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## Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability

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### Recommended Citation

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# ARTICLES

## SOLICITATION OF LAW FIRM CLIENTS BY DEPARTING PARTNERS AND ASSOCIATES: TORT, FIDUCIARY, AND DISCIPLINARY LIABILITY†

*Vincent Robert Johnson\**

*Recent years have seen a marked increase in the number of attorneys switching firms, many of whom seek to take with them the business of their former firm's clientele. While the contours of permissible departure-based solicitation were once clearly and narrowly circumscribed by the rules of legal ethics, the continued validity of those restrictions is seriously placed in doubt by the principles enunciated in Supreme Court decisions of the past decade dealing with commercial speech about legal services.*

*In this Article, Professor Johnson endeavors to comprehensively chart and evaluate the myriad aspects of the new jurisprudence on departure-based solicitation which is now emerging in piecemeal fashion from court decisions, ethics opinions, and legal scholarship. The Article considers both the disciplinary ramifications of such conduct, and the closely related question of whether such solicitation may give rise to civil liability under the law of torts or the law of agency. Concluding that certain varieties of departure-based solicitation are ultimately likely to be deemed permissible, Professor Johnson discusses the issue of whether, and by what means, a firm may endeavor to protect itself from loss of clients to an attorney who leaves the firm. Finally, a model rule of ethics is proposed for the purpose of rectifying, in a manner consistent with Supreme Court precedent, the current precedential confusion in the field.*

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This Article benefited from the comments, criticism, and ideas of Michael Ariens, Sue Bentsch, Susan A. Bowen, and John P. Palmer; from the research assistance of Curtis L. Cukjati, Joseph H. Gay, Jr., Philip Lionberger, and William C. McMurrey; from the editorial support of Jill E. Goldberger, Stephen J. Gripkey, and Todd M. Turner; and from the encouragement provided by St. Mary's Law Journal, which invited the author to speak on this topic at its 1988 Symposium Conference on Business Torts.

The Article is dedicated to Professor Gerald S. Reamey for his many insights into the legal profession and the delivery of legal services.

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## I. INTRODUCTION

### A. *Dilemma in Context*

Each year thousands of law firm associates<sup>1</sup> leave the firms for which they have worked, and then continue to practice law, either on their own or with other attorneys.<sup>2</sup> The same is true of law firm part-

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1. As used herein, the term "associate" denotes a junior attorney who is regularly employed by a law firm, normally on a salary basis, regardless of whether the firm is organized as a partnership, a professional corporation, or otherwise. The associate occupies a position of subordination in the sense that he has no ownership interest in the firm and that his work is subject to the direction and control of more senior attorneys. See generally Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 260-61, 266-67 (1985); see also Mazur v. Greenberg, 110 A.D.2d 605, 488 N.Y.S.2d 397 (1985) (attorney with right to share profits but no ownership interest in firm was not partner).

2. The magnitude of the associate-departure phenomenon is undocumented, but may be inferred from indirect evidence. In 1987, there were approximately 700,000 lawyers in the United States. Diamond, *A Trace Element in the Law*, 73 A.B.A. J., May 1987, at 46. Of this number, many were recent law graduates, since during the 1980s American Bar Association-accredited law schools have awarded in excess of 34,000 juris doctorate degrees annually. *A Review of Legal Education in the United States, Fall 1986: Law Schools and Bar Admission Requirements*, 1987 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR 66. Most new graduates enter active law practice and few open offices on their own. See *Employment Patterns of Law School Graduates*, 49 TEX. B.J. 490 (1986) (57.4% of 1984 graduates nationwide entered private practice, including 3.7% who were self-employed). Thus it is reasonable to conclude that a majority of law graduates begin their careers as associates in firms. *Id.* According to some authorities, the climb from associate to partner typically takes anywhere from five to ten years. See Lynch, *How Law Firms Select Partners*, 70 A.B.A. J., Oct. 1984, at 65 (five years is norm); C. WOLFRAM, *MODERN LEGAL ETHICS* § 16.2.3, at 886 (1986) (as many as ten years).

A 1985 survey of the graduates of seven law schools in the northeast (Boston College, Boston University, Columbia University, University of Connecticut, Harvard University, Northeastern University, and Suffolk University) revealed that although members of the class of 1981 had only four years in which to move, one-half had changed jobs since law school, and those who began their legal careers in private practice more often than not stayed in that segment of the profession. L. VOGT, *FROM LAW SCHOOL TO CAREER: WHERE DO GRADUATES GO AND WHAT DO THEY DO?* iv, 28, 36, 37 (May 1986) (prepared for Harvard Law School Program on the Legal Profession). Inasmuch as the survey was based on a broad cross-section of schools—national and regional, large and small, private and state-related—such career paths may represent national patterns. The survey indicated that most graduates who change jobs do so early in their careers. *Id.* at iv. Lawyers who graduated in 1959, 1969, 1974, and 1981 from the seven schools surveyed stayed in their first job an average of only two to five years. *Id.* at iv, 28.

In a similar vein, a study of Chicago lawyers indicated that the turnover rate for associates

ners,<sup>3</sup> although the numbers involved are considerably less.<sup>4</sup> These

between 1970-78 was more than 35%. Nelson, *The Changing Structure of Opportunity: Recruitment and Careers in Large Law Firms*, 1983 AM. B. FOUND. RES. J. 109, 123. In other cities, the turnover rates for associates in 1981-82 were New York (16%), Washington (13%), San Francisco (19%), and Los Angeles (17%). *Id.*

Further, the number of associates leaving firms is suggested by reports in the press. See Kaplan, *Lateral Hiring of Associates Up*, Nat'l L.J., Jan. 9, 1984, at 2, col. 3 (lateral hiring of associates doubled from 1978 to 1982); Kristof, *The Rush to Hire L.A. Lawyers*, N.Y. Times, Sept. 21, 1986, at F14, col. 4 ("number of lawyers going from firm to firm [in L.A.] is incredible"); Galante, *Partner Leads Mass Exodus From L.A. Firm*, Nat'l L.J., Dec. 19, 1983, at 3, col. 2 (departure of at least 16 associates); Lavine, *Who Corrals Clients When Firms Split?*, Nat'l L.J., Apr. 30, 1979, at 1, col. 4 (departure of several associates); Carley, *Law-Firm Breakup is Tale of Dashed Hopes and Bitter Feelings*, Wall St. J., June 8, 1983, at 1, col. 1 (associates and partners scattered after law firm dissolution); cf. Jensen, *What's Hot, What's Not: A Roundup*, Nat'l L.J., Nov. 2, 1987, at 7, col. 1 (many firms attempt to hire attorneys with two or three years experience); see also District of Columbia Legal Ethics Comm., Op. 181, at 11 (undated), summarized in [Manual] Law. Man. on Prof. Conduct (ABA/BNA) 901:2307 (1987) [hereinafter ABA/BNA Manual] (stating, in reviewing restrictive covenants, "The Washington bar has grown exponentially in recent years. Many out-of-town lawyers are opening branches in the city, and for this and other reasons many lawyers have left their old firms to form new associations."); *The Roads Taken*, 37 Harv. Law School Bull., No. 3, at 14 (Spring 1986) ("While statistics on career choices of recent graduates suggest a race to Wall Street, longitudinal studies show that many do not stay there. . . . [I]n some large firms associates stand no more than a five to ten percent chance of becoming partner. Those who know that they will not be offered a partnership usually change jobs after their third or fourth year with the firm."); *Lateral Moves*, Nat'l L.J., May 9, 1988, at 2, col. 2 (firm switches by prominent attorneys); STATE BAR OF TEX., *INSIDE THE PRACTICE OF LAW: ENTERING THE LARGE LAW FIRM* (1987) (videotape) (Houston attorney Scott Rozzell commented: "There is considerably more mobility for law students and new lawyers among law firms than there was even four or five years ago. The stigma that used to be associated with lateral moves. . . is gone altogether.").

3. The term "partner" refers herein to a senior attorney in a law firm, regardless of whether the firm is organized as a partnership. Compare *supra* note 1, defining "associates." Although some firms have non-equity partners, the term "partner," as employed in this Article and commonly used in other works, denotes an attorney who has an ownership interest in a firm. This Article will not explore the differences, if any, in the legal and ethical liability rules applicable to non-equity partners.

4. The Chief Justice has recently written 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, *The Legal Profession Today*, 62 IND. L.J. 151, 152 (1986). See also Pollak, *Withdrawal Today: Big News Becomes Old News*, in WITHDRAWAL, RETIREMENT & DISPUTES 3 (E. Berger ed. 1986) ("Not too many years ago, partner defections from law firms were big news. . . . These days switching firms is commonplace."); C. WOLFRAM, *supra* note 2, § 16.2.3, at 886 ("Although employed rarely or never in some large firms, lateral hires of partners or senior associates from other firms has become somewhat more common.") (citing Nat'l L.J., Oct. 31, 1983, at 1, col. 1); Lewin, *When Law Partners Split Up*, N.Y. Times, Nov. 26, 1984, at D1, col. 3 (discussing departure of partners from New York City and Chicago firms; "the idea that partnership was for life seems almost quaint"); Kaplan, *The Rush for Lateral Hires*, Nat'l L.J., Oct. 31, 1983, at 1, col. 1 (noting rise in number of partners nationwide migrating between firms); Ranii, *Defections at Chicago Firm*, Nat'l L.J., July 11, 1983, at 2, col. 2 (discussing departure of between 13 and 21 lawyers, including 6 or 7 partners, from 80 lawyer firm); Kristof, *supra* note 2, at F14, col. 2 (discussing "snatching away partners"); Wehrwein, *St. Paul Break-Up*, Nat'l L.J., Sept. 5, 1983, at 2, col. 2 (commenting on

departures—including moves sometimes described as “split-offs,”<sup>5</sup> “break-ups,”<sup>6</sup> and “lateral hires”<sup>7</sup>—may be amicable or not in their inception. Regardless, however, of the reasons underlying these changes in employment,<sup>8</sup> such moves often give rise to bitter disputes

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departure of four associates and seven partners from state's fourth largest firm); Granelli, *Decimated by Defections, Kaplan Livingston Ends*, Nat'l L.J., Dec. 21, 1981, at 2, col. 2 (more than one half of 68-attorney firm's partners and associates left to work for clients or other firms or to form new firms); Weingarten, *Breaking Up*, Nat'l L.J., June 1, 1981, at 1, col. 2 (discussing departure of partners and subsequent dissolution of New York City firm); Jensen & Wise, *Finley Kumble: The End of an Era*, Nat'l L.J., Nov. 23, 1987, at 1, col. 1 (discussing partners leaving firm which itself had engaged in “raiding of lawyers and clients” from other firms); Galante, *supra* note 2, at 3, col. 2 (discussing exit of three partners and sixteen associates); Ranii, *A Combative Chicago Firm*, Nat'l L.J., July 1, 1985, at 1, col. 3 (discussing “loss of numerous established and rising legal stars”); Carley, *supra* note 2, at 16, col. 2 (partners left in dispute over growth of firm); Kerlow, *Lewis, Mitchell Dissolves as Partners Diverge*, Legal Times, Oct. 19, 1987, at 6, col. 1 (discussing defections of partners and subsequent break-up of firm); Wise, *8 Leave Finley*, Nat'l L.J., Nov. 16, 1987, at 2, col. 1 (partners left in context of firm program to “skinny down”); Berger, *Litigator Moves to Baker & Botts*, Tex. Law., Nov. 16, 1987, at 3, col. 1 (discussing lateral moves by partners); Berger, *Finley, Kumble Crisis Reaches Texas Branch*, Tex. Law., Nov. 16, 1987, at 11, col. 1 (discussing departure of at least one dozen partners from nation's fourth largest firm; firm's “worst mistake” allegedly was hiring high-powered, affluent, experienced lawyers). *See also Battling Barristers*, Wall St. J., Dec. 16, 1983, at 33, col. 2 (partner “wooded” by other firms after physical confrontation with member of firm).

5. Lavine, *supra* note 2, at 8, col. 3 (“splitoffs and breakups”); Weingarten, *supra* note 4, at 26, col. 1 (“split-up”); *see also* Ranii, *A Combative Chicago Firm*, *supra* note 4, at 1, col. 3 (“many successful spin-offs”).

6. Carley, *supra* note 2, at 1, col. 1 (quoting Steven Brill, editor of American Lawyer magazine: “This is the age of the law-firm breakup.”); Kerlow, *Messy Breakup Takes Nasty Turn*, Legal Times, June 13, 1988, at 3, col. 1 (battle over division of assets, clients, and files took on “the air of a contentious divorce”).

7. C. WOLFRAM, *supra* note 2, § 16.2.3, at 886; Kaplan, *supra* note 2, at 2, col. 4. *See also* Jensen, *The Urge to Merge Isn't Gone*, Nat'l L.J., Aug. 15, 1988, at 1, col. 1 (discussing firm expansion via lateral hiring).

8. The events and reasons giving rise to termination of attorneys' employment are myriad.

The conventional wisdom is that . . . the motives to change are usually an opportunity for more income and wealth, the desire for more influence and control in one's working organization and/or more personal autonomy.

....

. . . While mobility may be a matter of change for the better, it may be the result of a failure in organizational sensitivity and intelligence about the true needs and desires of individual lawyers or groups of lawyers.

Redmount, *Stemming Lawyer Mobility*, Nat'l L.J., Aug. 22, 1983, at 15, col. 1. *See also* Nelson, *Practice and Privilege: Social Change and the Structure of Large Law Firms*, 1981 AM. B. FOUND. RES. J. 95, 124 (“Fragmentation at the managerial level sometimes results in the departure of lawyers working as a group in one field or for one client.”); Weingarten, *supra* note 4, at 26, col. 1 (departures triggered by money dispute); Ranii, *Defections at Chicago Firm*, *supra* note 4, at 9, col. 2 (departures allegedly arose from controversy over in-house exercise of authority); Jensen & Wise, *supra* note 4, at 34, col. 2 (“unceasing power struggles”); Wehrwein, *supra* note 4, at 39, col. 1 (departures attributed to personal frictions among firm attorneys or between attorneys and clients); Galante, *supra* note 2, at 33, col. 2 (departures of partners and associates attributed to “lure of more

over client solicitation,<sup>9</sup> where, as frequently happens,<sup>10</sup> an exiting attorney seeks to take with him a segment of the firm's clientele.

money" and "hard-charging" style of some firm attorneys); Lavine, *supra* note 2, at 8, col. 3 (most common causes for law firm breakups historically were salary disputes and disagreement about firm administration, but fears about future and trends in law practice are becoming more important); Carley, *supra* note 2, at 1, col. 1 ("ego often plays the biggest role in a split [of a law firm]"); Lewin, *supra* note 4, at D12, col. 2 ("Even where there is no major dispute, many lawyers are leaving their partners to seek new opportunities, and often higher pay, at a different firm."); Kerlow, *supra* note 6, at 6, col. 1 (discussing disputes over direction of firm expansion); Kerlow, *Factions Eye \$5 Million Fee*, Legal Times, Aug. 1, 1988, at 5, col. 1 ("bitter" breakup allegedly caused by former partner's scheme to deprive firm of its share of large fee); Frantz, *Breaking Ranks*, L.A. Times, Sept. 18, 1988, at II-5, col. 1 ("Money is not so much an issue with the associates who leave, . . . They get tired of the personalities or the environment. . . . Law firm partners . . . are more likely to leave for money. Or they may feel unappreciated.").

Many associate departures are triggered by unfavorable partnership decisions, even in firms without "up-or-out" policies. See generally Dunnan, *When You Don't Make Partner*, 70 A.B.A. J., Oct. 1984, at 68 (40% of attorneys who do not make partner are expected to leave firm) (citing *Associates in the Legal Profession*, 70 A.B.A. J., Aug. 1984, at 42); cf. *Bray v. Squires*, 702 S.W.2d 266, 269 (Tex. App. 1985) (exiting associates "felt there was little hope of becoming a partner").

"Many associates join large firms with no intention of staying the long course until a partnership decision, but use employment as a firm associate as training for a future career with a smaller firm, in corporate or government practice, or in solo practice." C. WOLFRAM, *supra* note 2, § 16.2.3, at 886. Thus, although few law school graduates begin their careers as self-employed attorneys, a large number of those graduates eventually enter solo practice. Compare *Employment Patterns of Law School Graduates*, 49 TEX. B.J. 490 (1986) (only 3.7% of those who graduated from an ABA-approved law school in 1984 entered solo practice) with B. CURRAN, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1985, at 4 (1986) (in 1985, 47% of the attorneys in private practice were self-employed).

Some departures become necessary when attorneys within a firm refuse to abandon clients whose interests have come into conflict with one another. See Eisler, *Client Conflicts Spark Partner Exits*, Legal Times, Mar. 21, 1988, at 1, col. 2 (discussing several departures).

9. See Lewin, *supra* note 4, at D12, col. 3 ("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."); *id.* at D12, col. 4 (remaining partner in Chicago firm expressed special concern about whether departing lawyers solicited firm clients prior to departure); Lavine, *supra* note 2, at 1, col. 4 ("heated tug-of-war over clients"); Kerlow, *supra* note 6, at 6, col. 4 (break-up labeled "friendly" but "traumatic"). See also *infra* note 41.

10. Departing attorneys—especially partners—often seek and accept the business of clients of their former firm. See, e.g., Rani, *Defections at Chicago Firm*, *supra* note 4, at 9, cols. 1-2 (spokesman for partners and associates leaving to form new firm "declined to say what business his group [was] taking with it but said that there is 'certainly more than enough to keep us busy at the start'"); Wehrwein, *supra* note 4, at 39, col. 1 (exiting partners and associates "let some previous clients know about the departure"); Granelli, *supra* note 4, at 16, col. 3 (several departing partners took big-name clients with them); Weingarten, *supra* note 4, at 26, col. 1, 27, col. 1 (departing partners took major clients; remaining partners divided clients, associates, and office staff); Lavine, *supra* note 2, at 8 (exiting partners and associates "took" or "carried" clients with them); Groner, *Lane and Edson Stung as Partners. Client Exit*, Legal Times, Sept. 19, 1988, at 1, col. 4 (firm faced loss of one-third of its lawyers and its largest client); see also *Veering From Lane*, Legal Times, Aug. 8, 1988, at 3, col. 3 (describing firm as "worried" that departing partner would take other attorneys and a "substantial portion" of the firm's work with him).



