive for the lawyer's doing so is the lawyer's pecuniary gain.").


44. See MODEL RULES, supra note 14, at Rules 7.1, 7.3 & 7.5 (establishing restrictions on attorney solicitation).

45. Id. at Rule 7.3.


47. 486 U.S. 466, 472 (1988).

48. Id.
3. Local Authorities

Given the conflicting standards in the Model Code and the Model Rules, the precise scope of permissible client solicitation by departing partners continues to be a subject of contention and concern.\(^{49}\) Local authorities charged with analyzing ethical dilemmas have applied a number of conflicting approaches to this problem. For instance, some authorities have held that a lawyer may not contact a client unless the lawyer had a personal relationship with that client.\(^{50}\) Other jurisdictions allow contact with all clients from a former firm.\(^{51}\) Some states deny an attorney the opportunity to advise their clients of the right to choose their own counsel,\(^{52}\) while others allow lawyers the opportunity to provide such

\(^{49}\) See, e.g., Chicago Bar Ass'n Comm. on Professional Responsibility, Op. 83-2 (1983) (departing attorney should be permitted to send written communication to present and former clients of law firm announcing his or her departure); Florida Bar Professional Ethics Comm., Op. 84-1 (1984) (concluding that attorneys may notify client of their withdrawal from firm, but may not solicit response from client regarding handling of client's files); Idaho State Bar Comm. on Ethics, Formal Op. 108 (1981) (deciding that attorney may notify clients of departure but cannot solicit their business); State Bar of Texas Professional Ethics Comm., Op. 422 (1984) (finding duty owed as result of attorney-client relationship allows attorney to notify clients of withdrawal from firm); see also PRACTICING LAW INSTITUTE, LEGAL ETHICS, EVERYTHING A LAWYER NEEDS TO KNOW AND SHOULD NOT BE AFRAID TO ASK 246-47 (1988) (suggesting that after separation from firm, lawyers may communicate with clients, but not prior to departure).

\(^{50}\) See, e.g., ABA Informal Op. 681 (1963) (deciding that attorneys may send announcements of their withdrawal only to their personal clients, not to firm clients).

\(^{51}\) See, e.g., Iowa State Bar Comm. on Professional Ethics and Conduct, Op. 80-40 (1980) (determining that upon dissolution, all firm clients may be notified by mail and given choice of attorney).

\(^{52}\) See, e.g., Florida Bar Professional Ethics Comm., Op. 84-1 (1984) (concluding that attorney may notify client of withdrawal from firm, but may not solicit response from client or provide further information regarding handling of client's files).
information. Finally, some authorities require that the attorney-client contact be only in writing. Still others allow for telephone contact.

Courts have also attempted to settle this issue. In doing so, some courts have examined the issue in terms of whether the client "belongs to" the law firm or to the departing partner. Such an "ownership" approach is problematic, however, because clients are not assets subject to possession or "bartering." Rather, clients are free to hire counsel of their choosing and they retain the absolute right to discharge their lawyers, with or without cause. As demonstrated earlier, however, neither the Model

53. See, e.g., State Bar of Cal. Standing Comm. on Professional Responsibility & Conduct, Formal Op. 1985-86 (1985) (deciding that attorneys have duty to notify client so that client can make "informed choice of counsel"); Illinois State Bar Ass'n Comm. on Professional Responsibility, Op. 84-13 (1985) (departing attorney may inform clients of their right to choose who will represent them); State Bar of Wis. Comm. on Professional Ethics, Op. 80-18 (1981) (stating that attorney may send notice of change of employment and notice may inform client that client has right to choose future representation, but may not urge or recommend attorney's employment).

54. See Chicago Bar Ass'n Comm. on Professional Responsibility, Op. 83-2 (1983) (declaring that departing attorney should be permitted to send written communication to present and former clients of law firm); Iowa State Bar Comm. on Professional Ethics & Conduct, Op. 80-40 (1980) (determining that upon dissolution attorneys may notify clients by mail, but may not contact clients personally).


56. See, e.g., Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 393 A.2d 1175, 1181-85 (Pa. 1978) (referring to clients and their respective files as property of departing attorneys' former firm), cert. denied, 442 U.S. 907 (1979). For a general discussion of property rights issues upon termination of attorney-client relationship with regard to client file and information contained therein, see Brian J. Slovut, Note Eliminating Conflict at the Termination of the Attorney-Client Relationship: A Proposed Standard Governing Property Rights in the Client's File, 76 Minn. L. Rev. 1483, 1484 (1992) (concluding that attorneys should have ownership rights in notes and intraoffice communications and that clients should have ownership rights in remainder of file).

57. See DRINKER, supra note 1, at 189 (noting that clients are not merchandise); see also Dwyer v. Jung, 336 A.2d 498, 499 (N.J. Super. Ct. Ch. Div.) (citing DRINKER, supra note 1, at 189) ("A lawyer's clients are neither chattels nor merchandise, and his practice and good will may not be offered for sale."); aff'd, 348 A.2d 208 (N.J. Super. Ct. App. Div. 1975); Missan v. Schoenfeld, 445 N.Y.S.2d 856, 859 (Sup. Ct. 1981) (ruling that partner has no "property right" in clients because clients select counsel of their own choosing); ABA Comm. on Professional Ethics, Formal Op. 300 (1961) (holding restrictive covenant invalid because it constituted inappropriate attempt to "barter in clients" that would be inconsistent with concept of professional status); cf. WOLFRAM, supra note 10, § 16.21, at 879-80 ("A client's files are not subject to sale or other voluntary or involuntary transfer because they belong to the client and not to the lawyer.").

58. See, e.g., Ellerby v. Spiezer, 485 N.E.2d 413, 416 (Ill. App. Ct. 1985) ("[C]lients of ... [a dissolving] partnership ... [are] free to be represented by any member of the dissolved partnership or by other attorneys of their choice."); Resnick v. Kaplan, 434 A.2d 582, 588 (Md. Ct. Spec. App. 1981) ("[A] client has the right to elect the attorney he prefers, and ... a member of a firm can not force himself upon a client of the firm merely because he is a member of that partner-
Code nor the Model Rules provide definitive assistance in resolving this dilemma, with both emphasizing attorney-client, rather than firm-client, relationships. As a result, courts, left to their own predilection, have at times produced curious decisions.

A recent illustration of the property or "ownership" approach to attorney solicitation is found in *Adler, Barish, Daniels, Levin & Creskoff v. Epstein.* In that case, a group of associates left a larger law firm to establish their own firm. Immediately upon leaving their former firm, the associates contacted certain clients, predominantly via the mails, concerning the clients' legal representation. Ultimately, the court found the associates' conduct to be an "improper" self-recommendation and to be damaging both to the firm and to its clients. Finding that the attorneys acted in

Both the Model Code and the Model Rules require attorney withdrawal upon discharge by the client. *Model Code,* supra note 14, at DR 2-110B (providing that lawyer "shall withdraw from employment . . . if: (4) he is discharged by his client"); *Model Rules,* supra note 14, Rule 1.16 ("[A] lawyer . . . shall withdraw from the representation of a client if: (3) the lawyer is discharged."). Even a contract claiming to bind a client remains terminable at the will of the client. *See id.* at 1.16 cmt. (stating that "[a] client has a right to discharge a lawyer at anytime, with or without cause, subject to liability for payment for lawyer's services").

59. See *Model Rules,* supra note 14, at Rule 1.1 (requiring attorney, rather than firm, to provide competent representation of client); *see also id.* at Rules 1.6, 1.7, 1.8, 1.9 and 5.1 (speaking in terms of attorney obligations as opposed to firm obligations); ABA Comm. on Professional Ethics, Formal Op. 300 (1961) (stating that "[the] relationship between attorney and client are personal and individual relationships"). *But cf.* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1428 (1979) (determining that "[a] client employs the legal services office as a firm and not a particular lawyer").