In its most essential terms, the resulting dilemma can be simply put: May a departing attorney, with or without firm consent, contact clients of the firm, in person or in writing, for the purpose of soliciting their present and future legal business? Subsumed within this issue are numerous subsidiary questions. Their answers might depend on such diverse factors as whether the solicitation occurred prior to the departure; whether the firm was apprised of the fact or content of communications by the departing attorney with firm clients; and whether the clients in question were recruited to the firm by the exiting attorney or were persons for whom that attorney performed substantial legal services.

The growth of lawyer mobility over the past twenty years<sup>11</sup> has led to a careful rethinking of various rules of attorney conduct.<sup>12</sup> Thus far, the bulk of attention has been lavished on conflicts of interest issues, as is evidenced by the expanded conflicts provisions embodied in the American Bar Association's new Model Rules of Professional Conduct (Model Rules)<sup>13</sup> and by the numerous conflicts cases reported bi-weekly in the Lawyers' Manual on Professional Conduct.<sup>14</sup> In addition, other rules, such as residency requirements for admission to practice, have been affected by the increase in lawyer mobility.<sup>15</sup> Thus, it is all the more surprising that departure-based solicitation—an issue of recurring, and likely increasing,<sup>16</sup> significance—has been largely overlooked.

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11. See Rehnquist, *supra* note 4, at 151-52 (discussing growth of huge multi-state firms and increased mobility of partners).

12. See *id.* at 154 (noting "increase in ethical difficulties" has coincided with "structural changes in the profession" during past 25 years).

13. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.10, 1.11, 1.12 (1983) (discussing conflict of interest rules relating to imputed disqualification, successive government employment and private practice, and former judges, law clerks, and arbitrators).

14. See ABA/BNA Manual, *supra* note 2.

15. See *New Hampshire v. Piper*, 470 U.S. 274 (1985) (rule limiting bar admissions to state residents violates privileges and immunities clause of the U.S. Constitution); see also Ariens, *A Uniform Rule Governing the Admission and Practice of Attorneys Before United States District Courts*, 35 DEPAUL L. REV. 649, 674 (1986) ("The increased mobility of lawyers and the increase in the interstate practice of law in the United States requires the implementation of a modern, uniform rule [governing admission and practice in federal district courts].").

16. Cf. Kristof, *supra* note 2, at F14, col. 4 (noting increasing number of departures); *id.* ("Once a local lawyer was expected to spend his entire career at the same firm, but now even the most senior of partners have been wooed away by other firms with extravagant pay packages and sometimes more interesting work."); Lavine, *supra* note 2, at 8, col. 3 ("experts say today's economic climate is creating an environment in which splitoffs and breakups are becoming more likely"); Nelson, *supra* note 2, at 134 ("firms are increasingly likely to hire more partners laterally") (emphasis added); Fisk, *What Does the Future Have In Store?*, Nat'l L.J., Sept. 26, 1988, at 49, col. 1

Only the beginnings of a jurisprudence on this subject presently exists.<sup>17</sup> Neither the 1983 Model Rules,<sup>18</sup> nor their predecessor, the 1969 Model Code of Professional Responsibility (Model Code),<sup>19</sup> speaks directly to the question.<sup>20</sup> While a few courts<sup>21</sup> and ethics committees<sup>22</sup> have attempted to thoughtfully grapple with aspects of

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(predicting that "[t]here will be constant movement from firm to firm and from firms to corporations—or out of the profession").

Similar problems concerning post-departure client solicitation are also faced by other professions. See Berton, *Andersen's Chief of Consulting Relieved of Role*, Wall St. J., May 19, 1988, at 2, col. 2 (discussing dispute related to proposed firm rule barring solicitation of accounting firm clients for one year).

17. See Robinson, *When the Party is Over: Rights of Departing Attorneys to the Clients of Their Former Firm*, 75 ILL. B.J. 552 (1986-87), reprinted as Robinson, *Rights of Departing Attorneys to Clients of Their Former Firm*, 28 LAW OFF. ECON. & MGMT. 321 (1987-88) (subsequent cites are to Illinois Bar Journal version); Annotation, *Rights of Attorneys Leaving Firm with Respect to Firm Clients*, 1 A.L.R. 4th 1164 (1980); Comment, *Lateral Moves and the Quest for Clients: Tort Liability of Departing Attorneys for Taking Firm Clients*, 75 CALIF. L. REV. 1809 (1987). See also Lavine, *supra* note 2, at 1, col. 4 ("Despite the recent attention given the breakups of several prominent firms . . . there is almost no body of opinion on the ethics of dividing clients when members desert a firm.").

18. Since their promulgation by the American Bar Association as a statutory model on August 2, 1983, the Model Rules have been enacted, with local variations, in 28 states: Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Utah, Washington, West Virginia, Wisconsin, and Wyoming. Three other states—North Carolina, Oregon, and Virginia—have incorporated the substance of some provisions in the Model Rules into hybrid codifications based on the Model Code of Professional Responsibility, the ABA's prior statutory model. See ABA/BNA Manual, *supra* note 2, at 01:3.

19. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980). During the years immediately following its adoption by the American Bar Association, the Model Code was enacted, officially or unofficially, in every jurisdiction, generally with few modifications. See generally C. WOLFRAM, *supra* note 2, § 2.6.3, at 56-57. Various amendments to the Model Code were considered and adopted by the ABA between 1969 and 1980, not all of which found wide acceptance in the individual states. *Id.* at 57. In 1983, the Model Code was superseded as a proposed statutory scheme by the Model Rules.

As originally promulgated by the American Bar Association in 1969, the Model Code was denominated the "Code of Professional Responsibility." The word "Model" was added in the late 1970s as part of the settlement of an antitrust action brought by the Justice Department against the ABA. See C. WOLFRAM, *supra* note 2, § 2.6, at 57.

20. But see *infra* Part II-B of the text, for the discussion of the "formal announcement rule," which indirectly bears upon the issue.

21. See, e.g., Paul L. Pratt, P.C. v. Blunt, 140 Ill. App. 3d 512, 488 N.E.2d 1062 (1986) (direct mail solicitation of firm's clients by former associates enjoined); Koeppel v. Schroder, 122 A.D.2d 780, 505 N.Y.S.2d 666 (1986) (injunction against client solicitation by former partners denied); Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978), cert. denied and appeal dismissed, 442 U.S. 907 (1979) (direct mail solicitation of firm's clients by former associates permanently enjoined); Bray v. Squires, 702 S.W.2d 266 (Tex. App. 1985) (former associates did not breach fiduciary duty to firm in obtaining business from firm's former clients).

22. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Informal Ops. 910

the problem, their statements have been criticized by commentators as wrongly decided and may be vulnerable to revision in light of later constitutional developments.<sup>23</sup> Other courts, unfortunately, have been content to cope with the myriad attendant issues by doing little more than invoking shallowly-reasoned shibboleths. As one court summarized its position concerning attorney departures, "If they want their own firm, let them get their own clients."<sup>24</sup>

Faced, generally, with an almost total lack of guidance, departing attorneys are relegated to a Hobson's choice. They may act at their peril in a field largely devoid of reliable ethical and jurisprudential benchmarks, and thereby risk both professional discipline<sup>25</sup> and

(1966), 1457 (1980), 1466 (1981), and 1504 (1984); State Bar of Cal. Comm. on Professional Responsibility and Conduct, Formal Op. 1985-86 (undated), noted in ABA/BNA Manual, *supra* note 2, at 901:1601.

Typically, ethics opinions are issued by volunteer committees at the national, state, and sometimes, local levels of the bar. They are not binding on disciplinary tribunals or courts, and are authoritative only to the extent that their reasoning is persuasive. See C. WOLFRAM, *supra* note 2, § 2.6.6, at 65-67. Authorities differ as to the significance of ethics opinions in the lawyer regulatory process. For example, Professor Charles Wolfram has stated:

Ethics opinions continue to be *rarely cited and relied upon* in judicial decisions' . . .

. . . [However,] [m]ost jurisdictions at least seem to defer to ethics opinions to the extent that a lawyer who has acted in accordance with a recent ethics committee recommendation is ordinarily given the benefit of the doubt in disciplinary proceedings.

*Id.* (emphasis added). In contrast, Professor Harry Haynsworth has opined that such advisory opinions are admissible in disciplinary proceedings and litigation and are "generally given serious weight." H. HAYNSWORTH, *EXPANDING YOUR PRACTICE: THE ETHICAL RISKS 71* (1984) (emphasis added).

Professor Haynsworth has also noted that "[a]s a general rule . . . ethics committees have been much more conservative in their attitude toward public relations activities than has the United States Supreme Court, and have shown a marked tendency toward construing the Supreme Court decisions as narrowly as possible." *Id.* at 5. Consequently, if a particular mode of marketing legal services has been found to pass muster by ethics committees, it is likely that the same conduct will survive a court challenge.

23. Thus, for example, Yale Law Professor Geoffrey Hazard, Director of the American Law Institute and Reporter for the Model Rules, has criticized the result in *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175 (1978), cert. denied and appeal dismissed, 442 U.S. 907 (1979), the case which some regard as a leading decision in the field, as "wrong under either the [Model] Code or the Model Rules." 1 G. HAZARD & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 526.1-.2 (1987). See also Hazard, *Ethical Considerations in Withdrawal, Expulsion, and Retirement*, in *WITHDRAWAL, RETIREMENT & DISPUTES* 36 (E. Berger ed. 1986); Robinson, *supra* note 17, at 556-58 (criticizing *Adler, Barish*). So too, the reasoning in *Shapiro v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988), raises serious doubts as to the continued vitality of both *Adler, Barish* and *Paul L. Pratt, P.C. v. Blunt*, 140 Ill. App. 3d 512, 488 N.E.2d 1062 (1986). See generally *infra* Part III-B-2 and note 321; see also Part II-D.

24. *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 252 Pa. Super. 553, 382 A.2d 1226, 1233 (1977) (Spaeth, J., concurring) (quoting trial court).

25. Cf. H. HAYNSWORTH, *supra* note 22, at 44 n.12 (suggesting that "telephone calls or state-

civil liability<sup>26</sup> for damages sustained by their former firm. Alternatively, they may forfeit important opportunities to persuade former clients to engage their legal services. In addition, other interests are jeopardized by the current lack of precedential guidance. The economic viability of firms from which attorneys depart,<sup>27</sup> the free flow of information to clients relevant to selection of counsel, and, ultimately,

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ments in the notice letter urging the client to choose the lawyer" would be ethically impermissible and might result in discipline, as well as liability for tortious interference).

26. The fact that improper solicitation may give rise to disciplinary action is no bar to a civil action seeking to restrain such conduct. See *Paul L. Pratt, P.C. v. Blunt*, 140 Ill. App. 3d 512, 488 N.E.2d 1062, 1067 (1986) (injunction granted against former associates); *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175 (1978) (injunction granted), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979); see also RESTATEMENT (SECOND) OF TORTS § 766 comment u (1977) (discussing tortious interference with present or prospective contractual rights); *Kettlewell, Breaking Up is Hard to Do*, TRIAL, Oct. 1988, at 17 (civil suits often follow). Damages may also be sought. See *Bray v. Squires*, 702 S.W.2d 266 (Tex. App. 1985) (damages denied in action against former associates for breach of fiduciary duties and tortious interference with business relationship); *Paul L. Pratt, P.C. v. Blunt*, 140 Ill. App. 3d 512, 488 N.E.2d 1062, 1064, 1070 (1986) (damages claim left for trial; preliminary injunction granted); see also RESTATEMENT (SECOND) OF TORTS § 766 comment t, § 774A (1977) (discussing tortious interference with present or prospective contractual rights). The chilling effect of exposure to such liability may be substantial. See *District of Columbia Legal Ethics Comm.*, Op. 181, at 14 (undated), summarized in ABA/BNA Manual, *supra* note 2, at 901:2307 (In holding employment agreement was unethical where it purported to ban post-departure representation of clients of former firm and to confer on firm right to injunctive relief and liquidated damages, the committee stated: "The *in terrorem* effect of this sword of Damocles hanging over the head of a departing lawyer is not to be underestimated.").

Statutory sanctions may also come into issue. One ethics committee noted that apart from questions of professional ethics and tort liability, departure-based solicitation might violate a provision in the state judiciary law prohibiting direct or indirect solicitation of legal business. See *Association of the Bar of the City of N.Y. Comm. on Professional Ethics*, Op. 80-65 (1980), summarized in [1980-1985 Ethics Opinions] Law. Man. on Prof. Conduct (ABA/BNA) 801:6315 [hereinafter ABA/BNA Ethics Ops.] (declining to express opinion on issue).

27. A typical firm grievance was recorded in an opinion arising from a fee allocation dispute between an associate, who left with a lucrative contingent fee case, and her former firm:

The firm argues that it would be unfair to permit young associates to use a firm's long-established good reputation, have the firm cover all overhead and then, having built their own reputation, without incurring the start-up costs associated with developing expertise and reputation, leave taking, in particular, negligence cases which would involve the possibility of large settlements in the future.

*McLean v. Michaelowsky*, 117 Misc. 2d 669, 458 N.Y.S.2d 1005, 1006 (1983). It is easier to credit such arguments in some contexts than in others. As to large law firms, it is frequently reported that associates are "profit centers," who produce firm income far exceeding their compensation and overhead, and thus make possible the high salaries and bonuses paid to senior attorneys. See *J. STEWART, THE PARTNERS* 376 app. 3 (1983) (large corporate law firms "make money from associates by billing their clients for their work at rates which more than compensate for associate salaries and overhead"); *Rehnquist, supra* note 4, at 152 (some major firms expect associates to bill in excess of 2000 hours per year and "the ratio of associates to partners in some large firms is increasing sharply"); *Nelson, supra* note 2, at 142 ("While high levels of turnover have their costs, they may also have their benefits for the partnership. If firms can maintain high levels of work commitment from associates before they leave the firm, firms can meet the demands of practice while still main-

the prestige of the profession,<sup>28</sup> are all affected by the confusion over the rules applicable to departure-based solicitation.

By reference to principles of legal ethics, and to the law of torts, contracts, agency, and partnership, this Article will begin to demarcate the line between permissible and impermissible conduct. Because it is necessary to consider the question from both disciplinary and civil liability perspectives, the analysis will begin with two basic questions:

(1) Whether it is a violation of governing disciplinary norms for a departing attorney to solicit the present or future business of clients of his former firm?<sup>29</sup> and

(2) Whether, aside from exposure to professional discipline, an attorney may be civilly enjoined or held liable for damages resulting from efforts to divert for personal gain the patronage of firm clients?<sup>30</sup>

In addition, because a survey of cathedral principles suggests that under some circumstances departure-based solicitation should be deemed permissible, the Article will further consider a preventive law question:

(3) Whether a firm may protect itself from loss of clients, or from disputes relating thereto, either by including provisions in employment or partnership agreements limiting the rights of departing attorneys to contact or accept employment from firm clients, or by other means?<sup>31</sup>

Finally, after summarizing the present status of various issues bearing upon disciplinary and civil liability,<sup>32</sup> the Article will propose a model rule designed to minimize the risks of professional overreaching and

taining a favorable partner-associate ratio."); see also Elkind, *The Hustlers*, TEX. MONTHLY, Nov. 1985, at 273 (billing more hours than average raises chances of making partner).

According to recent surveys, in 1985 the average salary for an associate in a firm with 10 or more attorneys ranged from a starting figure of \$32,200 to a high of \$106,500, while during that same time period, such associates billed an average of 40 hours per week at \$80 per hour, or \$166,400 per year. See *LawPoll: Associates' Starting Salaries Level Off*, A.B.A. J., Aug. 1985, at 42; *LawPoll: Lawyers' Workweek Averages 50 Hours*, A.B.A. J., Oct. 1985, at 42.

28. See Feerick, *Avoiding and Resolving Lawyer Disputes*, in WITHDRAWAL, RETIREMENT & DISPUTES 7 (E. Berger ed. 1986) (disputes among lawyers damage reputations, tarnish image of legal profession, and harm third parties).

29. See *infra* Part II.

30. See *infra* Part III.

31. See *infra* Part IV.

32. See *infra* Part V-A.

of needless diminution of public respect for the legal system.<sup>33</sup>

Where a departing attorney is hired by a client of his former firm to complete work already in progress, an important question arises as to what portion, if any, of the fees ultimately recovered must be paid to attorneys in the former firm for the work they performed on the client's behalf. A detailed examination of that issue is beyond the scope of this Article and, except as noted in the margin,<sup>34</sup> will be dis-

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33. See *infra* Part V-B.