61. *Id.* at 1177.
62. *Id.* at 1177-78. Although some contacts were made in-person or by phone, most were made by letter. *Id.* A sample letter contained the following information: confirmation of a recent conversation; termination of the lawyers' association with the firm; advice regarding the client's right to choose his or her own counsel; confirmation of the client's prior expressed desire to retain the author of the letter; and identification of enclosed documents facilitating choice of counsel to be sent to Adler, Barish and to the author. *Id.* at 1178.
63. *Id.* at 1184. Seemingly more concerned with the adverse affect on the firm rather than the clients, the court stated that the associates' conduct "adversely affected more than the informed and reliable decision-making of Adler, Barish clients with active cases. Their conduct also had an immediate impact upon Adler, Barish." *Id.* (emphasis added).
contravention of the “rules of the game,” the court enjoined the attorneys from making further communications with the former firm’s clients other than by means of the formal announcements permitted under the Model Code.

The validity of the Adler, Barish court’s opinion is questionable in light of the established principles of client choice and the constitutional protection granted to attorney speech. For example, the Adler, Barish court characterized clients previously represented by Adler, Barish as the firm’s property. This idea, that a client “belongs” to an attorney or law firm, is repugnant to the rule that the client has an absolute right to determine who will represent him or her. Indeed, the Adler, Barish court’s categorical conclusion that clients represented by a firm’s attorneys are thereby clients of the firm goes too far.

64. Id. at 1184-85. The “rules of the game” to which the Adler, Barish court referred are indefinite standards for regulating attorney conduct. Cf. Mark D. Flanagan, Comment, Lateral Moves and the Quest for Clients: Tort Liability of Departing Attorneys for Taking Firm Clients, 75 CAL. L. REV. 1809, 1831 (1987) (criticizing use of vague standards such as “rules of the game”).

65. Adler, Barish, 393 A.2d at 1186. The Adler, Barish court analogized the facts presented in the case before them to those in Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978). Id. The Adler, Barish court found that the associates’ conduct of corresponding with their former firm’s clients “frustrates, rather than advances, Adler, Barish clients’ informed and reliable decisionmaking.” Id. at 1181. The egregious “ambulance chasing” conduct involving the in-person solicitation set forth in Ohralik, however, hardly represents the conduct of the Adler, Barish associates; rather, the Adler, Barish associates’ conduct more closely typifies the targeted mail communications expressly determined by the Supreme Court to be constitutional. See Shapero v. Kentucky Bar Ass’n, 486 U.S. 466, 472 (1988); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648 (1985).

66. See, e.g., Hillman, supra note 3, at 24-25 (criticizing decision of Adler, Barish court stating, “particularly with respect to the mailings that the court found so offensive . . . the . . . court’s facile dismissal of the associates’ claims of constitutional protection may well reflect a different era’s ‘rules of the game’”).

67. Adler, Barish, 393 A.2d at 1184.

68. WOLFRAM, supra note 10, § 16.2.3, at 888. As one commentator stated: Attempting to resolve the issue [of unfinished partnership business] by referring to clients as “files” and debating which lawyer “owns,” or to which lawyer a client “belongs” obscures and distorts the client-lawyer relationship. The compelling fact is that the client-lawyer relationship is personal; clients should accordingly have a free choice of counsel. The best way to accommodate interests that pull in sometimes conflicting directions is to permit clients to make their own choice but to penalize lawyers who employ methods of gaining clients that overreach the clients, breach fiduciary obligations to other partners during the existence of the partnership, or falsely disparage former colleagues.

Id.

69. Hillman, supra note 3, at 90. At first blush, this idea seems in line with general partnership, contract or tort law that maintains that a client represented by an attorney at a firm actually is a client of the partnership, rather than a client of the particular lawyer actually consulted. See, e.g., Corti v. Fleisher, 417 N.E.2d 764, 768 (Ill. App. 1981) (“It is fundamental that the employment of one member of a law firm is the employment of all whether all are specially consulted or not, except where there is a special understanding to the contrary.”). The Adler, Barish
The *Adler, Barish* opinion is flawed in another context. In setting forth its rationale, the court stated that, without supplemental communication with any attorneys, the client alone must ascertain the ability to terminate current legal representation and to secure other counsel.\(^{70}\) Clearly, an uninformed client—a layperson uneducated in the law—cannot be expected to unilaterally realize all possible consequences and implications of a firm breakup. Such a determination sounds more akin to a strategic decision to be made by attorneys after careful study and considerable contemplation. By placing such an onerous burden on the unsuspecting client, the *Adler, Barish* decision fails to adequately protect and advance the concept of client-informed choice—a goal the court apparently sought to achieve.\(^ {71}\)

As discussed, the ethical rules governing the practice of law are far from uniform.\(^ {72}\) Whether they are modelled after the Model Code or the Model Rules, the area of client solicitation involves consideration of many issues and remains a confusing area with which to deal. This confusion is evidenced by the conflicting decisions of local ethics committees.\(^ {73}\) The United States Supreme Court, however, has decided a line of cases in the context of the First Amendment.\(^ {74}\) These cases provide some guidance as to constitutionally permissible restrictions on client solicitation by attorneys.

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\(^{70}\) Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 382 A.2d 1226, 1233 (Pa. Super. 1977) (Spaeth, J., concurring), rev'd, 393 A.2d 1175 (Pa. 1978) (emphasis added). The concurrence to the intermediate appellate court’s opinion dramatizes this point:

> It is noble and daring to embark on a career of law by cutting the umbilical cord that ties one to an employment contract. But taking the heart and soul of the benefactor is immoral, illegal and repulsive. *If they want their own firm, let them get their own clients.*


\(^{71}\) *Id.* at 1181 (stating that the withdrawing associates' conduct “frustrates, rather than advances, Adler Barish clients’ ‘informed and reliable decisionmaking’”); *id.* at 1184 (indicating that withdrawing associates' conduct “adversely affected . . . the informed and reliable decisionmaking of Adler Barish clients with active cases”).

\(^{72}\) For a discussion of the Model Code and the Model Rules, see *supra,* notes 33-48 and accompanying text.

\(^{73}\) For a discussion of conflict rulings of local ethics committees, see *supra,* notes 49-55 and accompanying text.

\(^{74}\) For a discussion of the First Amendment cases decided by the United States Supreme Court, see *infra* notes 75-100 and accompanying text.
B. Attorney Solicitation and the First Amendment

1. Written Solicitations

*Bates v. State Bar of Arizona* \(^{75}\) marked the Supreme Court's initial examination of the interplay between the First Amendment and ethical rules prohibiting attorneys from soliciting clients. In *Bates*, the Court announced an attorney's right under the First and Fourteenth Amendments \(^{76}\) to advertise truthfully the prices of routine legal services. \(^{77}\)

In reaching its conclusion, the Court rejected several arguments asserted by the State. \(^{78}\) First, the State argued that lawyer advertising would adversely affect professionalism. \(^{79}\) Rejecting this contention, the Court found the asserted nexus between attorney advertising and the feared downfall of the legal profession to be "severely strained." \(^{80}\) Next, the State alleged that attorney advertising was inherently misleading. \(^{81}\) The Court refused to accept this argument as well, responding that "[i]f the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." \(^{82}\) Several additional arguments were offered by the State, including an assertion that

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76. *Id.* at 353. The First Amendment was made applicable to the states under the Due Process Clause of the Fourteenth Amendment. *See*, e.g., *Schneider v. State*, 308 U.S. 147, 160 (1939). Although the Bill of Rights is not entirely applicable to the states, those rights deemed to be "fundamental" to a just system of government are made applicable to the states. *Id.* With regard to this issue, the Court has stated that "[f]reedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action." *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938).
77. *Bates*, 433 U.S. at 384. Note, however, that the attitude against competition through advertising still existed at the time *Bates* was heard, as evidenced by the 5-4 decision of the Court. *Id.* at 352.
78. *Id.* at 368-70, 372, 376, 377-79.
79. *Id.* at 368.
80. *Id.* Writing for the Court, Justice Blackmun acknowledged that attorneys practice law to earn a living. *Id.* As support for this claim, the Court recounted appellee's statement at oral argument: "We all know that law offices are big businesses, that they may have billion-dollar or million-dollar clients, they're run with computers, and all the rest. And so the argument may be made that to term them noncommercial is sanctimonious humbug." *Id.* at 368 n.19.
81. *Id.* at 372.
82. *Id.* at 375. The Court recognized the problems created by a blanket prohibition against attorney advertising:

In fact, it has been suggested that the failure of lawyers to advertise creates public disillusionment with the profession. The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community: Studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services or because of an inability to locate a competent attorney.