34. In the case of a departing associate, the fee normally is divided in proportion to the services contributed, whereas with a departing partner, the partnership agreement controls the right of the remaining and former partners to share in the fee—regardless of whether the client has discharged the former firm and hired the departing partner. See C. WOLFRAM, *supra* note 2, § 16.2.3, at 887-88 & nn.65 & 66; Comment, *Dissolution of a Law Partnership—Goodwill, Winding Up Profits, & Additional Compensation*, 6 J. LEGAL PROF. 277, 282 (1981) (unless partners have agreed otherwise, profits and losses incurred during winding up period are shared by partners in proportion to their pre-dissolution ratios); see also Jewel v. Boxer, 156 Cal. App. 3d 171, 203 Cal. Rptr. 13, 15 (1984) (in the absence of a partnership agreement, fees received on cases in progress upon dissolution of firm must be shared by former partners according to the right to fees in former partnership, regardless of which attorney completes services after dissolution and even though clients substitute one former partner as attorney of record in place of the former partnership); Fox v. Abrams, 163 Cal. App. 3d 610, 210 Cal. Rptr. 260, 265 (1985) (similar rule applies to former shareholders of law corporation); Sheradsky v. Moore, 389 So. 2d 1206 (Fla. App. 1980) (former partner is not entitled to extra compensation for completing cases after dissolution in absence of specific agreement among partners providing therefor); Ellerby v. Spiezer, 138 Ill. App. 3d 77, 485 N.E.2d 413, 416-18 (1985) (partnership agreement governed distribution of contingent fee from case completed by departing partner after departure, regardless of fact that client discharged partnership and retained attorney who had left); Resnick v. Kaplan, 49 Md. App. 499, 434 A.2d 582, 587-88 (1981) (former partner who winds up firm business is not entitled to extra compensation in absence of provision in partnership document, regardless of fact that partner was chosen by client to continue representation); McLean v. Michaelowsky, 117 Misc. 2d 669, 458 N.Y.S.2d 1005, 1007 (1983) (fee earned by former associate divided based on reasonable value of work done); cf. Seale v. Sledge, 430 So. 2d 1028 (La. App. 1983) (although contingent fee in case brought into partnership by one member did not ripen into fee until after dissolution and completion of case by same member, finding that partnership had no interest in fee at time of dissolution was factually and legally erroneous); Little v. Caldwell, 101 Cal. 553, 36 P. 107, 108 (1894) (where partner dies, surviving partner is bound to complete unfinished work and is not entitled to compensation therefor absent special agreement among partners). But see Bader v. Cox, 701 S.W.2d 677 (Tex. App. 1985) (surviving law partners were entitled to compensation for services in concluding cases pending at the time of dissolution because of partner's death); Cofer v. Hearne, 459 S.W.2d 877 (Tex. App. 1970) (partner should receive extra compensation for work done on partnership business after voluntary dissolution of partnership); Virginia State Bar Comm. on Legal Ethics, Op. 794 (1986), summarized in ABA/BNA Manual, *supra* note 2, at 901:8706 (division of fee earned by former partner who completes work on case is subject to fee splitting rules).

The justification for the general rule against extra compensation of partners has been stated as follows:

The rule prevents partners from competing for the most remunerative cases during the life of the partnership in anticipation that they might retain those cases should the partnership dissolve. It also discourages former partners from scrambling to take physical possession of files and seeking personal gain by soliciting a firm's existing clients upon dissolution.

cussed only to the extent necessary to address the issues defined above.

### B. *Partners Versus Associates*

At the threshold, it is useful to note that while in most instances the same ethical and legal precepts are applicable to both departing partners and departing associates, the analysis defining the bounds of permissible conduct may vary in some situations depending upon the status of the attorney. For example, the obligations which a partner and an associate owe to a firm under the law of agency and partnership occasionally differ, as in the case of the duty of obedience.<sup>35</sup> This and similar factors may be significant where a firm sues a departing attorney based on breach of fiduciary obligations<sup>36</sup> or to the extent that such considerations bear upon an action for tortious interference with contract.<sup>37</sup> In addition, the existence of a partnership agreement purporting to define termination rights may be a factor where the exiting attorney is a partner, though it will generally not be in the case of an associate, since such agreements normally do not address the interests of non-partners. Partnership agreements, of course, are subject to many of the same ethical restrictions that are applicable to employment agreements with salaried associates, including those

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Jewel v. Boxer, 156 Cal. App. 3d 171, 203 Cal. Rptr. 13, 18 (1984); see also *Ellerby v. Spiezer*, 138 Ill. App. 3d 77, 485 N.E.2d 413, 416 (1985) (departing partner is "not entitled to take any action with respect to the unfinished business [of a dissolving firm] leading to purely personal gain").

While the rules discourage partners from attempting to "run off" with lucrative pending cases, ironically, they do not similarly disadvantage associates, the class of attorneys statistically most likely to leave firms. See *supra* notes 2 & 4. However, even as applied to partners, the rules are largely irrelevant to the question of whether a departing partner will be able to financially benefit from the *future* (rather than pending) legal business of a client with recurring needs for legal representation.

The impact of these rules, as applied to partnership dissolution, was defended in *Rosenfeld, Meyer & Susman v. Cohen*, 146 Cal. App. 3d 200, 194 Cal. Rptr. 180 (1983):

*Little v. Caldwell* [101 Cal. 553, 36 P. 107 (1894)] and the other unfinished business cases strike a reasonable balance between a partner's right to pursue his own business after dissolution of a partnership, and his duty of loyalty to his ex-copartners. The partner may take for his own account new business even when emanating from clients of the dissolved partnership and the partner is entitled to the reasonable value of the services in completing the partnership business, but he may not seize for his own account the business which was in existence during the term of the partnership.

194 Cal. Rptr. at 192.

35. See, e.g., *Gross, supra* note 1, at 259 (point stated); see also *infra* Part III-C-2, discussing duties of associates and partners.

36. See *infra* Part III-C.

37. See *infra* Part III-B.

which bar non-solicitation agreements or division of client files without client consent.<sup>38</sup> Nevertheless, a partnership agreement may exert an important influence on the voluntary conduct of the attorneys involved where no dispute is ever litigated and no disciplinary complaint filed.<sup>39</sup>

The case of a departing associate also may differ significantly from that of a departing partner in terms of an important non-doctri-  
nal matter, namely the prospect of informal dispute resolution. The solicitation issue is likely to be openly addressed by a departing partner and his firm in the process of determining what share of the assets—including the right to continue to represent present clients—belongs to the departing attorney.<sup>40</sup> Experience shows that where the departing partner intends to compete with his former firm, the settlement process may be extraordinarily vitriolic,<sup>41</sup> for the departure may

38. See generally *infra* Parts IV-A and IV-B.

39. Some writers have argued, however, that that role may be nominal. See Reuben, *Saying Goodbye Gracefully*, in WITHDRAWAL, RETIREMENT & DISPUTES 6 (E. Berger ed. 1986) ("There is often no correlation with the separation agreement and the partnership agreement provisions . . . . It's all a matter of circumstances and leverage."); Lewin, *supra* note 4, at D1, col. 3 ("Most firms that have been around for a while have partnership agreements without any clear provisions for what happens when a partner leaves." (quoting John Moulead)); Nelson, *supra* note 2, at 127 ("[M]ost [partnership] relationships are left unwritten. Firms are run in a collegial style . . ."). As one article stated:

Representatives of several major law firms . . . said they make no provisions in employment contracts or partnership agreements to clarify which clients belong to whom in the event of a breakup. Nor do they specify what methods a former member may use to contact clients.

"We don't have a firm policy because disputes don't happen very often," said John K. O'Connor, chairman of the executive committee of Chicago's Lord, Bissell & Brook. "We take it on an ad hoc basis."

Lavine, *supra* note 2, at 8, col. 2; see also McLean v. Michaelowsky, 117 Misc. 2d 669, 458 N.Y.S.2d 1005, 1007 (1983) ("euphoric atmosphere" at time associate was hired precluded contemplation of what would happen if associate left). But see Jewel v. Boxer, 156 Cal. App. 3d 171, 203 Cal. Rptr. 13, 15, 19 (1984) (indicating that partnership agreement may play major role in determining how much time former partner of dissolved firm must contribute to winding-up firm's business and how much compensation he will receive therefor).

40. See generally C. WOLFRAM, *supra* note 2, § 16.2.3, at 888 (discussing attempts to "resolve the issue by referring to clients as 'files' and debating which client each lawyer 'owns,' or to which lawyer a client 'belongs'").

41. Several law firm departures which escalated to the point of litigation are discussed in Polak, *Withdrawal Today: Big News Becomes Old News*, in WITHDRAWAL, RETIREMENT & DISPUTES 3 (E. Berger ed. 1986) ("[A]gony . . . all too often accompanies the move. . . . While defections are usually business decisions, the repercussions are typically emotional. Indeed, it probably isn't possible for partnerships to be ripped apart without charges of disloyalty and mismanagement."); see also Fox v. Abrams, 163 Cal. App. 3d 610, 210 Cal. Rptr. 260, 262 (1985) (70 clients executed forms substituting departing attorneys in "bitter breakup"); State Bar of Cal. Comm. on Professional Responsibility and Conduct, Formal Op. 1985-86, at 3 (undated), summarized in ABA/BNA Ethics



endanger the reputation<sup>42</sup> and income-producing ability of the firm.<sup>43</sup> To the extent, however, that the attorneys candidly confront the issue of "who gets which clients," the untoward consequences of a surprise raid on clientele are avoided, and, at least in theory, it is possible that solicitation issues may be resolved by mutual agreement.<sup>44</sup> In some instances, for example, a compromise is devised whereby the departing partner receives a smaller pay-out for his interest in the firm than might otherwise be expected, but is free to take with him the files of certain clients, subject of course to client consent.<sup>45</sup>

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Ops., *supra* note 26, at 901:1601 ("law firm dissolutions or attorney withdrawals are often fraught with acrimony and accusations of wrongdoing"); C. WOLFRAM, *supra* note 2, § 16.2.3, at 887 (bitter emotions attending firm dissolution can lead to "remarkably unprofessional disputes and litigation"); Reuben, *supra* note 39, at 5 ("[T]he bitter controversies occur when a partner or partners leave and intend to compete—yes, compete—with the firm, taking along some of its people or its resources or both. Then the atmosphere becomes filled with emotion, the parties posture, the clients are contacted, and the accountings between the partners become bones of contention."); Feerick, *supra* note 28, at 7 ("During the past decade courts have been drawn increasingly into lawyer disputes, provoking such strong judicial reactions as 'unseemly,' 'hasty,' 'bitter,' 'petty,' 'irresponsible,' and 'close to combat conditions.' The disputes have involved . . . [among other things] client files, distribution of a firm's assets and liabilities, rights upon withdrawal, and the like."); Lewin, *supra* note 4, at D1, cols. 3-5 ("bitter litigation"; "sense of betrayal"); Wehrwein, *supra* note 4, at 39, col. 1 (departure of 11 partners and associates who intended to form a new firm termed "emotional and hurtful thing" by partner in former firm); Lewin, *Belli Says Law Firm Thrives Despite Fights*, N.Y. Times, Mar. 19, 1984, at D1, col. 1 ("ugly squabbles over who stole whose clients"); Weingarten, *supra* note 4, at 26, col. 1 (partner stated it was "too painful" to discuss firm split-up). See generally *supra* note 9.

42. See Ranii, *Defections at Chicago Firm*, *supra* note 4, at 9, cols. 1-2 (loss of several partners and associates may be major blow to firm reputation).

43. See Lewin, *supra* note 4, at D12, col. 4 ("[t]he problem is especially acute when a group of lawyers leaves, which is very threatening to the firm"); Lavine, *supra* note 2, at 1, col. 4 (issues surrounding law firm split-ups are "a murky area of legal ethics involving friendships, business loyalties and, invariably, thousands of dollars in fees"); see also *Bray v. Squires*, 702 S.W.2d 266, 268 (Tex. App. 1985) (attorney alleged that solicitation by departing associates caused \$250,000 to \$360,000 in annual gross revenue from major client to almost entirely cease).

44. See Feerick, *supra* note 28, at 7 ("direct dealings between the parties are the best way of achieving a harmonious separation"); Lavine, *supra* note 2, at 8, col. 2 ("Don Reuben, the Chicago lawyer who took at least 11 clients with him when he was ousted from Kirkland & Ellis, says a breakup need not result in bitterness if the departing attorneys deal forthrightly with all parties."). Of course, disputes spawned by *furtive* departures may also be informally resolved. See Lavine, *supra* note 2, at 1, col. 4 ("tug-of-war over clients . . . was settled out of court after months of stormy negotiations").

45. See Cassidy, *Design and Implementation of Buy/Sell Agreements*, in *WITHDRAWAL, RETIREMENT & DISPUTES* 38-39 (E. Berger ed. 1986); *Hagen v. O'Connell, Goyak & Ball*, 68 Or. App. 700, 683 P.2d 563, 565 (1984) (in valuing departing attorney's stock, a legal "professional corporation must have the right to adjust the value of its stock according to the effect created when a withdrawing shareholder takes clients from the firm"). The consent of all of the clients and lawyers involved is critical to such an arrangement. An agreement purporting to divide clients will not be upheld where an attorney or a client objects thereto. See *Dwyer v. Jung*, 133 N.J. Super. 343, 336 A.2d 498, 501 (Ch. Div. 1975), *aff'd*, 137 N.J. Super. 135, 348 A.2d 208 (App. Div. 1975).

In contrast, where the departing attorney is an associate, the issue of client solicitation is usually left undiscussed. Firms commonly fail to raise the issue because, under conventional teaching, an associate has no stake in partnership assets.<sup>46</sup> The remaining attorneys therefore often assume that the associate will take nothing with him, other than experience. At the same time, the associate may be reluctant to broach the solicitation issue, first, because it frequently carries with it a substantial threat to the financial well-being of the firm,<sup>47</sup> and, second, because associates normally have little leverage with which to negotiate a favorable result.<sup>48</sup> Ironically, therefore, in many associate-departure cases, where financial stakes are great and enmities run deep, there is often little chance for informal resolution.<sup>49</sup>

### C. *Legal Ethics During a Period of Transition*

Also at the outset, a brief word must be said as to the changing terrain of the field of professional responsibility. Legal ethics is now, and for a number of years has been, in a period of transition. It is only against this shifting background that issues of attorney conduct intelligently may be pursued.

At the risk of oversimplification, it is probably fair to state that the profession has moved from a point, in the early 1970s, when rules of ethics were largely uniform from one jurisdiction to the next, to a point where today there is less harmony and greater diversity as to the norms of professional conduct. Applicable ethical strictures now often differ from state to state, depending on the subject.<sup>50</sup> The domi-

46. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 330 (1972) (term "associates" may be used to describe a situation in which the firm or the individual [lawyer] has other lawyers working for them or him who are not partners and who do not generally share in the responsibility and liability for the acts of the firm"); ABA Comm. on Professional Ethics and Grievances, Formal Op. 310 (1963) (similar); Gross, *supra* note 1, at 260 (law firm typically pays associate's salary and bears overhead expenses).

47. "A significant loss of clients and business may result from certain lawyer defections." Redmount, *supra* note 8, at 15; see also Lavine, *supra* note 2, at 8, col. 3 (three associates "carried clients with them in a departure that illustrates the high stakes that are often involved in defections from large firms"; one client accounted for \$250,000 in fees in the first year). See *supra* note 43.

48. Cf. Reuben, *supra* note 39, at 6 (leverage is critical in resolving disputes involving departing partners).

49. This is not to say that the issue is always ignored or avoided. In many instances, especially where an associate leaves on friendly terms in order to start his own office, a firm may provide assistance by arranging for him to take certain files (generally less lucrative ones) with him, subject to client approval.

50. C. WOLFRAM, *supra* note 2, § 2.6.6, at 67 ("[T]he lawyer codes . . . increasingly vary from one jurisdiction to another.").

nant feature of legal ethics in the early 1970s was the ABA's 1969 Model Code. It served as the basis for codifications adopted, with minor variations, in virtually every jurisdiction.<sup>51</sup> The Model Code was superseded as a statutory model, however, in 1983, by the Model Rules,<sup>52</sup> which have now been adopted in more than half of the states—often with substantial modifications. Consequently, in addressing an unsettled ethics question from a multi-jurisdictional perspective, one cannot ignore the Model Code, the Model Rules, or local variations.

The Model Code, while now repealed as a statutory model, still represents on many points the law presently in force in numerous jurisdictions. Until very recently, it exerted a dominant force on court decisions, ethics opinions, and scholarly commentary in virtually every state. Thus, even where superseded, the Model Code leaves behind a legacy which must be taken into account. The Model Rules, in contrast, increasingly represent the trend of authority. Even where they have not been adopted, the Model Rules may be cited as persuasive authority to the extent that they amplify and clarify any of the many ambiguous points in the Model Code, provided the Model Rules do not embrace an inconsistent position.<sup>53</sup> Accordingly, the following will refer to both the Model Code and the Model Rules, and to local provisions which depart therefrom. Where appropriate, consistencies and inconsistencies among the various formulations will be highlighted.

## II. DISCIPLINARY LIABILITY

### A. Overview

Traditionally, attempts to actively persuade specific laypersons to engage lawyers' services have been addressed through rules prohibiting (or, in limited circumstances, permitting) client solicitation.<sup>54</sup> These standards must therefore be consulted in determining whether

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51. See *supra* note 19.

52. See *supra* note 18.

53. Accord Moss, *The Ethics of Law Practice Marketing*, 61 NOTRE DAME L. REV. 601, 605 (1986) ("regardless of whether they embrace the Rules, the states surely will use the ABA's new Rules as a guide").

54. See generally MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103, DR 2-104 (1980); CANONS OF PROFESSIONAL ETHICS Canons 27, 28 (1951); see also H. DRINKER, LEGAL ETHICS 210-12 (1953) (discussing origin of proscription of lawyer advertising and solicitation).

a departing attorney's efforts to convince a client to follow him are ethically permissible.

The norms of attorney solicitation vary to some extent depending upon such factors as whether the communication involves in-person contact or mere written statements, and whether the recipient is a person with whom the attorney has had a prior professional relationship.<sup>55</sup> Accordingly, these distinctions will be explored below.

As a preliminary matter, however, it is necessary to address the continued presence and vitality of the "formal announcement rule." For many years—particularly during the period between the turn of the century and 1977 when all lawyer self-promotion was rigorously banned—this standard was held to fully define the scope of permissible communications by exiting attorneys with firm clients.

## B. *Formal Announcement Rule*

### 1. *Contours of the Rule*

Consistent with prior precedent,<sup>56</sup> the 1969 Model Code permit-

55. See 1 G. HAZARD & H. HODES, *supra* note 23, at 524-26.1 (discussing difference between targeted mail and in-person solicitation); see also *infra* Parts II-C-2 and II-D.