*Id.* at 370 (citations omitted).

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lawyer advertising was undignified. The Court countered this notion with its observation that other professionals advertise without incurring any loss of dignity or respect.

Following the Bates decision, forty-five states and the District of Columbia revised their ethical codes to allow attorney advertising. Because many states continued, however, to find attorney advertisements distasteful, as a practical matter, many rules allowed no more than was expressly required under Bates.

Five years after Bates, the Court extended similar constitutional protections for more targeted written communications by attorneys. The holding of In re R.M.J. precludes a state from prohibiting or restricting the contents of legal advertisements unless such advertisements are found to be false or misleading. Although states are constitutionally permitted to regulate misleading speech, the Court emphasized that they must do so "with care and in a manner no more extensive than reasonably necessary to further substantial [governmental] interests." Commentators have suggested that the R.M.J. decision indicates the Court's unwillingness to permit needless restrictions on the content of attorney advertising.

83. Id. at 375-79 (including arguments based on: adverse effect on administration of justice; undesirable economic effects of advertising; adverse effect of advertising on quality of service; and difficulties of enforcement).

84. Id. at 369-70. In fact, the Court explained: "[I]t has been suggested that the failure of lawyers to advertise creates public disillusionment with the profession. . . . Indeed, cynicism with regard to the [legal] profession may be created by the fact that it long has publicly eschewed advertising." Id. at 370-71 (footnotes omitted).

85. Roger P. Brosnahan & Lori B. Andrews, Regulation of Lawyer Advertising: In the Public Interest, 46 BROOK. L. REV. 423, 426 n.19 (1980). For an examination of how various states revised their rules after the Bates decision, see id. at 426-34.

86. Id. at 426-34. Although states could no longer impose a per se ban on attorney advertising, many of them established restrictions that were intended to limit attorneys' use of their newfound right to advertise. Id.


88. Id. at 203. Specifically, the Court stated that "[t]ruthful advertising related to lawful activities is entitled to the protections of the First Amendment." Id.

89. Id. at 207. The Court went on to state that, "[t]he absolute prohibition on [the attorney's] speech, in the absence of a finding that his speech was misleading, does not meet these requirements." Id.

90. See Shields, supra note 3, at 304 ("In re R.M.J. inspires hope that the Court is prepared to pull the legal profession into the modern world."); see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976). In Virginia State Bd. of Pharmacy, the Court stated:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id. (emphasis added).
The Court continued to expand the scope of permissible attorney communications in *Zauderer v. Office of Disciplinary Counsel.* In this opinion, the Court again rejected a rule mandating dignified advertising. The Court found that any state rule prohibiting attorneys from soliciting or accepting employment through truthful and non-deceptive advertisements containing information or advice about a specific legal problem violates the First Amendment. The Court required a more substantial evil than mere "bad taste" or lack of dignity to justify an absolute ban on attorney communications.

Finally, in *Shapero v. Kentucky Bar Ass'n,* the Supreme Court supported virtually unrestricted written communications between attorneys and prospective clients by holding that the targeted direct mail provision of Model Rule 7.3 was unconstitutional. Although these attorney solicitation cases permit states to regulate communications in order to protect consumers from deception, each holding flatly rejects overly broad restrictions on written communications targeting prospective clients.

92. Id. at 647. The Court expressed its sentiments as follows: "[T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity." Id. at 648 (emphasis added).
93. Id. ("An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients.").
94. Id. at 648. Specifically, the Court stated: [W]e are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights. Even if that were the case, we are unpersuaded that undignified behavior would tend to recur so often as to warrant a prophylactic rule.
96. Id. at 472. Rule 7.3 of the Model Rules provided: A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person, or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communications directed to a specific recipient, but does not include letters addressed or advertising circulars, distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.
97. See, e.g., *Shapero,* 486 U.S. at 472 (stating that state rules "may be no broader than reasonably necessary to prevent the perceived evil" (quoting *In re*...
2. In-Person Solicitation

In contrast to mailed communications, in-person solicitation involves direct and personal contact with prospective clients and presents different concerns, such as an invasion of the client’s privacy, overreaching and undue influence by the attorney.\(^\text{98}\) Due to the fact that attorneys are trained in the art of persuasion, traditional solicitation standards have prohibited efforts taken by attorneys to secure employment through personal con-

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98. \textit{Zauderer}, 471 U.S. at 641 ("In-person solicitation by a lawyer . . . [is] a practice rife with possibilities for overreaching, invasion of privacy and outright fraud." ) (citing \textit{Ohralik v. Ohio State Bar Ass’n}, 436 U.S. 447, 464-65 (1978)). Overreaching and undue influence are the feared results of personal contact between an attorney and an unsuspecting and unsophisticated layperson. This concern is illustrated in the following passage: "The Rule [against solicitation] is designed to protect the layperson from the importuning of a lawyer in a direct interpersonal encounter where the layperson may feel overwhelmed and ‘have an impaired capacity for reason, judgment and protective self-interests.’" \textit{ABA Comm. on Ethics and Professional Responsibility, Informal Op. 85-1515} (1985) (quoting \textit{MODEL RULES}, supra note 14, Rule 7.3 cmt); see also \textit{Shapero}, 486 U.S. at 476 (recognizing similarly increased likelihood for abuses or mistakes with regard to direct-mail solicitation); \textit{Ohralik}, 436 U.S. at 457 ("Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection."); \textit{Wolfram}, supra note 10, § 8.11.1, at 479 ("Business relationships with clients are beset with conflicts of interest and will often involve situations in which the lawyer occupies a dangerously superior bargaining position.").

After stating that "the mode of communication makes all the difference," the \textit{Shapero} Court observed the alternatives which could prevent overreaching, at least in the context of direct mail solicitation:

\[\text{[M]ereby because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech. The State can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, giving the State ample opportunity to supervise mailings and penalize actual abuses.}\]

\textit{Shapero}, 486 U.S. at 476 (citations omitted). The Supreme Court has cited other possible risks that might result from in-person client contact, such as increased litigation, increased fraudulent claims and a demeaning of the legal profession. Ruth Fleet Thurman, \textit{Direct Mail: Advertising or Solicitation? A Distinction Without a Difference} 4-5 (1982); see also Deborah L. Rhode, \textit{Solicitation}, 36 \textit{J. LEG. EDUC.} 317, 319-21 (1986) (describing how underrepresentation, overreaching misrepresentation, overcharging and intrusiveness have historically been associated with attorney solicitation).
Accordingly, the Supreme Court upheld a categorical ban on in-person solicitation for purposes of pecuniary gain in *Ohralik v. Ohio State Bar Ass'n.*

3. Justice O'Connor's Dissenting Views

In both *Shapero* and *Zauderer,* Justice O'Connor authored dissenting opinions. In each, Justice O'Connor expressed her view that the interest in keeping the practice of law "professional" is a sufficient justification for the restrictions imposed by the states. She felt that the specialized training and education in the law may "confer[ ] [upon an attorney] the power and the temptation to manipulate the system of justice for one's own ends." In fact, under Justice O'Connor's paternalistic approach, rigid ethical proscriptions against attorney advertising are absolutely necessary to prevent overreaching and other abuses by attorneys. Based purely on her desire to preserve the legal profession as "a genuine profession," Justice O'Connor called for the continuation of "fairly severe constraints on attorney advertising."