56. Earlier ABA ethics opinions allowed departing *partners* to announce a change of employment. See ABA Comm. on Professional Ethics and Grievances, Informal Op. 910 (1966) (withdrawing partner 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"); ABA Comm. on Professional Ethics and Grievances, Informal Op. 681 (1963) ("any formal announcement must be dignified and simply state the fact that the lawyer has changed the firm with which he is associated and . . . it should be sent only to his own clients, and those clients of the old firm for whom he had worked, where his relationship to the clients was sufficiently personal as to be included within the phrase 'warranted by personal relations'"); see also New York State Bar Ass'n, Op. 109 (1916), summarized in O. MARU & R. CLOUGH, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 1724 (1970) [hereinafter DIGEST] (attorney may send "simple business cards" announcing departure, but may take no other steps to secure employment by clients of previous firm); Luther, *The Problem of Solicitation*, 44 A.B.A. J. 554, 557-88 (1958) (discussing announcement rule). However, at least one pre-Model Code ABA ethics opinion prohibited a departing salaried *associate* from "contacting clients of the partnership and advising them that he was disassociating himself from the partnership and beginning a practice elsewhere and would like to continue doing legal work for these clients which he had commenced while employed by the partnership." ABA Comm. on Professional Ethics and Grievances, Informal Op. C-787 (1964). The reasoning underlying this opinion is not clear. It is possible that the proposed announcement may have gone significantly beyond the scope of the usual, tightly-worded and detail-barren, formal notice of a change in employment, and have actively sought to disclose information or present arguments calculated to persuade the client to in fact change firms. In any event, subsequent ABA ethics opinions make clear that no distinction is to be drawn between departing partners and associates. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1466 (1981). A very small number of jurisdictions relegate associates to an inferior status and bar them from contacting firm clients, including those whom they personally served. See State Bar of Mich., Informal Op. CI-1133, at 2 (1986), summarized in ABA/BNA

ted law firms and lawyers to inform present or former clients of "new or changed associations."<sup>57</sup> Under this widely influential<sup>58</sup> rule, an exiting partner or associate could apprise firm clients for whom he had worked of the fact of his departure. To pass muster under this standard, a notice, in the form of a "brief professional announcement card"<sup>59</sup> or an equivalent letter,<sup>60</sup> was required to be both "dignified"<sup>61</sup>

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Manual, *supra* note 2, at 901:4753 (rule stated); State Bar of Mich., Informal Op. CI-662, at 2-4 (1981), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:4827 (attorney may not send announcement of new office to firm clients whose affairs he handled, unless attorney was partner in firm and had sufficiently close relationship with clients to warrant their interest in his new association; associate may send letter to firm clients for whom he performed substantial work which advises that file will be reassigned to another attorney, but may not disclose location of departing associate's new office or type of practice); Virginia State Bar, Informal Op. 94 (undated), reprinted in O'MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 10028 (Supp. 1975) [hereinafter DIGEST SUPP. 1975] (improper for former salaried attorney to write to all firm clients he previously served seeking responses from them as to whether he was to continue representing them at new firm); see also New York County Lawyers' Ass'n, Opinion 59 (1914), summarized in DIGEST, *supra*, at ¶ 1674 (associate may not advise firm client to wait on obtaining patent agreement until associate goes into practice on his own so that client can obtain better bargain).

57. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(A)(2) (1980).

58. See Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978), cert. denied and appeal dismissed, 442 U.S. 907 (1979). ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1457 (1980) (proposed notice to be mailed by departing attorney to clients whose matters he was then handling deemed permissible); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1466 (1981) (same rule as to departing associate); Illinois State Bar Ass'n, Op. 432, 62 ILL. B.J. 690 (1974), summarized in DIGEST SUPP. 1975, *supra* note 56, at ¶ 8341 (departing member of firm may notify his own clients from firm, as opposed to firm's other clients, but may not actively solicit transfer of firm's business to him); Maryland State Bar Ass'n, Op. 83-59 (1983), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:4329 (attorney may advise clients personally served of change in employment, but not other clients of former firm); New York County Lawyers' Ass'n, Op. 596, 1972 N.Y. Co. Y.B. 244, summarized in DIGEST SUPP. 1975, *supra* note 56, at ¶ 9187 (rule stated); New York County Lawyers' Ass'n, Op. 621 (1974), summarized in DIGEST SUPP. 1975, *supra* note 56, at ¶ 9212 (rule stated); New York State Bar Ass'n, Op. 411, 47 N.Y. St. B.J. 623 (1975), summarized in DIGEST SUPP. 1975, *supra* note 56, at ¶ 9171 (rule stated); North Carolina State Bar, Op. CPR-23, 21 N.C.B. 12 (1974), summarized in DIGEST SUPP. 1975, *supra* note 56, at ¶ 9622 (withdrawing lawyer may send brief notice to clients and former clients whom he served or with whom he had significant professional contact); North Carolina State Bar, Op. CPR-35, 22 N.C.B. 14 (1975), summarized in DIGEST SUPP. 1975, *supra* note 56, at ¶ 9634 (public defender entering private practice may send notices to persons he defended); Virginia State Bar, Op. 406 (1983), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:8804 (attorney leaving legal clinic may contact clients whom he served to communicate change of association); State Bar of Wis., Op. 80-18 (1980), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:9103 (attorney leaving employment with legal services corporation may contact persons with whom he had an active attorney-client relationship at time of departure).

59. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(A)(2) (1980); see also Florida Bar, Op. 66-44 (1966), summarized in O'MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 6455 (Supp. 1970) [hereinafter DIGEST SUPP. 1970] (rule stated); cf. ABA Comm. on Professional Ethics, Formal Op. 301 (1961) (card may be sent to former clients announcing attorney's return to private practice from government service); Colorado Bar Ass'n, Op. 37 (1965), summarized in DIGEST, *supra* note 56, at ¶ 565 (same).

and exceedingly laconic. As to content, the Model Code directed 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 [a rule narrowly defining the circumstances in which a lawyer could hold himself out as a specialist].<sup>62</sup>

Other authorities made clear that language intended to induce a client to discharge the attorney's former firm was wholly impermissible.<sup>63</sup>

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60. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1457 (1980) (no material distinction between announcement card mailed by departing partner and notice in form of letter); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1466 (1981) (same rule as to departing associate); see also Florida Bar, Op. 84-1 (1984), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:2503 (joint letter should be sent by departing associate and firm, but if both cannot agree on form or content, associate may send letter or notice); Illinois State Bar Ass'n, Op. 297 (1968), summarized in DIGEST SUPP. 1970, *supra* note 59, at ¶ 6639 (surviving attorneys of firm dissolved because of death of member may notify clients of old firm of formation of new firm); Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175, 1179 (1978), (citing PA. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(A)(2) and ABA Comm. on Prof. Ethics and Professional Responsibility, Informal Op. 681 (1963)), cert. denied and appeal dismissed, 442 U.S. 907 (1979).

61. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(A) (1980).

62. *Id.* at DR 2-102(A)(2).

63. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1457 (1980). In Opinion 1457, a letter stripped of all but the most basic facts passed muster. The letter provided: 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. (Brackets in original). In finding that the letter would not violate the Model Code, the committee stated in excessively cautious terms:

This opinion is limited to the facts presented: (a) the notice is mailed; (b) the notice is sent only to persons with whom the lawyer had an active lawyer-client relationship immediately before the change in the lawyer's professional association; (c) the notice is clearly related to open and pending matters for which the lawyer had direct professional responsibility to the client immediately before the change; (d) the notice is sent promptly after the change; (e) the notice does not urge the client to sever relationship with the lawyer's former firm and does not recommend the lawyer's employment (although it indicates the lawyer's willingness to continue his responsibility for the matters); (f) the notice makes clear that the client has the right to decide who will complete or continue the matters; and (g) the notice is brief, dignified, and not disparaging of the lawyer's former firm.

*Id.* (emphasis added); see also Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393

The 1983 Model Rules do not include a provision similar to that contained in the Model Code. However, this difference is not surprising. A major achievement of the Model Rules is that they streamline the minutely detailed advertising and solicitation provisions of the Model Code—the portion of that pattern statute which encompassed the formal announcement rule.<sup>64</sup> The Model Rules are generally less restrictive than the Model Code in defining the permissible scope of communications as to the availability, terms, and nature of legal services.<sup>65</sup> Thus, it is likely that a brief formal announcement, if sent by

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A.2d 1175, 1181 n.10 (1978) (oral contacts which expressed departing associate's interest in clients' cases failed to conform with PA. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102 and were enjoined), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 910 (1966) (departing partner "may, however, 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*") (emphasis added); ABA Comm. on Professional Ethics, Informal Op. 521 (1962) (departing attorney must "refrain from any effort to secure the work of clients of his former employer"); Kansas Bar Ass'n Professional Ethics Comm., Op. 82-18, *summarized in ABA/BNA Ethics Ops.*, *supra* note 26, at 801:3809 (may not state that attorney will be doing "same type of work"); Michigan State Bar Comm. on Professional and Judicial Ethics, Informal Op. CI-681, at 3 (1981), *summarized in ABA/BNA Ethics Ops.*, *supra* note 26, at 801:4830 ("Any other statements . . . regarding your willingness to continue to represent the client, your expertise in the area or the procedure for discharging the firm or any actions such as preparation of a letter of discharge would be inappropriate . . ."); Oregon State Bar, Op. 359 (1977), *summarized in O'MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS* ¶ 12625 (Supp. 1980) [hereinafter *DIGEST SUPP.* 1980] (it is improper for associate to solicit legal work from firm's clients, regardless of whether associate brought clients to firm or did any work for them); Philadelphia Bar Ass'n Professional Guidance Comm., Op. 80-94, *summarized in ABA/BNA Ethics Ops.*, *supra* note 26, at 801:7510 (may notify clients provided there is no attempt to solicit their business); South Carolina Bar Ethics Advisory Comm., Op. 83-09 (1984), *summarized in [Current Reports] Law. Man. on Prof. Conduct (ABA/BNA)* 279 (June 27, 1984) [hereinafter *ABA/BNA Current Reports*] (announcement cards may contain only limited information); State Bar of Wis., Op. 80-18 (1980), *summarized in ABA/BNA Ethics Ops.*, *supra* note 26, at 801:9103 (notice of change in employment may inform client that he has the right to choose who will continue or complete representation, but may not urge or recommend attorney's employment).

64. In the wake of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the first Supreme Court decision to hold that some forms of lawyer advertising are constitutionally protected, the ABA adopted intricate amendments of the Model Code in an attempt to define (arguably in the narrowest terms) the scope of acceptable lawyer advertising. For example, DR 2-101(B) of the Model Code was amended to set forth 25 different categories of information which could be disseminated (e.g., certain biographical information, office information, fee information, et cetera). What emerged at the individual state level, was a "crazy quilt of regulations, differing widely in approach." Andrews, *The Model Rules and Advertising*, 68 A.B.A. J. 808, 809 (July 1982). About 30 states based their revised rules, at least in part, on the "laundry list" contained in amended DR 2-101(B), although the content and length of the lists frequently varied. *Id.* Eighteen states rejected this minutely detailed approach in favor of more broadly stated standards (e.g., rules simply forbidding "false, fraudulent, or misleading" statements). *Id.* This latter course is embraced by the Model Rules. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1983).

65. H. HAYNSWORTH, *supra* note 22, at 5 ("The Model Rules . . . are in many respects much more permissive with respect to law firm public relations activities than the ABA Model [Code].");

an exiting attorney to clients whom he previously served, would be deemed acceptable under the new standards.<sup>66</sup>

While virtually all jurisdictions would agree, at a minimum, that an exiting attorney might take steps consistent with the Model Code's formulation of the announcement rule,<sup>67</sup> there is a serious question as to the validity of the restrictions which the Model Code imposed on the form and content of such communications. As the following sections indicate, these limitations are unlikely to withstand constitutional challenge.

## 2. "Undignified" Communications

Although the Model Code and other authorities held that a formal announcement of departure had to be "dignified" or in "good taste,"<sup>68</sup> recent Supreme Court precedent suggests that such limitations are unconstitutional.<sup>69</sup> It is now well-established that commer-

Andrews, *supra* note 64, at 808 (the proposed Model Rules "offer a new, less restrictive approach to lawyer advertising than does the current Model Code").

66. Cf. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 84-1504 (1984) (expansively worded announcement by attorney moving from government commission to private practice, to be sent to other lawyers, rather than to former clients, held permissible under both Model Code announcement rule (as interpreted in light of applicable Supreme Court decisions) and relevant provisions in Model Rules).

67. *But see* Iowa State Bar Ass'n Comm. on Professional Ethics and Conduct, Op. 82-23 (1982), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:3610 (departing lawyer previously employed by firm may not notify firm clients whom he represented of fact that he is leaving firm; notification must be made by firm); State Bar of Mich., Informal Op. CI-1133 (1986), summarized in ABA/BNA Manual, *supra* note 2, at 901:4753 (departing associate barred from sending announcement of change in firms to clients of former firm, even if he had substantial personal contact with them); State Bar of Mich., Informal Op. CI-662 (1981), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:4827 (attorney may not send announcement of departure to clients whose affairs he handled, unless attorney is partner in firm and has sufficiently close relationship with clients to warrant their interest in his new association). To the extent that the Iowa and Michigan opinions purport to apply a rule imposing a total ban on commercial speech by departing associates, they are subject to constitutional challenge. Commercial speech may be totally prohibited only where it is inherently likely to mislead or where historical experience demonstrates that its content or form routinely is misleading. *See infra* Part II-C-3. No such showing can be made with respect to departure-based communications by attorneys. *See id.*

68. In the late 1970s and early 1980s, 25 states specifically required lawyer advertisements to be dignified. *See* Andrews, *supra* note 64, at 810; *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102 (1980) (to avoid discipline, professional cards, announcement cards, office signs, letterheads, and "similar professional notices or devices" had to be used only in specified circumstances and be "in dignified form"); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1457 (1980) ("dignified" letter announcing attorney's departure held ethically permissible). Earlier authorities had imposed similar standards. *See* ABA Comm. on Professional Ethics, Informal Op. 681 (1963) ("good taste is the standard to be applied in connection with formal announcements"; "good taste would require that any formal announcement be dignified").

69. *See* Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (rejecting argument that ban on



cial speech by attorneys is protected by the first amendment, and may be restricted only for the purpose of directly advancing an important governmental interest.<sup>70</sup> In *Zauderer v. Office of Disciplinary Counsel*,<sup>71</sup> the Supreme Court, in 1985, rejected a rule which, for the purpose of ensuring that attorneys advertised "in a dignified manner," restricted the use of illustrations.<sup>72</sup> The Court expressed its views as follows:

[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 . . . [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.<sup>73</sup>

If communications by a departing attorney with firm clients are to be banned or curtailed, the restriction therefore must be intended to combat a more substantial evil than mere "bad taste" or lack of dignity.<sup>74</sup>

Consistent with *Zauderer*, the Model Rules eschew attempts to restrict advertising based on criteria such as effectiveness, taste, or dignity, stating that such assessments are matters of "speculation and

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lawyer advertising was justified by fact that advertising would undermine attorneys' sense of dignity or self-worth or tarnish dignified public image of profession); see also G. HAZARD & W. HODES, *supra* note 23, at 512:

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*.

70. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650-51 (1985); *In re R.M.J.*, 455 U.S. 191, 203 (1982).

71. 471 U.S. 626 (1985).

72. *Id.* at 647.

73. *Id.* at 648 (emphasis added).

74. Provisions in the Model Rules which limit dissemination of information about legal services typically are calculated to address more serious problems, such as contamination of the client's decision making process through attorney over-reaching (see, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983) ("Direct Contact with Prospective Clients")) or dissemination of false or misleading statements (see, e.g., *id.* Rule 7.1). Supreme Court cases make clear that "regulation—and imposition of discipline—are permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive." *In re R.M.J.*, 455 U.S. 191, 202 (1982). See generally *infra* Parts II-C-1 and II-C-3 discussing restrictions on solicitation.

subjective judgment" which are likely to interfere with society's "need to know" by unnecessarily impeding the flow of information about legal services to many segments of the public.<sup>75</sup> A number of recent state court cases similarly have held or suggested that lack of dignity is an improper standard for the imposition of attorney discipline.<sup>76</sup> Consequently, the dignity requirement of the Model Code announcement rule is of dubious validity at best.<sup>77</sup>

### 3. *Restrictions on Content*

Under the Model Code, an announcement of departure conveyed a minimum of information. The writing was permitted to disclose little more than the names and addresses of the exiting attorney, the former firm, and the new firm; the date of the departure; and the fact that the client could decide who would represent him in the future.<sup>78</sup> Any attempt to furnish facts bearing upon the client's decision as to who should represent him—such as information relating to the existence or nature of a dispute giving rise to the departure or data concerning the exiting attorney's qualifications or prior participation in legal work for the client—was regarded as impermissible. Presumably, this restrictive approach was attributable to the fact that, in its

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75. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 comments 1 & 3 (1983).

76. See *McLellan v. Mississippi State Bar Ass'n*, 413 So. 2d 705, 708 n.2 (Miss. 1982) (blanket prohibition of Yellow Pages legal advertising held constitutionally impermissible notwithstanding fact that "advertising of any kind was/is repulsive to attorneys of the so-called 'Old School' "); *In re Marcus*, 107 Wis. 2d 560, 320 N.W.2d 806, 817 (1982) (Beilfuss, C.J., concurring) (fact that ads were "offensive to many respected and ethical members of the bar . . . [and] were degrading and . . . [lacked a] sense of professionalism" was no basis for prohibiting them); see also *Petition of Felmeister & Isaacs*, 104 N.J. 515, 518 A.2d 188, 188-89, 205 (1986) (though expressly declining to hold dignity standard unconstitutional, court held that public interest was better served by rule requiring that advertisements be "predominantly informational").

Two relatively recent cases upheld the dignity standard against first amendment and void-for-vagueness challenges. See *Spencer v. Supreme Court*, 579 F. Supp. 880, 892 (E.D. Pa. 1984), *aff'd without opinion*, 760 F.2d 261 (3d Cir. 1985) (requirement that attorney-to-attorney advertisements be dignified was not vague, because attorneys would understand it to require caution and restraint in formulation of ads, and was not unreasonable, since state has substantial interest in maintaining dignity of legal profession); *Bishop v. Committee on Professional Ethics*, 521 F. Supp. 1219, 1230 (S.D. Iowa 1981), *vacated as moot*, 686 F.2d 1278 (8th Cir. 1982) (requirement that advertising be dignified advances state's interest in preserving professionalism and minimizing commercialization of legal profession). However, these cases may be distinguished on the ground that they were decided and appealed prior to *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), discussed *supra* in the text accompanying notes 71-73.