99. *Ohralik,* 436 U.S. at 465. For example, with respect to client solicitation, the 1908 Canons of Professional Ethics took a strong position, announcing that "[a] duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred." *Canons,* supra note 2, at Canon 28 (emphasis added); see also ABA Comm. on Professional Ethics and Grievances, Formal Op. 111 (1934) ("From earliest times, both in England and in America, solicitation of employment by lawyers has been considered beneath the essential dignity of the profession."); Deborah T. Landis, Annotation, *Modern Status of Law Regarding Solicitation of Business By or For Attorney,* 5 A.L.R.4TH 866, 870-72 (1980) (concluding that these rules bar any personal contact between departing attorney and clients of attorney's former firm for purposes of representing clients).


101. See, e.g., *Shapero,* 486 U.S. at 489 (O'Connor, J., dissenting) ("[S]pecial ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a political system like ours."); *Zauderer,* 471 U.S. at 676 (O'Connor, J., dissenting) ("The States understandably require more of attorneys than of others engaged in commerce. Lawyers are professionals, and as such they have greater obligations." (emphasis added)).


103. *Id.* at 490 (O'Connor, J., dissenting). In her dissent in *Shapero,* Justice O'Connor stated that "ordinary legal prohibitions against force and fraud, are simply insufficient to protect consumers of their necessary services from the peculiar power of the specialized knowledge that [attorneys] possess." *Id.* (O'Connor, J., dissenting).

104. *Id.* at 491 (O'Connor, J., dissenting). Nowhere in her opinions does Justice O'Connor elaborate on what is meant by the term "profession" or what specific authority requires attorneys to be held to a more stringent standard than other professionals—such as doctors or accountants.
Although the public perceives the partnership form of organization as fairly simple and straightforward, dissolution of such an arrangement presents rather complex issues.\(^{105}\) Seemingly, a partnership could avoid problems associated with dissolution by simply including in its partnership agreement a restrictive covenant prohibiting withdrawing partners from competing with the firm. Many courts, however, have held that legal ethics create a per se ban on the use of restrictive covenants among lawyers for these purposes.\(^{106}\)

The history of this per se ban on restrictive covenants is a relatively short but tumultuous one. Prior to 1961, cases and other authorities addressing restrictive covenants between lawyers were sparse.\(^{107}\) But, in 1961, the American Bar Association Committee on Ethics and Professional Responsibility voiced strong opposition to such agreements.\(^{108}\) Relying primarily on Canon 7 of the Professional Canons of Ethics, which precludes a lawyer from encroaching on the business of another lawyer,\(^{109}\) the Committee viewed noncompetition covenants as an unacceptable form of bartering in clients and inconsistent with a lawyer's professional status.\(^{110}\) In the Committee's opinion, such agreements constituted a per se ethics violation.\(^{111}\) The ABA Committee offered three rationales for its conclusion: (1) because clients are not merchandise, they cannot be bartered among lawyers; (2) lawyers should have the right to practice wherever they please; and (3) because ethical rules prohibit a lawyer from

\(^{105}\) See generally Unif. Partnership Act § 6, 6 U.L.A. 1 (Supp. 1985) (discussing obligations of partners upon firm dissolution, including winding up of firm business). For a detailed discussion of the relevant implications of firm dissolution under the Uniform Partnership Act, see Hillman, supra note 3, at 30-57.


\(^{109}\) Canons, supra note 2, Canon 7. Canon 7 provides that "efforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the Bar." Id.

\(^{110}\) ABA Comm. on Professional Ethics and Grievances, Formal Op. 300 (1961). ("It is unethical for a lawyer employing another lawyer to include as part of the employment contract a restrictive covenant prohibiting the employee from practicing law in the city and county for two years after the termination of employment."). The Committee so held despite any express prohibition in the Canons. A literal reading of the Canons suggests only that covenants imposing an outright ban on competition are unethical.

\(^{111}\) Id. It is significant that the Committee described the practice of law as a profession, not a business or commercial enterprise. Id. The Committee further stated: "The practice of law is not a business which can be bought or sold." Id.
soliciting another lawyer's clients, restrictive covenants are unnecessary.\textsuperscript{112} It is noteworthy that in its discussion, the Committee emphasized the deleterious effects such a covenant would have on lawyers, but failed to discuss the effects on clients.\textsuperscript{115}

One year later, the Committee temporarily reconsidered its stance.\textsuperscript{114} Reasoning that the ban on restrictive covenants applied only in the employment context (i.e., as to employment agreements between an employer/partner and an employee/associate), the Committee held that the per se ban was inapplicable to agreements between partners.\textsuperscript{115} The Committee reached this conclusion because it believed that partners were on "equal footing" with each other in the legal arena.\textsuperscript{116} The Committee subsequently reversed this decision, however, and applied the per se ban on restrictive covenants to all attorneys in Informal Opinion 1072.\textsuperscript{117}

In this informal opinion, the ABA Committee emphasized the client's freedom of choice.\textsuperscript{118} Justifying the imposition of a per se ban on lawyer noncompetition agreements, the Committee stated, without substantiation, that such agreements "[t]end to interfere with and obstruct the freedom of the client in choosing and dealing with his lawyer."\textsuperscript{119} The virtual per se ban on lawyer advertising and solicitation currently advocated by the Committee, however, contravenes the rather long line of Supreme Court cases upholding lawyers' First Amendment right to truthful advertising and solicitation.\textsuperscript{120} The courts have relied on language in both the

\begin{itemize}
\item \textsuperscript{112} Id.
\item \textsuperscript{113} See Penasack, supra note 6, at 892.
\item \textsuperscript{114} ABA Comm. on Ethics and Professional Responsibility, Informal Op. 521 (1962).
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Id.
\item \textsuperscript{117} ABA Comm. on Professional Ethics and Grievances, Informal Op. 1072 (1968) (rejecting employee-partner distinction). The opinion concluded that "attorneys should not engage in an attempt to barter clients, nor should their practice be restricted. The attorney must remain free to practice when and where he will and to be available to prospective clients who might desire to engage his services." Id.
\item \textsuperscript{118} Id.
\item \textsuperscript{119} Id. For a general discussion of the case law addressing the per se rule against restrictive covenants in lawyer employment agreements, see Penasack, supra note 6, at 889-904.
\item \textsuperscript{120} For a discussion of First Amendment cases, see supra, notes 71-100 and accompanying text.
\end{itemize}
Model Code\textsuperscript{121} and the Model Rules\textsuperscript{122} to invalidate restrictive covenants in attorney partnership agreements.\textsuperscript{123}

Courts proscribing the use of restrictive covenants by attorneys have drawn a distinction between lawyers and all other professionals who remain free to agree to restrictive covenants limiting their professional practice.\textsuperscript{124} There are two primary justifications proffered for treating lawyers

\textsuperscript{121} Model Code, supra note 14, at DR 2-108. This section states:
(A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.
(B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

\textit{Id.}

\textsuperscript{122} Model Rules, supra note 14, at Rule 5.6. This Rule provides that:
\begin{itemize}
  \item[(a)] a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
  \item[(b)] an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a controversy between private parties.
\end{itemize}

\textit{Id.} The comment to Rule 5.6 further states that “[a]n agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer.” \textit{Id.} at Rule 5.6 cmt.