77. See *Moss*, *supra* note 53, at 694 ("[p]rohibitions based upon good taste face certain defeat"); see also *id.* at 642-45 (discussing restrictions on undignified, garish advertising).

78. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1457 (1980).

inception, the rule was an exception to the total ban on lawyer advertising which prevailed for approximately three-quarters of a century.<sup>79</sup>

Developments in the law of attorney advertising during the past decade<sup>80</sup> call into question such restrictions on the informational content of a departure-based announcement.<sup>81</sup> In general, the state and federal judiciaries, following the leadership of the United States Supreme Court, have recognized that there is a substantial public interest in ensuring that individual citizens have ready access to reliable information about all facets of the the legal system.<sup>82</sup> Undoubtedly this is proper, for as Chief Justice Robert N. Wilentz of the New Jersey Supreme Court recently stated, "A legal system that leaves its citizens ignorant of their rights and how to enforce them . . . fails in securing one of society's most fundamental values: the attainment of justice."<sup>83</sup>

The leading United States Supreme Court decision on content restrictions in lawyer advertising is *In re R.M.J.*<sup>84</sup> There, an attorney violated state disciplinary rules which permitted publication of only ten categories of information and required that any reference to areas of practice be accomplished through use of one or more of twenty-

79. Over one hundred years ago, advertising by the legal profession was an accepted practice with some famous users. [The accompanying illustration depicts an advertisement by Abraham Lincoln.] By the early 1900's, however, advertising by lawyers had become regarded as inappropriate . . . . In 1977, . . . the United States Supreme Court held, in *Bates v. State Bar of Arizona*, that a lawyer has a constitutional right to advertise . . . .

A.B.A. COMM'N ON ADVERTISING, EFFECTIVE MARKETING OF LEGAL SERVICES THROUGH ADVERTISING: A PRACTICAL GUIDE FOR LAWYERS 1 (1985) (brackets added).

80. The sequence and holdings of the leading cases have been recounted by many authors and will not be retraced here. See, e.g., Wallace & McKelvey, *Regulating Attorney Advertising*, 18 TEX. TECH. L. REV. 761, 761-75 (1987); Pearson & O'Neill, *The First Amendment, Commercial Speech, and the Advertising Lawyer*, 9 U. PUGET SOUND L. REV. 293, 311-18 (1986).

81. The fact that constitutionally dubious rules are on the books in many states is not surprising for "[s]tate rules of professional responsibility commonly have lagged behind the Supreme Court's interpretation of the first amendment." Pearson & O'Neill, *supra* note 80, at 294; *id.* at 318 ("Most states continue to maintain rules of professional conduct that are inconsistent with the highest Court's commercial speech decisions.").

82. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) ("the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides"); *Petition of Felmeister & Isaacs*, 104 N.J. 515, 518 A.2d 188, 192-93 (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."); see also Pearson & O'Neill, *supra* note 80, at 293 ("the concept of a public right to a free flow of information has become firmly established"); *id.* at 304-07 (tracing development of "right to know" in cases not involving attorneys).

83. *Petition of Felmeister & Isaacs*, 104 N.J. 515, 518 A.2d 188, 192-93 (1986).

84. 455 U.S. 191 (1982).

three descriptive terms enumerated in a list. The attorney substituted different words for authorized terms (e.g., "personal injury law" for "tort law"), and used other words which had no counterpart on the list (e.g., "contracts"). The Supreme Court held that in the absence of proof of a substantial interest which cannot be advanced or protected less intrusively, a state may not restrict the flow of information about the availability of legal services.<sup>85</sup> Accordingly, the Court ruled that the information disseminated by the attorney—which was not shown to be false or misleading—could not justify the imposition of discipline.<sup>86</sup>

*In re R.M.J.* indicates that the Court is unwilling to permit needless limitations on advertising content.<sup>87</sup> Recognizing this fact and expressly relying on *R.M.J.*, a 1984 ABA ethics opinion held that the restrictions on content embodied in the Model Code formulation of the formal announcement rule were invalid.<sup>88</sup> The facts there at issue concerned communications addressed to fellow attorneys, rather than to existing or former clients. The committee held that the attorney in question, who was returning to private practice from work on a government commission, not only could discuss the impact of consumer laws and regulations and disclose biographical data relating to his activities in the consumer litigation field, but could offer to consult with attorneys on related subjects. Although that ethics opinion did not deal with a departure-based communication directed to a layperson, the result most likely would have been the same even if it had, for *In re R.M.J.*, the decision on which the opinion was premised, concerned the dissemination of information to laypersons.<sup>89</sup> Some state courts

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85. *Id.* at 203-04. See also *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985) ("Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.").

86. *In re R.M.J.*, 455 U.S. at 206-07. The Court also held that the scope of the announcement rule set forth in DR 2-102(A) of the Model Code (which permits the mailing of announcement *only* to lawyers, clients, former clients, personal friends, and relatives) was unduly restrictive. It held that if the state was concerned about the difficulty of supervising the content of such announcements, it could require the attorney to file copies with the state. Put differently, there was a less restrictive alternative than absolute prohibition by which to advance the legitimate interests of the state. *Id.* at 206.

87. Similar resolve was demonstrated in a later case where the Court unequivocally held that "an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and non-deceptive information and advice regarding the legal rights of potential clients." *Zauderer*, 471 U.S. at 647.

88. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 84-1504 (1984).

89. Cf. H. HAYNSWORTH, *supra* note 22, at 50, which, in discussing the content of attorney business cards, states:

have indicated that the disclosure of any information rationally related to the selection of an attorney is constitutionally protected.<sup>90</sup> Together, these various authorities suggest that the content limitations imposed by the Model Code announcement rule are invalid absent a showing of compelling state interest. Of course, whether such an interest exists turns, at least in part, upon a careful examination of the policies underlying the profession's anti-solicitation rules.

### C. *In-Person Solicitation*

#### 1. *In General*

Certain efforts to secure legal employment through personal contact with prospective clients have long been condemned in the strongest of terms under the solicitation standards.<sup>91</sup> In general, these

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[T]here is no justifiable reason [why business cards] cannot contain material allowed in media advertisements. Therefore, the provisions in DR 2-102(A)(1) of the ABA Model [Code], which limit the information that can be included in professional cards to the name and address of the lawyer and his law firm, the names of other members of the firm, and permissible information on fields of practice, is questionable.

See also *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988) (no difference between newspaper advertising, telephone directory advertising, and announcement card advertising).

90. See *Petition of Felmeister & Isaacs*, 104 N.J. 515, 518 A.2d 188, 193-95 (1986) (adopting rule that lawyer advertising must be "predominantly informational"); 518 A.2d at 204 ("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 the public interest.").

91. For example, the predecessor to the Model Code, the 1908 Canons of Professional Ethics, expressly stated with respect to client solicitation 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 OF PROFESSIONAL ETHICS Canon 28 (1967) (emphasis added). See Comment, *Legal Ethics: The Solicitation Prohibition*, 18 WASHBURN L.J. 383, 383 (1979) ("Early American courts disbarred attorneys who employed runners and disallowed fees generated by personal solicitation."); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (discussing history of ban on solicitation); 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."); Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1181-82 (1972) (1908 Canons are basis for current restrictions on champerty and maintenance); Annotation, *Modern Status of Law Regarding Solicitation of Business By or For Attorney*, 5 A.L.R.4TH 866 (1980) (one writer has concluded that these rules bar any personal contact between a departing attorney and clients of the attorney's former firm which is directed toward obtaining the client's patronage); see also H. HAYNSWORTH, *supra* note 22, at 44 n.12 ("Direct in-person solicitation of the old firm's clients is clearly impermissible.").

A few scholars have argued that the rules against advertising and solicitation were originally intended not to protect the public from attorney overreaching but to obstruct the entry of religious and ethnic minorities into the profession, to the benefit of "established" lawyers. See J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 204-05 (1976); Rhode, *Solicitation*, 36 J. LEGAL EDUC. 317, 318 (1986). One might reasonably ask whether rules prohibiting a departing attorney from contacting clients of the attorney's former firm are directed

practices have involved face-to-face contacts by attorneys with "strangers" under circumstances fraught with potential for abuse through overreaching and undue influence, in settings screened from the watchful eye of neutral third parties.<sup>92</sup> As one writer has put it, the danger in such situations is that "a lawyer may paint a one-sided picture, thus fostering uninformed decisionmaking, exerting pressure on the layman, and discouraging critical comparison of available legal services."<sup>93</sup>

## 2. *Permissible Solicitation of Present and Former Clients*

### a. *Professional Relationship Exception Defined*

However, not all forms of solicitation are forbidden.<sup>94</sup> One category of contact exempt from condemnation in most jurisdictions,<sup>95</sup>

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not at protecting those individuals, but at obstructing attorney mobility and competition in order to protect the hegemony of established firms.

92. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457-58 (1978); R. THURMAN, *DIRECT MAIL: ADVERTISING OR SOLICITATION? A DISTINCTION WITHOUT A DIFFERENCE* 4-5 (1982).

Professors Hazard and Hodes state:

[I]n-person communication lacks the safeguards inherent in public advertising. Private communications are hard to police, partly because there is no accurate record of what was said. . . . Furthermore, a personal presentation is far more likely to sway the judgment of a lay person than even the most effective television advertisement.

These fears are not unrealistic. Pressure tactics may induce a lay person to purchase legal services he really does not need.

1 G. HAZARD & W. HODES, *supra* note 23, at 523.

The Supreme Court has catalogued other risks alleged to result from in-person client recruitment: stirring up of litigation, assertion of fraudulent claims, and debasement of the legal profession. See *Ohralik*, 436 U.S. at 461; see also Rhode, *supra* note 91, at 319-21 (underrepresentation, overreaching, misrepresentation, overcharging, and intrusiveness have historically been associated with solicitation).

93. R. THURMAN, *supra* note 92, at 4.

94. The most discussed exception to the solicitation ban concerns political or ideological speech. In *In re Primus*, 436 U.S. 412 (1978), the Supreme Court held that an offer by mail by an NAACP Legal Defense Fund lawyer to provide free representation to a sterilized woman was constitutionally protected, where no actual abuse was shown and the proposed litigation was intended to be a vehicle for first amendment political expression by a not-for-profit group. A footnote in *Primus* further indicated that "the ethical rules of the legal profession traditionally have recognized an exception from any general ban on solicitation for offers of representation, without charge, extended to individuals who may be unable to obtain legal assistance on their own." *Id.* at 437 n.31. A somewhat dated discussion of other exceptions to the no-solicitation rule appears in Luther, *supra* note 56, at 557 (solicitation relating to court appointments, multi-plaintiff actions, and expensive litigation).

95. The professional relationship exception, discussed below in the text, is not recognized in some states. See CALIFORNIA RULES OF PROFESSIONAL CONDUCT DR 2-101(B), reprinted in 1 NAT'L REP. ON LEGAL ETHICS CA:Rules:1 (1986) (expressly stating that communications with present and former clients are encompassed by ban on solicitation with "potential clients"). Among these jurisdictions are some states which embrace only limited versions of the solicitation ban and

and especially relevant here, encompasses lawyer communications which apprise present or former clients of possible legal needs, and which thereby generate additional business.<sup>96</sup> This exception to the solicitation ban is embodied in the Model Rules, which squarely state that the ban applies only where the layman is one "with whom the lawyer has no family or *prior professional relationship*."<sup>97</sup> Likewise, language in the Model Code provided that an attorney was barred from accepting an offer of employment arising from the provision of unsolicited legal advice only where the offeror was not "a close friend,

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prohibit only those forms of in-person contact accompanied by fraud, overreaching, or similar abuses. See, e.g., INDIANA RULES OF PROFESSIONAL CONDUCT Rule 7.3, reprinted in 2 G. HAZARD & W. HODES, *supra* note 23, app. 4, at IN6-IN7; MAINE RULES OF PROFESSIONAL CONDUCT Rule 3.9(F), reprinted in 2 NAT'L REP. ON LEGAL ETHICS ME:10; MONTANA RULES OF PROFESSIONAL CONDUCT Rule 7.3, reprinted in 2 G. HAZARD & W. HODES, *supra* note 23, app. 4, at MT2; NEW JERSEY RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1987), reprinted in 2 G. HAZARD & W. HODES, *supra* note 23, app. 4, at NJ17-NJ18; VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A), reprinted in 2 G. HAZARD & W. HODES, *supra* note 23, app. 4, at VA3.

96. Some authorities purport to permit such communications, but only to the extent that they are devoid of solicitation overtones. See, e.g., Alabama State Bar, Unnumbered Op. (1976), 38 ALA. LAW. 39 (1977), summarized in DIGEST SUPP. 1980, *supra* note 63, at ¶ 10390 (attorney may inform clients of changes in tax law bearing upon work previously performed, "provided he does not recommend his services in connection with the notice he sends to his clients"); Hawaii State Bar, Op. 78-10-21 (1978), summarized in DIGEST SUPP. 1980, *supra* note 63, at ¶ 10896 (similar); Mississippi State Bar, Op. 39 (1977), summarized in DIGEST SUPP. 1980, *supra* note 63, at ¶ 11735 (similar). However, the greater weight of authority appears to impose no such qualification and treats such communications as exceptions to the solicitation ban, as indicated in the text and footnotes below.

97. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983) (emphasis added). Rule 7.3 states in full:

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 communication directed to a specific recipient, but does not include letters 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.

*Id.* Some of the states which have adopted codes based on the Model Rules have not adopted the official version of Rule 7.3 or its language pertaining to the prior professional relationship exception to the solicitation ban. Among these states are Indiana, Montana, New Jersey, New Mexico, North Dakota, Pennsylvania, and Virginia. See 2 G. HAZARD & H. HODES, *supra* note 23, at app. 4; ABA/BNA Manual, *supra* note 2, at 01:26 (discussing North Dakota); *id.* at 01:27 (discussing Pennsylvania). Based on the language contained in these codes—which frequently bans solicitation only under specific circumstances, such as where the lawyer should know that the recipient cannot exercise reasonable judgment—it is generally not reasonable to conclude that these states have intended to prohibit contact with present or former clients.

The last sentence of Rule 7.3 quoted above was held to be unconstitutional in *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988). However, neither the majority nor dissenting opinion suggested that the professional relationship exception embodied in the first sentence of Rule 7.3 was constitutionally infirm.

relative, former client (if the advice [was] germane to the former employment), or one whom the lawyer reasonably believe[d] to be a client."<sup>98</sup>

These provisions seldom have been the object of court interpretation or scholarly debate;<sup>99</sup> largely, they have been discussed only in advisory ethics opinions. The dearth of controlling authority concerning the professional relationship exception is perhaps due in part to the fact that the practice of "soliciting" one's present or former clients is so well-engrained into the lore of law practice, and takes so many subtle forms, as to give rise to little comment. It is today widely regarded as ethically acceptable<sup>100</sup> and, from a preventative lawyering standpoint,<sup>101</sup> as desirable, for a lawyer to "remind" a client of addi-

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98. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)(1) (1980) (emphasis added). It has been held that this exception to the rule on acceptance of employment logically must be read into DR 2-103(A), the rule which governs recommendation of professional employment to laypersons. See *Goldthwaite v. Disciplinary Bd. of Ala. State Bar*, 408 So. 2d 504, 507 (Ala. 1982). Ethical Consideration 2-4 similarly provided in relevant part:

A lawyer who volunteers in-person advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-4 (1980).

99. *But see* *Goldthwaite v. Disciplinary Bd. of Ala. State Bar*, 408 So. 2d 504 (Ala. 1982) (solicitation of former client and friend deemed permissible under professional relationship exception); *In re Madsen*, 68 Ill. 2d 472, 370 N.E.2d 199, 204-05 (1977) (Dooley, J., dissenting) (dissenting opinion invoked EC 2-4 to justify mass mailing of newsletter to clients, but did not elaborate on the professional relationship exception as embodied in DR 2-104(A)(1)).

100. See ABA Comm. on Professional Ethics and Grievances, Informal Op. 1356 (1975) (lawyer may contact client formerly represented in criminal matter to apprise him of new statute which permits expungement of criminal record, since such advice is germane to former employment; reasonable fee may be charged); see also Alabama State Bar, Op. 85-31 (1985), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:1099 (lawyer may advise former client, whom he represented on drunk driving charge, of recent decision questioning validity of convictions based on absence of sworn citation from arresting officer, and may accept employment with regard to recent judicial changes in law; DR 2-104(A)(1) cited); Illinois State Bar Ass'n, Op. 567 (1977), summarized in DIGEST SUPP. 1980, *supra* note 63, at ¶ 10950 (triennial reminder that former client's will may need to be revised held permissible; DR 2-104(A)(1) cited); North Carolina State Bar, Op. CPR-52 (1975), summarized in DIGEST SUPP. 1980, *supra* note 63, at ¶ 12303 (firm may annually remind clients and former clients for whom it provides custodial service for wills of need to review their wills and to contact firm or other lawyer if change is necessary; 2-104(A)(1) cited); Oregon State Bar, Op. 375 (1977), reprinted in DIGEST SUPP. 1980, *supra* note 63, at ¶ 12641 (letter informing former client of tax law changes likely to affect will and recommending that recipient consult "an attorney" held permissible; DR 2-104(A)(1) cited).