\textsuperscript{123} See, e.g., Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598, 603 (Iowa 1990) (holding that provision calling for forfeiture of partnership interest after causing “detriment” to firm by withdrawing and competing was void); Meehan v. Shaughnessy, 535 N.E.2d 1255, 1262-63 (Mass. 1989) (finding restrictive agreement permitting subsequent representation of firm’s clients by departing partners violative of ethical rule); Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 146-47 (N.J. 1992) (ruling that agreement barring compensation to withdrawing partners who represent clients of former firm within one year of departure was void); Dwyer v. Jung, 336 A.2d 498 (N.J. Super. Ch. Div.) (holding covenant not to represent former firm’s clients void), aff’d, 348 A.2d 208 (N.J. Super. Ct. App. Div. 1975); Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 417 (N.Y. 1989) (holding that agreement conditioning withdrawal payments if departing partner practices law in certain geographical area was void); Gray v. Martin, 663 P.2d 1285, 1290-91 (Or. 1983) (ruling agreement forfeiting withdrawal payments if withdrawing partner practices law in certain geographical area was void); Hagen v. O’Connell, Goyak & Ball, 683 P.2d 563, 565 (Or. App. 1984) (determining noncompetition agreement was void); Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528, 529-30 (Tenn. 1991) (voiding agreement calling for forfeiture of equity and deferred compensation for departing partner who continues to practice law); Cohen v. Graham, 722 P.2d 1390-92 (Wash. App. 1986) (holding that agreement not to represent former firm’s clients was unenforceable).

\textsuperscript{124} Dwyer, 336 A.2d at 500. (“Commercial standards may not be used to evaluate the reasonableness of lawyer restrictive covenants. Strong public policy considerations preclude their applicability.”); see also Model Code, supra note 14, at DR 2-108(A). Based upon this distinction, courts typically uphold restrictive covenants involving, for example, physicians and accountants. See Perry v. Moran, 748 P.2d 224, 229 (Wash. 1987) (“A covenant prohibiting the former employee from providing accounting services to the firm’s clients for a reasonable time is a fair
differently. First, doing so is thought to ensure that the public has an unrestricted pool of attorneys from which to choose legal counsel. Second, this approach protects attorneys from bargaining away their right to practice on their own after leaving an employer. Based on these concerns, authorities have held that ordinary commercial standards do not apply when evaluating the reasonableness of lawyer anticompetition covenants. Given the issues confronting a practicing lawyer today, however, it is questionable whether such a distinction is reasonable.

Duyer v. Jung \textsuperscript{130} is one of the earliest cases dealing with restrictive covenants in attorney partnership agreements. The disputed partnership agreement in Duyer provided that upon dissolution, clients would be divided among partners of the firm.\textsuperscript{131} Disregarding the typical balancing test applicable to doctors, accountants and other professionals, the Duyer court held that the agreement was void because it violated the public policy protecting clients' freedom of choice in legal representation.\textsuperscript{132} In an attempt to justify its decision, the Duyer court stated, "[c]ommercial standards may not be used to evaluate the reasonableness of lawyer restrictive covenants. Strong public policy considerations preclude their applicability."\textsuperscript{133} Commentators have expressed their disdain for the Duyer decision, criticizing the court's devotion to archaic ideals of the legal profession.\textsuperscript{134}

A few years later, the New York Supreme Court, in Cohen v. Lord, Day \& Lord,\textsuperscript{135} refused to enforce a clause that conditioned receipt of earned, but uncollected, partnership profits on an agreement not "to practice law in any state or other jurisdiction in which the [p]artnership maintains an office or any contiguous jurisdiction."\textsuperscript{136} Although it recognized that

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131. Id. at 499. Specifically, the agreement contained the following provision: Should the partnership terminate, all clients listed in exhibit "A" shall be designated to certain individual partners. Upon termination, and by virtue of this Agreement, all partners shall be restricted from doing business with a client designated as that of another partner for a period of 5 (five) years.
132. Id. at 501. The Duyer court opined that "an agreement dividing the client market and prohibiting attorneys from representing certain [clients] . . . has the effect of restricting those [clients] in their unlimited choice of counsel." Id.
133. Id. at 500. The court created a category of "lawyer restrictive covenants" that would be judged not by the usual commercial standards, but rather by ethical standards. Id. at 499. Although the court justified its decision on the principle of client choice, it failed to explain why the choice of a lawyer's client warranted any more protection than that of a doctor or accountant. Id.
134. See, e.g., Note, Attorneys Must Not Enter Into Partnership Agreements Prohibiting Themselves From Representing Former Clients Upon Termination of the Partnership, 4 Fordham Urb. L.J. 195, 207-09 (1975) (criticizing Duyer court's refusal to enforce restrictive covenant in partnership agreement).
136. Id. at 411. Reversing the decision of the Appellate Division, the Cohen court stated:

We hold that while the provision in question does not expressly or completely prohibit a withdrawing partner from engaging in the practice of law, the significant monetary penalty it exacts, if the withdrawing partner practices competitively with the former firm, constitutes an impermissible restriction on the practice of law. The forfeiture-for-competition provision would functionally and realistically discourage and foreclose a withdrawing partner from serving clients who might wish to continue to be represented by the withdrawing lawyer and would thus interfere with the client's choice of counsel.
\end{quote}
provision did not preclude an attorney from practicing law completely, the
court held that the "significant monetary penalty" resulting from the pro-
vision's enforcement would ultimately interfere with clients' freedom of
choice.\textsuperscript{137} The \textit{Cohen} decision put to rest the notion that financial forfeit-
ures would necessarily survive scrutiny under the disciplinary rules.\textsuperscript{138}
Since the \textit{Cohen} ruling, most courts have held that all restrictive covenants
between lawyers are unethical and against public policy.\textsuperscript{139}

Not all courts, however, follow the \textit{Cohen} approach. The first court to
decide counter to \textit{Cohen} was California's Second District Court of Appeals in
\textit{Haight, Brown \& Bonesteel v. Superior Court}.\textsuperscript{140} In \textit{Haight}, the court en-
forced a covenant that provided for the forfeiture of withdrawal benefits if
a partner subsequently competed with the firm.\textsuperscript{141} Although the court
recognized the primacy of client choice, it refused to hold that public pol-

\begin{flushright}
137. \textit{Id.}

138. \textit{Id.} at 411. Judge Hancock, in his dissent, disagreed with the majority's
concern with the attorney's financial well-being. \textit{Id.} at 417 (Hancock, J., dissent-
ing). He emphasized that the concern behind the ethical standard was for the
client: "Restrictions which somehow interfere with or restrict the freedom of pres-
ent or future clients to hire and fire lawyers are what the rule aims to prohibit." \textit{Id.}

N.W.2d 598, 602 (Iowa 1990) (holding that partnership attempted to penalize at-
torney for his clients' decisions to follow him, stating that "his freedom to withdraw
cannot be abrogated by the monetary penalty the firm has attempted to exact");
Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 143 (N.J. 1992) (finding that
termination agreement's provision discouraging withdrawing partners from con-
tacting firm's professional and paraprofessional staff violated public policy); \textit{Cohen},
550 N.E.2d at 410 ("A law firm partnership agreement which conditions payment
of earned but uncollected partnership revenues upon a withdrawing partner's obli-
gation to refrain from the practice of law in competition with the former law firm
restricts the practice of law in violation of Disciplinary Rule 2-108(A) ... and is
unenforceable in these circumstances as against public policy."); Gray v. Martin,
663 P. 2d 1285, 1290 (Or. Ct. App. 1983) (finding that loss of benefits is "certainly a
restriction on the attorney's right to practice"); Spiegel v. Thomas, Mann \& Smith,
P.C., 811 S.W.2d 528, 531 (Tenn. 1991) (holding that financial disincentive clause
incorporated into Tennessee Supreme Court rules violated DR 2-108).