101. Cf. L. BROWN & E. DAUER, *PLANNING BY LAWYERS: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS* 466 (1978). Professors Louis Brown and Edward Dauer state, in a related vein:

[M]any potential clients are imperfectly informed about the possibilities of legal services



tional legal services that the client may need—and which presumably the client will call upon the lawyer to perform. Thus, a widely-read “how to” manual, published by the American Bar Association,<sup>102</sup> echoing similar advice given in other publications,<sup>103</sup> advises lawyers that it is both good business and good ethics for an attorney to establish a “20-year follow-up calendar” showing when clients should be reminded about such things as revising a will, exercising a lease option, renewing a judgment, or expunging a criminal record.<sup>104</sup> Many such reminders are undoubtedly actuated by a genuine desire to advance the client’s welfare or to protect the value of prior legal work. But it cannot seriously be questioned that frequently a further prime objective is to secure additional work for the attorney.<sup>105</sup>

Permissible solicitation of business from existing clients is not a

and about the relevance of lawyers to future problems, because the “legal” dimensions of a situation are not always seen. . . . [Surely it is within the “client management”] competence of lawyers—for even the most hard-bitten clients—to guide and steer the client’s behavior. . . . [T]he client who asks for drafting can very often be shown the “need” for further and more expansive counseling.

*Id.*

102. J. FOONBERG, *HOW TO START AND BUILD A LAW PRACTICE* (1984).

103. See G. SINGER, *HOW TO GO DIRECTLY INTO YOUR OWN COMPUTERIZED SOLO LAW PRACTICE WITHOUT MISSING A MEAL (OR A BYTE)* 433-38 (1986):

You will be doing every client that you have a favor by inquiring into the status of the client’s will. Very often, the making of a will is something in the back of the mind, needing only a reminder to stimulate action.

. . . Giving full concern for propriety and keeping well within the precepts of ethical conduct, you should make such an inquiry at every single opportunity.

. . . .

The important thing is . . . never to overlook an opportunity to recommend whatever may be appropriate under the circumstances.

See also Moskowitz, *Marketplace Will Be The Final Judge of Lawyer’s Advertising Standards*, Wash. Post, Sept. 19, 1988 (Magazine), at 19, col. 1 (reporting that lawyer “advises colleagues to get clients up to the office, where they can be steered to meet partners who specialize in areas in which the client is not currently using the firm, but may be persuaded to in the future”).

104. J. FOONBERG, *supra* note 102, at 85-86. See also State Bar of Mich., Informal Op. 159 (1978), reprinted in DIGEST SUPP. 1980, *supra* note 63, at ¶ 11572 (attorney may suggest that will or trust he previously drafted be updated); Maryland Bar Ass’n, Informal Op. 76-45 (1975), reprinted in DIGEST SUPP. 1980, *supra* note 63, at ¶ 11279 (attorney may inform former clients of changes in the Internal Revenue Code which may affect their estate plans); State Bar of Mich., Informal Op. 50, 57 MICH. ST. B.J. 309 (1978), summarized in DIGEST SUPP. 1980, *supra* note 63, at ¶ 11497 (attorney may send regular clients tax advice which may affect clients’ interests); State Bar of Mich., Informal Op. 323, 57 MICH. ST. B.J. 330 (1978), summarized in DIGEST SUPP. 1980, *supra* note 63, at ¶ 11698 (attorney may communicate change in law to former clients); Virginia State Bar, Informal Op. 370 (undated), 28 VA. B. NEWS 19 (Feb. 1980), summarized in DIGEST SUPP. 1980, *supra* note 63, at ¶ 12993 (similar).

105. Cf. J. FOONBERG, *supra* note 102, at 85-86 (“The client will be happy to pay you and will be grateful to you for the reminder.”).

recent phenomenon. Even under pre-Code norms,<sup>106</sup> during the period in which virtually all forms of lawyer advertising and solicitation were rigorously banned,<sup>107</sup> attorneys were permitted to advise clients of such matters as the need for a periodic "legal check-up"<sup>108</sup> or the existence of new cases, statutes, or administrative rulings which might affect the client's interests.<sup>109</sup> Indeed, as early as 1925, an ABA ethics

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106. Canons 27 and 28 of the 1908 Canons of Professional Ethics, which prohibited all forms of direct and indirect in-person solicitation, were "strictly applied." H. HAYNSWORTH, *supra* note 22, at 12.

107. "Prior to *Bates*, the content of written communications to existing and former clients was tightly regulated to prevent anything that might be construed as advertising." *Id.* at 40.

108. ABA Comm. on Professional Ethics, Formal Op. 307 (1962); ABA Comm. on Professional Ethics and Grievances, Formal Op. 210 (1941) (periodic notices may be sent to will client advising re-examination of will in light of possibly changed situation, unless lawyer has "reason to believe that he has been supplanted by another attorney"); ABA Comm. on Professional Ethics, Informal Op. 661 (1963) (notices suggesting need for revision may be sent to will or estate clients, but not to clients generally); State Bar of Mich., Informal Op. 156, 57 MICH. ST. B.J. 315 (1978), summarized in DIGEST SUPP. 1980, *supra* note 63, at ¶ 11569 (attorney may not send letter about no-fault insurance to all clients, but only to clients whom attorney represented in automobile negligence cases).

Quoting an earlier Informal Decision (C-171), Opinion 307, *supra*, held that a distinction had to be drawn between "regular" clients (those with whom the lawyer "has a close relationship, warranting the conclusion that he is regarded as the client's attorney"), and other clients for whom the lawyer "has [merely] performed occasional services." A lawyer, pursuant to this opinion, could properly advise only regular clients of the value of a legal check-up. This distinction—which parallels language in other ethics opinions (see, e.g., ABA Comm. on Professional Ethics, Informal Op. 1040 (1968))—presumably is rooted in that portion of the text of the Canons of Professional Ethics which purportedly justified the recognition of any exception to the solicitation ban in the case of communications directed to clients. Canon 27 provided: "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews *not warranted by personal relations*." CANONS OF PROFESSIONAL ETHICS Canon 27 (1967) (emphasis added). See also H. DRINKER, *supra* note 54, at 252-54 (discussing meaning of phrase "personal relations"). Somewhat similarly, Canon 28 directed that "[i]t is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so." CANONS OF PROFESSIONAL ETHICS Canon 28 (emphasis added). The Model Code and the Model Rules do not distinguish between regular clients and other clients. Indeed, DR 2-104(A)(1) goes so far as to bring within the professional relationship exception communications directed to any "one whom the lawyer reasonably believes to be a client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)(1) (1980).

109. See ABA Comm. on Professional Ethics and Grievances, Formal Op. 213 (1941) (patent attorney may, through letter, periodic bulletin, or circular, advise regular clients of new statutes, court decisions, and administrative rulings which may affect clients' interests; circulars purporting to explain divorce laws to non-clients distinguished); ABA Comm. on Professional Ethics and Grievances, Informal Op. 76, text not otherwise available, but summarized in DIGEST SUPP. 1970, *supra* note 59, at ¶ 4841 (attorney may call legislation to attention only of clients with related interests); ABA Comm. on Professional Ethics and Grievances, Informal Op. 62, text not otherwise available, but summarized in DIGEST SUPP. 1970, *supra* note 59, at ¶ 4833 (personal letter is in better taste than circular as means for advising clients of change in law); ABA Comm. on Professional Ethics and Grievances, Informal Op. 61, text not otherwise available, but summarized in DIGEST, *supra* note 56, at ¶ 4832 (attorney may advise clients of administrative orders or changes in law); ABA Comm.

committee opined that an attorney, who had represented Osage Indians in legal matters for many years and had occasionally served individual tribe members, did not act unethically in soliciting, by form letters to members of the tribe, employment in connection with income tax returns.<sup>110</sup>

Communications with present and past clients often take the guise of a personal letter, and numerous firms now widely circulate periodic newsletters in furtherance of similar ends.<sup>111</sup> There is, how-

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on Professional Ethics, Informal Op. 1113 (1969) (rule in text recognized); ABA Comm. on Professional Ethics and Grievances, Informal Op. 809 (1965) (attorneys may, by letter or other appropriate communication sent directly to clients they regularly represent, advise clients of a seminar they will hold on employment law); Colorado Bar Ass'n, Op. 42 (1968), *summarized in* DIGEST SUPP. 1970, *supra* note 59, at ¶ 6216 (attorney may advise regular clients of directly relevant changes in law); Florida Bar, Op. 67-31 (1967), *summarized in* DIGEST SUPP. 1970, *supra* note 59, at ¶ 6506 (attorney may propose that client's will be reviewed in light of changed personal circumstances or changes in law); Florida Bar, Op. 60-17 (1960), *summarized in* DIGEST SUPP. 1970, *supra* note 59, at ¶ 6273 (attorney may advise particular client of change in law which may affect will); Illinois State Bar Ass'n, Op. 155 (1956), *summarized in* DIGEST, *supra* note 56, at ¶ 916 (firm may send personal letter to drainage commissioners advising them of new duties under changed law if firm represented commissioners recently enough that attorney-client relationship may be said to exist); New York State Bar Ass'n, Op. 1 (1964), *summarized in* DIGEST, *supra* note 56, at ¶ 1590 (attorney may advise by letter particular client (who may be affected by the development) of change in negligence law); H. DRINKER, *supra* note 54, at 254 (lawyer may send client information as to changes in law).

110. ABA Comm. on Professional Ethics and Grievances, Formal Op. 7 (1925) (conduct was not unwarranted by "personal relations" within the meaning of Canon 27).

111. See *In re Madsen*, 68 Ill. 2d 472, 370 N.E.2d 199, 200-02 (1977) (mailing more than 2,000 clients document entitled "Tips from your Lawyer for 1973," which advised clients that wills should be reviewed every two years and provided information concerning investments, arrests, franchises, probate, incorporation, etc., "did not, under the circumstances, constitute an improper effort to solicit business"); 370 N.E.2d at 204-05 (Dooley, J., dissenting) (mailing was justified under EC 2-4 and the professional relationship exception to the solicitation rule); *In re Ratner*, 194 Kan. 362, 399 P.2d 865, 872-73 (1965) (sending of newsletter to regular clients is not ethically offensive); Alabama State Bar, Op. 86-29 (1986), *summarized in* ABA/BNA Manual, *supra* note 2, at 901:1004-05 ("where the newsletter imparts advice or information to existing or former clients, a lawyer may accept employment resulting therefrom"); Colorado Bar Ass'n, Op. 74 (1986), *summarized in* ABA/BNA Manual, *supra* note 2, at 901:1901 (newsletter sent to clients and others permissible even if "pecuniary gain is the lawyer's primary motive for sending it"); District of Columbia Bar, Op. 134 (1984), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:2310 (because there is an underlying business incentive behind publication of newsletter distributed to clients and potential clients, rules governing advertising and solicitation apply); Indiana State Bar Ass'n, Op. 4 (1982), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:3305 (lawyer may distribute to clients newsletter which describes changes in law); Iowa State Bar Ass'n, Op. 84-9 (1984), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:3614 (lawyer may send quarterly newsletters to clients provided communication is not fraudulent, misleading, or self-laudatory); South Carolina Bar, Op. 85-18 (1985), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:7920 (lawyer's use of service which edits and prepares legal newsletter and sends it to his clients does not constitute improper solicitation); Virginia State Bar, Op. 448 (1983), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:8809 (attorney may send clients newsletter addressing general aspects of law); Virginia State Bar, Op. 671 (1985), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at

ever, no reason why such contacts cannot be verbal. The Model Code<sup>112</sup> and Model Rules<sup>113</sup> each expressly recognize that the professional relationship rule is an exception to the ban on "in-person" solicitation—and thus presumably it encompasses modes of verbal communication. Accordingly, the Alabama Supreme Court recently held that oral solicitation was protected under this rule.<sup>114</sup>

A few authorities have held that a lawyer may advise a client of developments affecting previous legal work *only if* the communication is not used for purposes of solicitation.<sup>115</sup> Surely this proviso is unrealistic. Whether a lawyer's statement includes a felicitous (and solicitous) invitation to "call if I can be of assistance" or an impersonal, detached (and, presumably, non-solicitous) directive advising the client to "see a lawyer," the effect will be the same. The client will be apprised of his potential legal problem and of the fact that the communicating lawyer is sufficiently knowledgeable and interested as to be able to furnish professional help. If that message has been conveyed, it is difficult to imagine what harm would be posed by permitting the attorney to candidly acknowledge that he would be pleased to do the work. Perhaps mindful of these considerations, most authorities reject the non-solicitation proviso and treat communications with

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801:8839 (firm may publish newsletter on recent changes in law and legal areas of general interest for distribution to clients and non-clients, subject to advertising restrictions); State Bar of Wis., Op. E-82-1 (1982), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:9105 (newsletter mailed to clients and acquaintances may provide general information on various law topics).

Some authorities require such newsletters to be informational and forbid the use of solicitous language. *See, e.g.*, Alabama State Bar, Op. 86-29 (1986), *summarized in* ABA/BNA Manual, *supra* note 2, at 901:1004-05 (some information must be pertinent to services performed for addressees; newsletter must contain no language that could be construed as solicitation); Alabama State Bar, Ops. 85-38 & 85-64 (1985), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:1100 (similar); Alabama State Bar, Op. 82-661 (1982), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:1040 (no solicitous language may be included); *see also* Indiana State Bar Ass'n, Op. 4 (1982), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:3305 (newsletter suggesting that clients seek review of will should not recommend that review be made by a particular attorney); Virginia State Bar, Op. 448 (1983), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:8809 (newsletter sent to clients may not be false, misleading, or used for purposes of solicitation). Whether such limitations are constitutional and otherwise valid would appear to depend upon the merits of many of the arguments discussed herein as bearing upon departure-based communications with present and former clients.

112. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A) (1980).

113. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983).

114. *Goldthwaite v. Disciplinary Bd. of Ala. State Bar*, 408 So. 2d 504, 507 (Ala. 1982) (oral solicitation of employment as estate attorney by bank officer was ethical because officer was long-time friend and former client).

115. *See, e.g.*, Virginia State Bar, Op. 448 (1983), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:8809 (rule stated); *see also supra* note 111, discussing firm newsletters.

present or former clients as a complete exception to the solicitation ban<sup>116</sup>—at least where the contact is germane to the prior representation. In a similar vein, one court has expressly rejected an argument that the professional relationship exception is applicable only where “exceptional circumstances” render unsolicited advice necessary to prevent a “miscarriage of justice or irreparable harm.”<sup>117</sup>

*b. Application of the Exception to Departing Attorneys*

Although, as noted earlier,<sup>118</sup> the Model Code, consistent with prior precedent,<sup>119</sup> imposed a “germaneness” requirement upon communications with former clients,<sup>120</sup> this restriction does not constitute a substantial obstacle in the exiting attorney context. The germaneness limitation was not carried forward into the Model Rules,<sup>121</sup> and even where the Model Code is still in force, the restriction does not apply to ongoing relationships with persons “reasonably believe[d] to [presently] be a client.”<sup>122</sup> Thus, because an increasing majority of states embrace the Model Rules,<sup>123</sup> and because many, if not most, departure-based contacts will be with clients presently served by the exiting attorney, the germaneness limitation will rarely apply. In addition, when the germaneness test is applicable, it is likely to be easily satisfied, for exiting attorneys generally will be primarily interested in securing the right to perform the same type of work the client previously obtained through the former firm, rather than the right to perform unrelated services. By definition, future matters closely allied or

116. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)(1) (1980).

117. *Goldthwaite*, 408 So. 2d at 507.

118. See *supra* text accompanying note 98.

119. See ABA Comm. on Professional Ethics and Grievances, Formal Op. 213 (1941) (“[a]ny such communication should be restricted to clients by whom the lawyer is regularly and customarily retained in matters of such a nature that the communication is relevant”); see also ABA Comm. on Professional Ethics and Grievances, Informal Op. 81 (undated), *text not otherwise reported but summarized in DIGEST SUPP.* 1970, *supra* note 59, at ¶ 4846 (attorney may not write to advise clients of new service his office offers); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1040 (1968) (requirement applicable to brochures provided to clients); Oklahoma Bar Ass’n, Op. 174 (1953), *summarized in DIGEST, supra* note 56, at ¶ 3778 (regular clients may be advised of changes in law that affect their interests, but not other matters).

120. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)(1) (1980).

121. The Model Rules exempt from the solicitation prohibition any communication with a person with whom the lawyer has a “prior [or, presumably, then-extant] professional relationship,” and do not purport to require that the communication be germane to the present or prior relationship. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983).

122. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)(1) (1980).

123. See *supra* note 18.

relevant to prior work qualify as germane.<sup>124</sup>

Cognizant of the foregoing, a departing partner or associate might attempt to justify efforts to secure future business from firm clients by arguing that such conduct falls within the scope of the professional relationship exception.<sup>125</sup> The success of this argument would depend, at least in part, upon whether the party solicited is regarded as a client solely "of the firm" or of both the entity as a whole and of the constituent firm attorneys who in fact perform legal services for that person.

A now-dated ABA ethics opinion took the position, in 1964, that for purposes of the formal announcement rule, a distinction was to be drawn between, on the one hand, the departing attorney's own clients and, on the other hand, "clients of the partnership."<sup>126</sup> The opinion held that announcements could be sent by an exiting attorney only to persons within the former group. Further, it strongly implied that that category did not encompass clients whose work produced income for the firm, regardless of the fact that the departing attorney had substantially contributed to that work.<sup>127</sup>

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124. The word "germane" has been variously defined by legal and non-legal authorities, and generally is deemed to mean that something is closely allied, appropriate, or relevant to a given matter. See, e.g., BLACK'S LAW DICTIONARY 618 (5th ed. 1979) ("In close relationship, appropriate, relevant, pertinent."); WEBSTER'S NEW INTERNATIONAL DICTIONARY 1051 (2d ed. 1951) ("near akin"; "[c]losely allied; appropriate; relevant"); *Los Angeles County v. Hurlbut*, 44 Cal. App. 2d 88, 111 P.2d 963, 970 (1941) (provision in act which is closely allied to subject expressed in title is germane thereto); *Redmon v. Davis*, 115 Colo. 415, 174 P.2d 945, 949 (1946) ("germane" means closely allied, appropriate, relevant); *Commonwealth v. Dodson*, 176 Va. 281, 11 S.E.2d 120, 131 (1940) (things are germane which are allied, relevant, or appropriate).

125. The argument has been accepted in at least two ethics opinions. See *Kentucky Bar Ass'n Ethics Comm.*, Op. 317 (1987), summarized in *ABA/BNA Manual*, *supra* note 2, at 901:3902; *Association of the Bar of the City of N.Y. Ethics Comm.*, Op. 80-65 (1980), reprinted in *ABA/BNA Ethics Ops.*, *supra* note 26, at 801:6315.

126. *ABA Comm. on Ethics and Professional Responsibility*, Informal Op. C-787 (1964).

127. A similar position concerning formal announcements of departure has been embraced recently in Michigan with respect to associates, but not as to partners. According to advisory ethics opinions in that state, an exiting associate may not inform firm clients, even those for whom she has performed substantial legal work, of the address of her new office or of the type of practice she intends to pursue, although such information may be disseminated to the associate's own clients. See *Michigan State Bar Comm. on Professional and Judicial Ethics*, Informal Op. CI-662, at 3 (1981), summarized in *ABA/BNA Ethics Ops.*, *supra* note 26, at 801:4827; *Michigan State Bar Comm. on Professional and Judicial Ethics*, Informal Op. CI-1133, at 2 (1986), summarized in *ABA/BNA Manual*, *supra* note 2, at 901:4753. A partner, in contrast, may contact firm clients with whom she has had substantial personal contact. See *id.* at 3; *Michigan State Bar Comm. on Professional and Judicial Ethics*, Informal Op. CI-681 (1981), summarized in *ABA/BNA Ethics Ops.*, *supra* note 26, at 801:4827. As discussed below in the text, the disparate treatment of partners and associates under the Michigan rules is subject to criticism. See *infra* Part II-E-2. To the extent that Michigan prohibits an associate from disclosing to clients she has served even the location of the associate's new

This opinion was tacitly superseded, however, by ABA ethics opinions issued in 1980 and 1981 which expressly held that exiting attorneys could send departure-based announcements to firm clients for whom they worked.<sup>128</sup> Implicit in these later rulings is recognition of the fact that the clients of a firm—at least for some purposes—are also clients of the attorneys who serve them through the firm. Consistent with this view, a recent Illinois ethics opinion has expressly acknowledged that an individual obtaining legal services stands in an attorney-client relationship with both the firm that she hires and with any associate therein who is responsible for her representation.<sup>129</sup>

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office, it embraces a position far more restrictive than the old formal announcement rule, and is constitutionally dubious. See *supra* Part II-B.

A recent New York case has also raised the issue of whether a meaningful distinction may be drawn between partners and associates. In an unpersuasive effort to distinguish *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175 (1978), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979), a case which granted a preliminary injunction against client solicitation by former associates, the New York court, in support of its refusal to enjoin similar solicitation by former partners, enigmatically stated: "In *Adler* the attorneys who solicited the firm's clients after they terminated their employment had been salaried associates of the firm and had no agreement with the partners entitling them to seek the clients' consent to substitute them for the firm." *Koepel v. Schroder*, 122 A.D.2d 780, 505 N.Y.S.2d 666, 669 (1986). Although *Koepel* did involve an agreement between the departing and remaining attorneys concerning client solicitation, the opinion is devoid of *any* discussion or citation to authority concerning why that factor, or the employment status of the attorneys, should be treated as significant. A more convincing explanation for the difference in result between *Koepel* and *Adler, Barish* is that the former, unlike the latter, expressly recognized that a privilege of reasonable competition defeats an action for tortious interference with a contract terminable at will and that direct mail solicitation is constitutionally protected. *Id.* That being the case, the brief language quoted above is better regarded as throw-away dicta than as adumbrative expression.

128. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1457 (1980) (partner may send announcement of departure to clients for whose active, open, and pending matters associate was directly responsible); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1466 (1981) (associate may send announcement of departure to clients for whose active, open, and pending matters associate was directly responsible).

129. Illinois State Bar Ass'n Comm. on Professional Responsibility, Op. 86-16, at 2 (1987), summarized in ABA/BNA Manual, *supra* note 2, at 901:3005 (holding that, in view of fact that "firm also had an attorney-client relationship with the clients in question," both firm and departing attorney could contact clients through truthful, non-misleading communications); see also *Rosenfeld, Meyer & Susman v. Cohen*, 146 Cal. App. 3d 200, 194 Cal. Rptr. 180, 197 (1983) (implicitly acknowledging that two departing partners of dissolved firm had attorney-client relationships with client they served while members of firm); *Saltzberg v. Fishman*, 123 Ill. App. 3d 447, 462 N.E.2d 901, 907 (1984) ("employment of one member of a firm is employment of the entire firm") (citing *Corti v. Fleisher*, 93 Ill. App. 3d 517, 417 N.E.2d 754 (1981)).

At least one recent trial court decision appears to have embraced a contrary position. See *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 252 Pa. Super. 553, 382 A.2d 1226 (1977), *rev'd*, 482 Pa. 416, 393 A.2d 1175 (1978), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979). A concurring opinion in the intermediate appellate court stated:

From functional and public policy perspectives, it is sound to hold (for purposes of solicitation rules and otherwise) that an individual is a client of those attorneys within a firm who contribute to the individual's representation. An attorney in a firm owes to those persons for whom he performs legal work all of the duties which are traditionally regarded as hallmarks of the lawyer-client relationship, including loyalty, confidentiality, competence, zealotry, and the like.<sup>130</sup> If the attorney fails to perform those fiduciary obligations, then he, personally, is subject to malpractice<sup>131</sup> and disciplinary<sup>132</sup> lia-

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The basis for . . . [the trial court's order enjoining certain departure-based communications] may be summarized as follows. Appellants were "merely employees" of appellees' firm. . . . The persons on whose cases appellants were working were therefore not appellants' clients but the firm's. . . . Appellants therefore had no right to write those clients that appellants were forming their own firm, and that the clients had the right to choose to be represented by appellants, or by appellees or any other attorney.

382 A.2d at 1233 (Spaeth, J., concurring); see also *id.* at 1233 n.12 (similar statements in majority opinion).

130. Professor Leonard Gross states:

[An associate] owes a fiduciary duty to the client on whose behalf he is working. His duty to the client is much the same as if he were the attorney in charge of the representation. . . .

. . . If the associate knows the identity of the client, . . . the associate is an agent of the client under principles of agency, and therefore owes the same duties to the client that the law firm itself owes to the client. . . .

The law of agency provides the basis for determining the potential civil liability of both the associate and of the law firm to the client for the associate's conduct. . . .

. . . Under the Model Code of Professional Responsibility, the associate owes the client many of the same duties that he owes the client under the law of agency. Specifically, the associate owes the client the duty to act competently, to avoid conflicts of interest, and to keep the client's secrets.

Gross, *supra* note 1, at 267-69 (footnotes omitted). See also *Harman v. La Crosse Tribune*, 117 Wis. 2d 448, 344 N.W.2d 536, 540 ("The duty of loyalty runs from each attorney employed by a law firm to every client of that firm."), *cert. denied*, 469 U.S. 803 (1984); C. WOLFRAM, *supra* note 2, § 16.2.2, at 881 ("Quite apart from the issue of control of the individual work by individual senior lawyers with whom a junior lawyer may be working, every responsible member of the firm shares in the firm's collective responsibility for the firm's work."); *id.* § 16.2.3, at 886 (footnote omitted) ("Despite their non-ownership status in a law firm, associates bear much the same responsibilities for devotion to client service and protection as do partners. Associates are fully responsible for compliance with the applicable lawyer codes and other law, subject to an exception for doubtful ethical questions under some circumstances."); Hazard, *supra* note 23, at 33:

All lawyers presently in the firm at any given time are bound to the duty of loyalty that governs the lawyer actually serving the affected client.

The basic rule, that all lawyers in the firm owe loyalty to all clients of the firm, is sometimes stated negatively: If any lawyer in the firm is individually barred from representation under the conflicts rule, that bar applies vicariously to all members of the firm.

131. R. MALLEN & V. LEVIT, *LEGAL MALPRACTICE* 57 (1977) ("attorney is liable for his own breaches of . . . tort obligations"). In the case of a partner, malpractice obligations are more extensive than with an associate. Cf. C. WOLFRAM, *supra* note 2, § 5.6.6., at 235 ("A lawyer who is a member of a partnership will be jointly and severally liable with other firm members for their wrongs, with possible limitations for some intentional wrongs. A lawyer-member of a professional



bility, regardless of whether relief may also be sought against the principals of the firm or other firm attorneys.<sup>133</sup> Consequently, from the standpoint of function, it is reasonable to treat a layman as a client of the individual attorney who performs work for him. Commentators have suggested that this view has merit.<sup>134</sup>

In addition, as recognized in case law<sup>135</sup> and the legislative history of the Model Rules,<sup>136</sup> as well as in Supreme Court precedent,<sup>137</sup>

corporation may enjoy limited liability, but that result has been denied in several jurisdictions." A partner may be held vicariously liable to a firm client for whom he personally performed no work, *see id.*, and this duty may extend to negligence committed by other attorneys after the partner's withdrawal from the firm, absent client consent or estoppel. *See Redman v. Walters*, 88 Cal. App. 3d 448, 152 Cal. Rptr. 42, 46 (1979) (estoppel and waiver were questions of fact).

132. *See* M. SCHWARTZ & R. WYDICK, PROBLEMS IN LEGAL ETHICS 105 (1983) (discussing discipline for incompetence); *see also* Walker v. Supreme Court of Ark. Comm. on Professional Conduct, 628 S.W.2d 552, 553 (Ark. 1982) (partner in firm disciplined for negligent failure to take action within statute of limitations); *In re Barry*, 90 N.J. 286, 447 A.2d 923, 923, 926 (1982) (in action arising from filing of complaint by firm which attorney was associated with, attorney was suspended for three months for fabricating stories about performance of work).

133. Indeed, Rule 5.2 expressly provides that a subordinate attorney is not relieved of responsibility for unethical conduct by the fact that he acted at the direction of a more senior attorney—who, presumably, will also be personally liable for the infraction. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1983).

134. One much-discussed case dealing with departure-based solicitation, (*Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175 (1978), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979)) has been criticized on the ground that the court begged an initial question by assuming that the clients were clients of the former firm only. Each departing associate "had at least a plausible argument that the people he contacted were *his* former clients or that he 'reasonably believed' them so to be." 1 G. HAZARD & W. HODES, *supra* note 23, at 526.1-527 (emphasis in original).

135. *See, e.g.*, *Goldthwaite v. Disciplinary Bd. of Ala. State Bar*, 408 So. 2d 504, 507 (Ala. 1982) ("a close friend, relative, [or] former client . . . is less likely [than other 'laypersons'] to be the subject of unethical practices or pressures").

136. An early draft of the Model Rules included a provision which would have permitted a lawyer to "initiate personal contact with a prospective client for the purpose of obtaining professional employment . . . if the prospective client is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client." ABA, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 182-83 (1987) (discussing Commission Proposed Rule 7.3). During the course of deliberations at the February 1983 midyear meeting, the ABA House of Delegates deleted in full the proposed Rule of which these provisions were a part, and substituted a new proposal which embraced a substantially different approach to the solicitation issue. *Id.* at 183-84 (discussion of midyear meeting). The substituted proposed Rule contained no language permitting solicitation of business from present or former clients. *Id.* at 185. However, prior to final approval in August 1983, a clause was added clarifying that the ban on solicitation applied only where the layperson was one "with whom the lawyer [had] no family or prior professional relationship." *Id.* at 185-86 (discussion of May 23, 1983 meeting). Through this amendment, "Rule 7.3 was revised to permit direct contact with a lawyer's family or those with whom the lawyer had a prior professional relationship. In those two instances, the relationship between the prospective client and the lawyer was seen as minimizing any motive toward overreaching or undue influence." *Id.* at 186 (emphasis added).

the public policy justification underlying the professional relationship exception to the solicitation ban is that such situations are less conducive to abuse than other circumstances in which solicitation occurs. To begin with, the existence of a lawyer/client relationship carries with it certain safeguards—ethical and tort limitations on attorney conduct—which, by way of deterrence, diminish the risk of professional overreaching.<sup>138</sup> At the same time, the client has often personally dealt with the lawyers working on his case<sup>139</sup> and, to that extent, is less likely to be overwhelmed by the prospect of interacting with a professional or coerced into making rash judgments.<sup>140</sup> This is particularly true where the client is a sophisticated businessperson or a corporation or similar entity with its own in-house counsel.<sup>141</sup> Further,

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137. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 466 n.26 (1978) ("By allowing a lawyer to accept employment after he has given unsolicited legal advice to a . . . former client, DR 2-104(A)(1) recognizes an exception for activity that is not likely to present these problems.")

138. A typical example of the heightened tort duties which arise from a lawyer-client relationship concerns misrepresentation. Although a person ordinarily may not seek redress for having detrimentally relied upon an expression of opinion, statements of opinion made by an attorney to a client have frequently been deemed actionable. *See, e.g., Rice v. Press*, 117 Vt. 442, 94 A.2d 397 (1953); *Ward v. Arnold*, 52 Wash. 2d 581, 328 P.2d 164 (1958); *see also Johnson, Fraud and Deceit* § 1.03[6][b][iv], in *PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES* (1988); P. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON TORTS* 760 (5th ed. 1984) [hereinafter *PROSSER AND KEETON ON TORTS*]; *RESTATEMENT (SECOND) OF TORTS* § 542 comment f (1977).

139. *Lavine, supra* note 2, at 8, col. 2 ("in most cases, the clients being sought by the departing lawyers have dealt face-to-face with those lawyers").

140. "The Rule [against solicitation] is designed to protect the lay person from the importuning of a lawyer in a direct interpersonal encounter where the lay person may feel overwhelmed and 'have an impaired capacity for reason, judgment and protective self-interest.'" ABA Comm. on Ethics and Professional Responsibility, *Informal Op. 85-1515* (1985) (quoting *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 7.3 comment (1983)). "Communications with individuals with whom a lawyer already has a professional relationship are fundamentally different from communications with individuals who have not previously sought the lawyer's advice. . . . The fact that the attorney is well known to the client enables the client to evaluate his statements more accurately." Association of the Bar of the City of N.Y. Comm. on Professional Ethics, *Op. 80-65* (1980), *summarized in ABA/BNA Ethics Ops., supra* note 26, at 801:6315. "Presumably such an individual [a close friend, relative, or former client] knows the competence and integrity of the advising attorney and can better evaluate the propriety of employing him than can laymen who are not within those categories." *Goldthwaite v. Disciplinary Bd. of Ala. State Bar*, 408 So. 2d 504, 507 (Ala. 1982); *see also Bowers & Stephens, Attorney Advertising and the First Amendment: The Development and Impact of a Constitutional Standard*, 17 *MEMPHIS ST. U.L. REV.* 221, 252 (1987) (possibility of undue influence, intimidation, and overreaching is far greater where attorney is unknown to potential client); *Chicago Bar Ass'n Professional Responsibility Comm., Op. 83-2* (1983), *summarized in ABA/BNA Ethics Ops., supra* note 26, at 801:3203 ("Since the [written] circulation here [by a departing salaried attorney] promises to be confined to present and former clients, the potential for abuse found in solicitation is diminished and does not, in our view, warrant an absolute ban against its circulation.").

141. Some persons have argued that a distinction may be drawn between solicitation of victims of tragedy, on the one hand, and persons who are fully capable of assessing and saying "no" to a

unlike classic "ambulance-chasing," which often involves the pressured confrontation of injured or distressed victims of misfortune,<sup>142</sup> the regular clients of a departing attorney are typically not grief-ridden individuals awash in a sea of recent tragedy.<sup>143</sup>

The foregoing considerations—normative safeguards, familiarity, and lack of imminent plight—suggest that the professional relationship exception should be deemed applicable to departure-based solicitation of clients for whom the attorney has worked. By the same token, however, it logically follows that an exiting attorney should not be permitted to solicit the business of firm clients for whom she has performed no work, for in such instances the safeguards of fiduciary obligations and professional familiarity are not present.<sup>144</sup> Although no case has yet passed upon the issue of whether departure-based communications can be justified under the professional relationship exception to the general solicitation ban, ethics committees in Illinois,<sup>145</sup> Kentucky,<sup>146</sup> and New York<sup>147</sup> and other authorities and

sales pitch, such as executives of large corporations, on the other. They contend that only solicitation of persons in the first group should be restricted. Address by Peter Elkind to the Legal Foundation (Dec. 6, 1985), *reprinted in* TEXAS BAR FOUNDATION, SOLICITATION AND LEGAL ADVERTISING: A PROFESSIONAL DILEMMA § 5 (1986).

142. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (proposition stated). *But see* *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1922 (1988) (stating, in decision upholding use of nondeceptive targeted mail, that the "relevant inquiry is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility").

143. A related argument, concerning "stirring up" litigation, was accepted by an intermediate appellate court which, in declining to find that departing associates had engaged in solicitation, stated:

The common thread in cases involving the issue of solicitation is fomenting litigation or other legal action when none was contemplated by the client. The instant case is readily distinguishable. Appellants contacted only clients who had already sought legal services.

They did not attempt to create lawsuits or controversy or to encourage an additional amount of legal work on behalf of those clients whom they contacted.

*Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 252 Pa. Super. 553, 382 A.2d 1226, 1230-31 (1977), *rev'd*, 482 Pa. 416, 393 A.2d 1175 (1978), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979).

144. Some ethics opinions appear to accept this position. See *Illinois State Bar Ass'n*, Op. 432, 62 ILL. B.J. 690 (1974), *summarized in* DIGEST SUPP. 1975, *supra* note 56, at ¶ 8341 (departing member of firm may notify his own clients from firm, as opposed to firm's other clients, but may not actively solicit transfer of firm's business to him); *Maryland State Bar Ass'n*, Op. 83-59 (1959), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:4329 (may advise clients personally served of change in employment, but not other clients of former firm).