141. \textit{Id.} The covenants at issue in the relevant partnership agreement read:
[E]ach Partner agrees that, if he withdraws or voluntarily retires from the
Partnership, he will not engage in any area of the practice of law regularly
practiced by the law firm and in so doing represent or become associated
with any firm that represents any client represented by this law firm
within a twelve (12) month period prior to said person leaving the firm,
within the Counties of Los Angeles, Ventura, Orange, Riverside or San
Bernardino nor with any City in such Counties for a period of three (3)
years from the date of withdrawal or retirement, so long as continuing
members of this firm engage in practice in the same areas of law.
A Partner . . . may violate [the section set forth immediately above]. How-
ever, by so doing, he forfeits any and all rights and interests, financial and
otherwise, to which he would otherwise be thereafter entitled as a depart-
ing Partner under the terms of this Agreement.
\textit{Id.} Adherence to these provisions relieves a withdrawing partner from liability for
debt incurred while with the firm. \textit{Id.}
icy required lawyers to be treated differently than other professionals.\textsuperscript{142} Broadly interpreting the California Rules,\textsuperscript{143} which codified the Model Rules, the court held that the Rules proscribed only agreements providing for an outright ban on competition and, as such, did not apply to covenants merely requiring the departing partner to "compensate his former partners."\textsuperscript{144} The court emphasized the importance of the distinction between covenants containing outright competitive proscriptions and agreements anticipating and resolving competition issues upon firm dissolution.\textsuperscript{145} In the \textit{Haight} court's opinion, the latter should be enforced if designed to protect legitimate interests of the law firm.\textsuperscript{146}

In December 1993, another California decision, \textit{Howard v. Babcock},\textsuperscript{147} again broke with nationwide precedent. The majority in \textit{Howard} first analyzed the law of restrictive covenants as applied to businesses in general.\textsuperscript{148} Based on the language of the general partnership statute, which allowed "any partner" to enter into a reasonable restrictive covenant, the \textit{Howard} court failed to find any indication or intent to provide an exception for lawyers.\textsuperscript{149} In fact, the \textit{Howard} court acknowledged that the comments to the original California Civil Code explicitly included lawyers.\textsuperscript{150} Although

\begin{itemize}
\item \textsuperscript{142} Id. at 971. Specifically, the \textit{Haight} court refused to "place lawyers in a class apart from other business and professional partnerships." Id.
\item \textsuperscript{143} \textit{CALIFORNIA RULES OF PROFESSIONAL CONDUCT}, Rule 1-500 (West Supp. 1993). Rule 1-500 of the California Rules of Professional Conduct states: A member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law, except that this rule shall not prohibit such an agreement which:
\begin{enumerate}
\item Is a part of an employment, shareholders', or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder or partnership relationship; or
\item Requires payments to a member upon the member's retirement from the practice of law.
\end{enumerate}
\item \textsuperscript{144} \textit{Haight}, 234 Cal. App. 3d at 969.
\item \textsuperscript{145} Id. The \textit{Haight} court stated that the partnership agreement provisions, on their face, "do not expressly or completely prohibit the . . . partners from engaging in the practice of law, or from representing any client." Id. As such, the provisions result in an outright ban on competition. Id.
\item \textsuperscript{146} Id. The \textit{Haight} court held that the ethical code at issue required respect not only for the client, but also for the relations among attorneys. Id.
\item \textsuperscript{147} 863 P.2d 150 (Cal. 1993).
\item \textsuperscript{148} Id. at 154. The \textit{Howard} court recognized the state's established law that "a partnership agreement may provide against competition by withdrawing partners in a limited geographical area." Id.
\item \textsuperscript{149} Id. at 157. The \textit{Howard} court agreed with the \textit{Haight} court and "declare[d] an agreement between law partners that a reasonable cost will be assessed for competition is consistent with [the applicable ethical rule]." Id. at 156.
\item \textsuperscript{150} Id. at 155. The \textit{Howard} court stated that "[w]hile it may be true that . . . when [the statute] . . . was enacted, it was not customary for lawyers to enter into noncompetition agreements, we do not view this historical circumstance as creating for all time an unspoken exception to the statute." Id.
\end{itemize}
it recognized its authority to impose higher standards of conduct under the professional rules of conduct,\footnote{151} the Howard court remained confident that both the interests of the public and the legitimate business interests of law firms\footnote{152} were protected by enforcing reasonable restrictive covenants.\footnote{153}

The Howard court further defended its decision based on the occurrence of what it termed "a revolution in the practice of law," that required the "economic interests of the law firm to be protected as they are in other business enterprises."\footnote{154} Because of these "sweeping changes" in the profession, the court felt justified in abolishing the per se rule banning non-competition agreements among law partners.\footnote{155} Accordingly, the case was remanded for examination under the "rule of reason" test applicable to noncompetition agreements between business partners generally.\footnote{156}

The sole dissenting justice, Justice Kennard, argued in support of the traditional per se ban on restrictive covenants.\footnote{157} Justice Kennard emphasized that despite the perceived "revolution" in the legal profession, the law was still first and foremost a profession, and that lawyers should continue to strive for the highest ethical standards.\footnote{158} Further, Justice Kennard opined that an attorney's fiduciary duty to clients directs that a

\begin{itemize}
  \item \footnote{151} \textit{Id.}
  \item \footnote{152} \textit{Id. at 160.} The Howard court recognized that "important business interests of law firms [could] no longer be ignored." \textit{Id. at 157.} In particular, the court referenced a firm's "financial interest in the continued patronage of its clientele." \textit{Id. (citing Kalish, supra note 124, at 438).}
  \item \footnote{153} \textit{Id.} The court felt assured that its decision sought to balance "the interests of clients in having the attorneys of choice, and the interest of law firms in a stable business environment." \textit{Id.} Dismissing the concerns of the dissent, the Howard majority stated: It is not our intent to relegate clients to the position of commodities, nor to elevate commercial concerns over the lawyer's bedrock duty of loyal and vigorous advocacy on behalf of the client. Rather, we have exercised our duty to regulate the practice of law with a care to understanding the world as it is, uninfluenced by rhetoric that appears to obscure, rather than clarify, the problem. \textit{Id. at 160-61.}
  \item \footnote{154} \textit{Id. at 156.} The Howard court further opined: "We are confident that our recognition of a new reality in the practice of law will have no deleterious effect on the current ability of clients to retain loyal, competent counsel of their choice." \textit{Id. at 156-57.}
  \item \footnote{155} \textit{Id. at 160.} The court went on to hold that, "an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm in a limited geographical area is not . . . void on its face as against public policy." \textit{Id.}
  \item \footnote{156} \textit{Id. at 161.}
  \item \footnote{157} \textit{Id. at 161-66 (Kennard, J., dissenting).}
  \item \footnote{158} \textit{Id. at 161 (Kennard, J., dissenting) ("Although the law is a business in the sense that an attorney in a law firm earns a living by practicing law, it is also and foremost a profession, with all the responsibilities that word implies."). Again, the Howard dissent fails to explain any substantive difference between attorneys and other professionals (e.g., doctors or accountants) to account for the heightened scrutiny imposed upon attorneys.}
\end{itemize}
client's right to choose counsel is paramount to any interest of either
the attorney or the law firm. In her view, the majority opinion
subordinated the client's rights to the monetary interests of law firms and,
consequently, weakened ethical standards as well as the integrity of the
legal profession.

Attorneys practicing law today are confronting new and complex is-
issues due, in large part, to increased mobility within the legal profession.
The rights of clients in choosing counsel and the rights of attorneys in
choosing where and for whom to practice must be appropriately balanced
when considering the proper scope of attorney solicitation as well as the
enforceability of restrictive covenants. The present ethical rules never
contemplated these concerns, and thus, rather than providing guidance in
this area, the rules only muddy the waters. Courts grappling with an ap-
propriate resolution must carefully weigh all the issues in order to reach a
decision that is truly fair—even if doing so would require the rejection of
certain traditional ideals which, viewed in today's standards, simply are
unworkable.

III. ATTORNEY SOLICITATION & USE OF RESTRICTIVE COVENANTS: THE
PROPER SCOPE OF ETHICAL RULES

The problem of bringing clients and lawyers together on a mutually fair
basis, consistent with the public interest, is as old as the profession itself.
It is one of considerable complexity, especially in view of the constantly
evolving nature of the need for legal services. The problem has not been
resolved with complete satisfaction despite diligent and thoughtful efforts
by the organized bar and others over a period of many years, and there is
no reason to believe that today's best answer will be responsive to future
needs.

A. Attorney Solicitation

Excessive restrictions on a departing attorney's right to communicate
with firm clients are inconsistent with the policies underlying Supreme
Court precedent. The Court's First Amendment case law with respect to
attorney solicitation instructs that an attorney has the right to contact any-
one, including clients of a former firm, in writing. Furthermore, the

159. Id. (Kennard, J., dissenting) ("The ethical rule that this court is called
upon to interpret exists to enforce the traditional and sound view that service to
clients, including protection of the clients' ability to employ the attorneys they
have come to trust, is more important than safeguarding the economic interests of
established attorneys and law firms.").

160. Id. (Kennard, J., dissenting).

dissenting).

162. For a discussion of permissible solicitation under the First Amendment,
see supra notes 75-100 and accompanying text.
Court's decisions make it clear that a substantial public interest supports the free flow of information to consumers concerning legal services. As one commentator noted: "[Because] individual[s are] constantly confronted with the necessity of making life-affecting decisions[,] they should have available a free flow of information upon which to base those decisions. . . . [Therefore,] there must be not only a freedom to speak but also a freedom to hear." Thus, the client's "need to know" and related public interests must be the principle concern when attempting to ascertain the appropriate scope of solicitation by attorneys. The mere availability of truthful advertising, however, is only the first step. Concomitant with this, a client must be educated as to the existence of the right to choose representation and the consequences of such a right so that he or she can truly make an informed choice.

Attorneys, therefore, must remain free to advise clients of their right to discharge one lawyer and substitute another, given that such information is truthful—especially in light of the fact that a client represented by an attorney involved in a firm breakup is often in a vulnerable position. Various authorities support the view that laypersons are entitled to material information bearing on the all-important decision of who shall represent them. The bar has long recognized that an attorney has an ethical obligation to "[p]rovide information relevant to the selection of the most appropriate counsel." Attorney conduct in the context of departures

163. See Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 646 (1985) (stating that "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful"); Bates, 433 U.S. at 364 (reasoning that commercial speech serves individual and societal interests in informed and reliable decision-making); see also In re Felmeister & Issacs, 518 A.2d 188, 192-93 (N.J. 1986) ("The public would be well served by more information about the legal system in order to know its legal rights and to help it choose a lawyer to enforce those rights . . . . All members of society, not just the direct recipients and users of the messages, benefit from attorney advertising.").


165. See ABA/BNA Manual Ethics Ops. (1986-1990), supra note 35, at 901:1601 (acknowledging client's right to "informed choice of counsel" (emphasis added)); ABA/BNA Manual Ethics Ops. (1980-1985), supra note 35, at 801:3203 ("A lawyer who terminates his association with a firm . . . may not insist on taking all active cases which came to him directly or because of earlier services rendered by him. Because the taking would result in a termination of employment, this client retains the right to decide on his counsel after full disclosure of all necessary information."); see also Lori B. Andrews, The Model Rules and Advertising, 68 A.B.A. J. 808, 809 (July 1982) ("Lawyer advertising at its best can inform people about their legal rights and help them to make an informed choice of attorneys to exercise those rights. . . . Lawyers have won the right to advertise, in part so that the public can obtain needed information about the identification of legal problems and the nature, availability, and uses of legal services." (emphasis added)).

166. Model Code, supra note 14, at EC-2-2; see also Model Code, supra note 14, at EC-2-1 (stating that important function "of the legal profession [is] . . . to facilitate the process of intelligent selection of lawyers"); Model Code, supra note
and firm dissolutions must be resolved with the "best interests of the client in mind." Concern with the client's right to choose its counsel not only permits, but requires, open discussion between departing attorneys and their clients regarding the options available to them with respect to representation.

In line with this view, one commentator has suggested that when a departing partner communicates with a client, traditional fiduciary obligations must give way to "special principles." This view appropriately emphasizes the preeminence of a client's right of free choice of counsel, but not at the expense of attorney mobility. The conflict of interest provisions of both the Model Code and the Model Rules support this view, advising that clients are entitled to the undivided loyalty of their attorney. Thus, it follows that whenever a departing attorney believes, in good faith, that the interests of his or her client will best be served by pre-departure disclosure of relevant facts, that attorney should not be precluded from communicating those facts due to conflicting firm obligations.

The absurdity of a contrary view is illustrated in Adler, Barish. In that case, the court chose to place a rather onerous burden on the client. The client must first recognize his or her right to continue or discontinue legal representation with the attorney's former firm and then, the client must decide what representation is in his or her best interest. It is entirely unreasonable and unrealistic, however, to assume that a brief written announcement stating nothing more than a partner's withdrawal from a firm adequately preserves a client's freedom to choose his or her own counsel. It is highly unlikely that a client will inquire or take any further action upon receiving such a terse departure announcement from the attorney or the attorney's firm. When the attorney leaves without offering a sufficient explanation for the departure, the client may feel poorly treated or even abandoned. Regardless of the precise reason behind the lack of in-

14, at EC 7-8 (requiring counsel to "exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations").

167. See Model Code, supra note 14, at EC 7-9 (requiring counsel to act "in manner consistent with the best interests of his client"). It is important to keep in mind the Supreme Court's views that paternalism is inappropriate because "people will perceive their own best interests if only they are well enough informed." Bates, 433 U.S. at 365 (quoting with approval Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976)).

168. See, e.g., Robinson, supra note 13, at 556 (discussing viable alternatives to per se ban on attorneys' use of restrictive covenants).

169. See Model Code, supra note 14, at DR 5-101 (addressing conflict of interest issues).

170. See Model Rules, supra note 14, at Rule 1.9 (addressing conflict of interest issues).

quiry, clients, through no fault of their own, will be deprived of important information relevant to a choice of counsel decision.

Similarly, a firm’s reassignment of a client file, upon the withdrawal of the client’s former attorney, to another lawyer does not adequately protect the client’s interest. Because the legal system is complex, the law cannot require the layperson-client to discover all relevant rights and consequences of attorney action or inaction. A client is often unaware of the effects of attorney departure or reassignment, and therefore, the client’s interests would be served only by allowing full, unsolicited discussion of their full impact. Reassignment does not substitute for free communication of facts relevant to the client’s decision as to his or her future representation.

B. Enforceability of Restrictive Covenants

A great majority of courts have ruled against the enforceability of restrictive covenants in lawyers’ partnership agreements. For example, the Adler, Barish court, espousing a restrictive approach, left Adler, Barish’s clients in a vulnerable position—having to make important decisions regarding their future legal representation without any knowledge of the available alternatives or the ramifications of any such choice. In contrast, courts adopting contrary views, such as the Howard court, offer a careful balancing of clients’ needs and attorneys’ concerns.

The well-reasoned rationale announced in Howard provides a sound basis for concluding that legal and ethical ideals authorize the use of restrictive covenants by lawyers—at least those agreements anticipating competition.172 Acknowledging the vulnerability of the contemporary law firm, the California Supreme Court recognized that modern realities necessitate change in order to protect the business interests of law firms.173 The Howard court reasoned that if the law failed to permit law firms to protect their financial interests—most importantly, their client base—lawyers may become unwilling to refer clients to, or to promote the practice of, their partners.174 The court found such a result particularly undesir-


173. Id. The Howard court expressed confidence that its decision would not adversely effect clients’ choice of counsel:

It is not our intent to relegate clients to the position of commodities, nor to elevate commercial concerns over the lawyer’s bedrock duty of loyal and vigorous advocacy on behalf of the client. Rather, we have exercised our duty to regulate the practice of law with a care to understanding the world as it is, uninfluenced by rhetoric that appears to obscure, rather than clarify, the problem. We are confident that our opinion will leave the lawyer’s professional duties to his or her clients undisturbed, and that clients will enjoy the same degree of choice in retaining attorneys as they have always possessed.

Id. at 160-61.

174. Id. The Howard court further opined: “In addition, partnerships may be less willing to invest monies necessary to provide the equipment, library and other
able given increased specialization throughout the profession. As the current highly-competitive legal environment undermines many assumptions driving traditional ethical requirements, the law with respect to restrictive covenants should be re-examined in order to recognize these changes.

Indeed, the Howard court discounted the import advanced by many courts in distinguishing lawyers from other professionals. The court dismissed previously preferred justifications for the disparate treatment as lacking a principled distinction. It is undisputed that all professionals have an interest in personal autonomy. In addition, doctors and other professionals develop close relationships with their patients and clients and, like attorneys, owe their patients and clients a high duty of skill and loyalty. Furthermore, clients choose all professionals based on a professional’s training, skill, experience and integrity. If protecting clients’ freedom of choice and attorneys’ autonomy are predominant concerns of the courts in refusing to enforce restrictive covenants between attorneys, then arguably restrictive covenants between doctors should be equally unenforceable. Indeed, the special trust patients place in their physicians merits as much, if not more, restraint in enforcing covenants which hinder the patient-doctor relationship than that which may hinder the attorney-client relationship. Thus, the application of a per se ban on attorney advertising, to the exclusion of physician advertising, is somewhat nonsensical.

resources necessary to serve a client well if a partner could both leave a firm free of the mutually incurred liability, and also take the future income of the firm.”

175. Id. (citing Penasack, supra note 6, at 890-91).

176. Id. The court specifically observed that, “[i]n an environment of pervasive lateral hiring, partners may be loath to financially or otherwise support the development of a colleague’s relations with particular clients because the colleague may later exclusively usurp the benefits of that relationship.”

177. Id. at 159-60. The court drew the following analogy: It seems to us unreasonable to distinguish lawyers from other professionals such as doctors or accountants, who also owe a high degree of skill and loyalty to their patients and clients. The interest of a patient in a doctor of his or her choice is obviously as significant as the interest of a litigant in a lawyer of his or her choosing. Yet for doctors, reasonable noncompetition agreements binding upon withdrawing partners are permitted.

178. Id. at 160.

179. Id. The Howard court further advised:

[T]he contemporary changes in the legal profession to which we have already alluded make the assertion that the practice of law is not comparable to a business unpersuasive and unreflective of reality. Commercial concerns are now openly recognized as important in the practice of law. . . . In any event, no longer can it be said that law is a profession apart, untouched by the marketplace.

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http://digitalcommons.law.villanova.edu/vlr/vol40/iss5/5

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Justice Kennard's dissent in *Howard* illustrates the inefficacy of the argument in favor of the per se approach to restrictive covenants. In her dissenting opinion, she stressed that ethics regulations seek to protect the public, not the monetary interests of law firms.\(^{180}\) She failed to explain, however, how the majority's decision would necessarily result in injury to the public. In fact, Justice Kennard's assertions amount to nothing more than "rationalization, not reasoning"—the very accusation she charged against the majority.\(^{181}\) Moreover, Judge Kennard posited that lawyers should not follow the same rules as other businesses because the ethics of other professions fail to assimilate the ethical duties imposed upon lawyers.\(^{182}\) Failing to expound on the distinct differences—or the import of those differences—she asserted simply and conclusively, that "the nature, ideals, and practices of the various professions are different."\(^{183}\)

From this discussion, it is apparent that the per se ban on restrictive covenants contained in attorney partnership agreements makes no sense today. Further, the per se ban is unsupported by any express ethical rule. Despite these realities, however, numerous courts continue to cite Model Rule 5.6 and its counterpart in the Model Code as authority for the imposition of a per se ban.\(^{184}\) The *Haight* and *Howard* cases, as well as the thoughtful dissent in *Cohen*, attack the interpretation of these ethical rules as an absolute bar to the enforcement of restrictive covenants in lawyers' partnership agreements.\(^{185}\) Interpreting the rules in light of modern realities faced by the legal profession, the emerging minority view against per se prohibition appropriately finds that the rule proscribes only *a total prohibition* on the practice of law in any given geographical area.\(^{186}\)

\(^{180}\) Howard, 863 P.2d at 165 (Kennard, J., dissenting).

\(^{181}\) Id. (Kennard, J., dissenting).

\(^{182}\) Id. (Kennard, J., dissenting). Although Justice Kennard acknowledges that "law firms have a financial interest in their clientele," she discounts the import of this interest by stating that, "the purpose of rules of professional ethics is to restrain and guide the conduct of attorneys and to protect the public, not to protect the financial interests of law firms." Id.

\(^{183}\) Id. at 166 (Kennard, J., dissenting). Justice Kennard rejects the significance of an analogy drawn between lawyers and other professionals: "Although other businesses and professions permit noncompetition agreements, the rules applicable to other professions do not necessarily provide guidance for the legal profession." Id.

\(^{184}\) For a list of cases, see *supra* note 123 and accompanying text. *See also* Penasack, *supra* note 6, at 904 (stating that Model Rule 5.6 was "designed to incorporate and perpetuate the per se rule").

\(^{185}\) For a discussion of the decisions in *Haight* and *Cohen*, see *supra* notes 135-60 and accompanying text.

\(^{186}\) As one court explained: "[N]o legal justification and no basis in fairness or logic exists [which would] permit a lawyer who accepted and benefited from [a restrictive covenant] for twenty years to then repudiate it." *Cohen* v. *Lord, Day & Lord*, 550 N.E.2d 410, 414 (N.Y. 1989).
Finally, it remains unchallenged that the primary consideration in determining the enforceability of a restrictive covenant must be clients' freedom to choose their own counsel. Clearly, attorneys may not agree to divide their clientele upon dissolution—at least not without client input and approval. Financial remedial provisions and similar covenants providing for other than outright bans on competition should be enforced, as they do not adversely affect the firm's clients or their absolute right to choose their own counsel.

IV. Conclusion

Courts and commentators agree that clients are not commodities with which attorneys can barter. Likewise, one must not discount the importance of a client's absolute right to freedom of choice in legal representation—a choice that is meaningless if it is not made with the benefit of any and all relevant information that may impact the client's ultimate decision. It would be foolhardy to put the burden on the unsuspecting, unsophisticated layperson, as client, to be aware of the consequences of retaining subsequent or terminating previous counsel or, in the first instance, realizing that such an option is even available.

Finally, as law firms act more and more like businesses, proffered justifications for different treatment from other professions become less compelling. Based on outdated mores of yesterday, distinctions between lawyers and other professionals threaten to undermine the very principle they purportedly seek to protect. Therefore, negotiated restrictive covenants placed in partnership agreements, seeking to address legitimate issues concerning rights of partners upon firm dissolution, should be held enforceable. In an effort to avoid further discord within the legal profession, the rules of conduct should be re-examined in the context of the modern practice and the pertinent issues faced by today's lawyers. After all, the stability of the legal profession "depend[s] upon the integrity of lawyers' dealings with each other."

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187. Penasack, supra note 6, at 913. One commentator suggested a revised Model Rule 5.6, which would allow agreements anticipating competition to be enforced. Id. at 913-14. Penasack's approach appropriately considers whether client choice of representation is, in fact, threatened to be denied by enforcing reasonable restrictive covenants in attorney partnership agreements.

188. Id. at 914.