145. See *Illinois State Bar Ass'n Comm. on Professional Responsibility*, Op. 86-16 (1987), *summarized in* ABA/BNA Manual, *supra* note 2, at 901:3005 (because both firm and former associate had attorney-client relationship with firm clients served by associate prior to his departure, each may contact those clients and inform them of their right to decide who will represent them, provided

scholars have opined that to be so.<sup>148</sup>

### 3. *Less Restrictive Forms of Regulation*

#### a. *In General*

There are, of course, grounds on which one might challenge the foregoing line of analysis. It might be argued that the risks of deception, undue influence, and overreaching accompanying solicitation occurring at the time of an attorney's departure are greater than those which attend more routine forms of solicitation practiced in the course of an ongoing lawyer-client relation. At departure, the stakes contingent on persuasion may be higher. The question is not simply whether a continuing client is interested in purchasing additional legal services, but whether, for the indefinite future, there will be any professional relationship at all. So too, the exiting attorney may feel heightened economic pressure to secure the client's business in order to place a new law practice on firm financial footing<sup>149</sup> or to please a new employer. Because departure-based solicitation frequently involves not one but many clients, the potential aggregate financial impact on either the firm or the departing attorney also may be so great as to distort the accuracy of statements made by any of the attorneys involved.<sup>150</sup> Together these factors might be read to suggest that con-

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such communications are not false or misleading); see also Illinois State Bar Ass'n Comm. on Professional Responsibility, Op. 84-13 (1985), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:3022 (contact by departing associate with clients of firm, to advise them of his departure and of their right to transfer their files to him, does not violate DR 2-103 of Illinois Code of Professional Responsibility where attorney has existing attorney-client relationship with clients involved).

146. See Kentucky Bar Ass'n, Op. 317 (1987), summarized in ABA/BNA Manual, *supra* note 2, at 901:3902 (departing lawyer who contacts clients of former firm whom he personally served, to advise them of their rights to choose whether former firm or new firm will represent them, does not engage in prohibited solicitation, for such "direct contact falls within the exception for persons with whom the lawyer has had a prior professional relationship").

147. See Association of the Bar of the City of N.Y. Comm. on Professional Ethics, Op. 80-65 (1980), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:6315 (withdrawing partner may communicate, by phone or in person, with clients of firm with whom he had professional relationship and may advise them of their right to choose to be represented by partner's new firm).

148. See 1 G. HAZARD & W. HODES, *supra* note 23, at 527 (position endorsed as correct); ABA/BNA Manual, *supra* note 2, at 91:901 (same).

149. In upholding an injunction against departure-based solicitation by former associates, one court disapprovingly noted that the former associates' "concern for their line of credit and the success of their new law firm gave them an immediate, personally created financial interest in the clients' decisions." Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175, 1181 (1978), cert. denied and appeal dismissed, 442 U.S. 907 (1979).

150. The Supreme Court has noted that even in the ordinary non-departure context, "[a] lawyer who engages in personal solicitation of clients may be inclined to subordinate the best interests of the client to his own pecuniary interests." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 461 n.19

tact with firm clients at the time an attorney leaves a firm poses special ethical risks.

To say, however, that departure-based communications are accompanied by uncommon problems is not to conclude that such issues should be addressed only by the most sweeping of ethical rules. Even if one determines that such contacts are not insulated from special scrutiny by application of the professional relationship exception, a question remains as to what form the limitations on departing attorney conduct should take. Substantial dangers of attorney overreaching pervade non-departure-based aspects of the professional relationship, such as financial transactions between lawyer and client.<sup>151</sup> Yet, to address those problems, the profession neither has forbidden such transactions entirely, nor has it adopted the most stringent forms of restrictions. Rather, the profession has opted for a course of reasonable regulation, via rules tailored to specific types of risks. For example, in various contexts, deception has been avoided by rules requiring that dealings be "fair and reasonable";<sup>152</sup> confusion has been minimized through requirements that agreements be placed in writing;<sup>153</sup> and haste and undue influence have been mitigated by standards requiring that clients be advised of the desirability or necessity of obtaining independent legal advice before entering into such transactions.<sup>154</sup> For at least two reasons, a carefully measured ap-

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(1978). This risk may be especially significant where the attorney communicates with the layperson by use of personalized, targeted mailings screened from public scrutiny. See *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1926 (1988) (O'Connor, J., dissenting) ("[T]argeted mailings are more likely than general advertisements to contain advice that is unduly tailored to serve the pecuniary interests of the lawyer.").

151. "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." C. WOLFRAM, *supra* note 2, § 8.11.1, at 479.

152. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(a) (1983) ("A lawyer shall not enter into a business transaction with a client . . . unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable . . .").

153. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(c) (1983) (a "contingent fee agreement shall be in writing" and shall spell out manner of calculation); *id.* at Rule 1.8(a) ("A lawyer shall not enter into a business transaction with a client . . . unless: (1) the transaction and terms . . . are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood . . . and (3) the client consents in writing.").

154. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(a) (1983) ("A lawyer shall not enter into a business transaction with a client . . . unless: . . . (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction . . ."); *id.* at Rule 1.8(h) ("A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless . . . the client is independently represented in making the agreement, or settle a claim for such liability without first advising that person in writing that independent representation is appropriate . . ."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-5 (1980) ("If a client

proach of reasonable regulation, rather than extensive prohibition, is also the most appropriate method for addressing the ethical risks of departure-based solicitation.

First, in the absence of a showing that commercial speech carries with it inherent risks of deception, overreaching, undue influence, or the like,<sup>155</sup> a broad prophylactic ban may be justified only by historical evidence that the practice, though originally thought not to be inherently harmful, has in fact given rise to widespread abuse.<sup>156</sup> Garden-variety solicitation of unknown laypersons has long been recognized as inherently conducive to misconduct,<sup>157</sup> but no corresponding status has ever been accorded to communications with known clients. Indeed, to the extent that the Supreme Court addressed this issue in its 1978 decision in *Ohralik v. Ohio State Bar Association*,<sup>158</sup> the Court appeared to reject any suggestion that solicitation of one's own clients is inherently abusive or that the practice has repeatedly given rise to harm. The Court, in a footnote to the majority opinion which upheld a broad ban on solicitation of unknown persons for pecuniary gain, stated that "[b]y allowing a lawyer to accept employment after he has given unsolicited advice to a . . . former client, DR 2-104(A)(1) recognizes an exception for activity that is not likely to present . . . problems."<sup>159</sup>

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voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person . . .).

155. *Cf.* Attorney Grievance Comm'n v. Gregory, 311 Md. 522, 536 A.2d 646, 650 (1988) (in imposing 90-day suspension on attorney who engaged in courthouse solicitation of criminal defendants who had recently been advised of right to counsel, court held that state may prohibit solicitation unaccompanied by proof of actual wrongdoing under circumstances where risk that improper conduct will accompany solicitation is sufficiently high and risk of detection or deterrence through alternative means is sufficiently low).

156. *In re R.M.J.*, 455 U.S. 191, 203 (1982) (discussing *Friedman v. Rogers*, 440 U.S. 1 (1979), and "considerable history" of abuse in use of trade names by optometrists in Texas); *see also id.* at 200 n.11 (stating experience is to be taken into account). In *In re R.M.J.*, the Court stated:

[W]hen the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information . . ., if the information also may be presented in a way that is not deceptive.

*Id.* at 203.

157. *Id.* (possibility of fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct are so likely in context of in-person solicitation, that such solicitation may be totally prohibited); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978) (garden-variety solicitation is "inherently conducive to overreaching and other forms of misconduct").

158. 436 U.S. 447 (1978).

159. *Id.* at 466 n.26.

To be sure, the absence of evidence of repeated and pervasive abuse in solicitation by departing attorneys may be attributable to the long-time existence and enforcement of the formal announcement rule. But there is no reason to conclude that less onerous restrictions would be ineffective in averting harm to clients.<sup>160</sup>

Second, and more importantly, extensive limitations on a departing attorney's right to communicate with firm clients would be inconsistent with the policies underlying Supreme Court decisions in the field of lawyer advertising. During the dozen years which have elapsed since commercial speech by attorneys was first granted constitutional protection, Supreme Court decisions have made clear that there is a substantial public interest supporting the free flow to consumers of information about legal services.<sup>161</sup> As thoughtful commentators have argued, "the primary reason for protecting speech is its role in allowing each of us to realize our individual human potential."<sup>162</sup> Because "an individual is constantly confronted with the necessity of making life-affecting decisions . . . , [he] therefore should have available a free flow of information upon which to base those decisions . . . . [And consequently,] there must be not only a freedom to speak but also a *freedom to hear*."<sup>163</sup> Any approach to ethical issues in firm-switching which fails to take account of the client's "need to know" and other related interests runs the serious risk of being mired in the same flawed reasoning that has often pervaded solicitation scholarship. As Professor Deborah Rhode has noted:

Much of the commentary surrounding solicitation has had all the trappings of a medieval morality play. Lawyers generally emerge as

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160. The threat that solicitation may result in overreaching may be generally overstated. One observer has noted that in three jurisdictions which removed the ban on direct contact by lawyers with prospective clients, except where such contact is accompanied by fraud, overreaching, or similar abusive tactics, "[o]pening the doors to in-person solicitation [did] not [result] in a rash of unethical lawyer behavior." Jacobs, *In Defense of Lawyer Advertising*, in TEXAS BAR FOUNDATION, SOLICITATION AND LEGAL ADVERTISING: A PROFESSIONAL DILEMMA § 6, at 6 (1986).

161. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985) ("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"); *id.* at 651 ("the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides"); *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) (commercial speech serves individual and societal interests in informed and reliable decision-making); see also *supra* note 82.

162. Pearson & O'Neill, *supra* note 80, at 303 (expressing preference for "self-realization" model of first amendment over other models which allegedly fail to adequately take into account some forms of speech and full range of existing constitutional precedent).

163. *Id.* (emphasis added).

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.<sup>164</sup>

In legal matters, there is considerable authority that laypersons are not only entitled to choose who shall represent them,<sup>165</sup> but to

164. Rhode, *supra* note 91, at 317.

165. See *Ellerby v. Spiezer*, 138 Ill. App. 3d 77, 485 N.E.2d 413, 416 (1985) ("clients 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*, 49 Md. App. 499, 434 A.2d 582, 588 (1981) (quoting *Platt v. Henderson*, 227 Or. 212, 361 P.2d 73, 85 (1961)) ("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 partnership'"); *Dwyer v. Jung*, 133 N.J. Super. 343, 336 A.2d 498, 500 (Ch. Div.) (a "client is always entitled to be represented by counsel of his own choosing . . . [e]xcept, perhaps, in cases of indigency"), *aff'd*, 137 N.J. Super. 135, 348 A.2d 208 (App. Div. 1975); ABA Comm. on Professional Ethics and Grievances, Formal Op. 10 (1926) (client's right to discharge one attorney and hire another is rooted in "litigant's right to be represented at all times by counsel of his own selection"); Idaho State Bar Comm. on Ethics, Formal Op. 108 (1981), *summarized in ABA/BNA Ethics Ops*, *supra* note 26, at 801:2902 (client, not departing attorney or firm, has right to decide who will represent client); Illinois State Bar Ass'n Comm. on Professional Responsibility, Op. 86-16 (1987), *summarized in ABA/BNA Manual*, *supra* note 2, at 901:3005 (in departing attorney context, "informed choice of the client," not employment agreement between former firm and exiting attorney, governs who continues to represent the client); *see also Lavine*, *supra* note 2, at 1, col. 4 (in this "murky area of legal ethics . . . [w]hat is clear is that apportionment of clients when a firm dissolves or splinters is ultimately up to the clients themselves"); Missouri Bar, Informal Op. 17 (1978), *summarized in DIGEST SUPP.* 1980, *supra* note 63, at ¶ 11875 (clients should be advised of law firm's dissolution and of their right to select which departing attorney or other attorney will represent them in future); Missouri Bar, Informal Op. 18 (1979), *summarized in DIGEST SUPP.* 1980, *supra* note 63, at ¶ 11943 (client has right to select which attorney will perform his work following firm breakup; attorney notified of client's preference may advise client to terminate services of other attorney then in possession of client's file); Association of the Bar of the City of N.Y. Comm. on Professional Ethics, Op. 80-65 (1980), *summarized in ABA/BNA Ethics Ops*, *supra* note 26, at 801:6315 ("the client has a right to know that he is free to select between counsel" where partner leaves firm); State Bar of Tex. Comm. on Professional Ethics, Op. 395 (1978), *reprinted in 42 TEX. B.J.* 436, 437 (1979) (noting that attorney's right to confer with client represented by another attorney about possible representation "derives from the client's right to be represented at all times by counsel of his own selection"); State Bar of Wis., Op. 80-18 (1980), *summarized in ABA/BNA Ethics Ops*, *supra* note 26, at 801:9103 (notice of change in employment may inform client that he has the right to choose who will continue or complete representation, but may not urge or recommend attorney's employment); *cf. Los Angeles County Bar Ass'n*, Op. 281, 40 L.A.B.B. 196 (1965), *summarized in DIGEST*, *supra* note 56, at ¶ 520 (former partners may not, without client consent, instruct banks named as executors and trustees in wills drawn by firm to change their records to indicate which former partners should be named as attorney for trustee or executor).

The strong policy favoring a person's right to select counsel is evidenced by the fact that it is hornbook law that "[s]ubject to limitation in the context of litigation, a client may discharge the lawyer at any time, with or without cause, although the client may incur civil liability for contract or quasi-contract damages." ABA/BNA Manual, *supra* note 2, at 31:1004 (citing authorities).

A number of jurisdictions have shaped the rules governing a client's liability for fees to an attorney terminated without cause so as to minimize any financial disincentive to changing counsel. *See Rosenberg v. Levin*, 409 So. 2d 1016, 1020 (Fla. 1982) (discussing competing theories of liability and need to "avoid restricting a client's freedom to discharge his attorney"); *Salem Realty Co. v.*



obtain material information bearing on that decision.<sup>166</sup> Indeed, the bar has long recognized that it is the ethical obligation of the profession to "provide information relevant to the selection of the most appropriate counsel."<sup>167</sup> If, then, the profession acknowledges the importance of consumer access to such data, it should logically follow that the interpretation of those ethical standards governing the provision thereof should not be crabbed.<sup>168</sup> As in other areas of law prac-

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Matera, 10 Mass. App. Ct. 571, 410 N.E.2d 716, 719 (1980) (adopting quantum meruit measure of damages because "the right of a client . . . [to change lawyers] has not much value if the client is put at risk to pay the full contract price for services not rendered and to pay a second lawyer as well"), *aff'd*, 384 Mass. 803, 426 N.E.2d 1160 (1981).

Similarly, many states agree that an attorney may not interfere with a client's right to change counsel by retaining, for the purpose of coercing payment of a disputed fee, files which the client needs to go to trial or for related purposes. See, e.g., *Academy of Cal. Optometrists, Inc. v. Superior Court*, 51 Cal. App. 3d 999, 124 Cal. Rptr. 668, 671-72 (1975) (provision in retainer agreement which gave discharged attorney retaining lien on all files to secure payment of fees was void as against public policy where client needed files to go to trial); *State Bar of Texas Comm. on Professional Ethics*, Op. 395 (1978), *reprinted in* 42 TEX. B.J. 436, 437 (1979) (lawyer may not retain file where that would prejudice client); *Dinkes, Mandel, Dinkes & Morelli v. Ioannou*, N.Y. Sup. Ct., 1st Dept., N.Y. County, *summarized in* ABA/BNA Current Reports, *supra* note 63, at 255-56 (Aug. 19, 1987) (law firm must release papers belonging to former clients who transferred their representation to firm's former associate, but may assert a special lien on proceeds of litigation); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A)(2) (1980) (discharged attorney must take reasonable steps to avoid foreseeable prejudice to client, including returning papers and property to which client is entitled); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(d) (1983) (similar); cf. *Bar Ass'n of San Francisco*, Op. 1984-1 (1984), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:1851 (attorney may not withhold from client any material in client's file, including attorney's work product, pending payment of fees and costs advanced).

166. See *State Bar of Cal. Comm. on Professional Responsibility and Conduct*, Formal Op. 1985-86, at 2 (undated), *summarized in* ABA/BNA Manual, *supra* note 2, at 901:1601 (recognizing client's right to "informed choice of counsel") (emphasis added); *Chicago Bar Ass'n Professional Responsibility Comm.*, Op. 83-2 (1983), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:3203 ("allocation of . . . cases upon the termination of the lawyer's employment should not be determined at the 'insistence' of the affected attorneys but according to the preference of the concerned clients after complete disclosure of all facts necessary for those clients to make informed decisions") (emphasis added); *State Bar of Tex. Comm. on Professional Ethics*, Op. 422 (1984), *reprinted in* 48 TEX. B.J. 209, 210 (1985) ("Basic among the ethical considerations of the Code of Professional Responsibility is the premise that clients should have the right of informed choice of an attorney of competence and integrity to represent them.") (emphasis added); see also *ANDREWS*, *supra* note 64, at 809 ("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 use of legal services.").

167. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-2 (1980); see also *id.* at EC 2-1 (an important function "of the legal profession [is] . . . to facilitate the process of intelligent selection of lawyers"); *id.* 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").

168. Professor Hazard states:

A client, of course, has an absolute right of choice as to the lawyer by whom the client is to

tice,<sup>169</sup> issues of attorney conduct in the arena of attorney departures and firm dissolutions must be resolved consistent with the "best interest of the client."<sup>170</sup> However, paternalism is inappropriate for, as the Supreme Court has stated, "people will perceive their own best interests if only they are well enough informed."<sup>171</sup> Consonant with that assessment, a number of ethics opinions have indicated that a departing attorney should,<sup>172</sup> or at least may,<sup>173</sup> inform clients of their op-

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be served. This is expressed in the rule that a client has an absolute right to discharge a lawyer, regardless of cause. . . . Hence, the client may "fire" the firm and retain the exiting lawyer, or "fire" the exiting lawyer who has previously served that client and retain the firm that is reconstituted after the exit.

Since the client has these rights, it ought also to follow that the client can negotiate with lawyers in the firm prior to their exiting on the matter of future representation. Correlatively, the lawyer should have the right to negotiate with a firm client on the same subject. In most businesses other than law practice such negotiations would probably constitute breach of the common law obligation of loyalty to the firm on the part of a partner or employee. In the case of law practice, however, the public policy favoring client freedom of choice in legal representation should override the firm's proprietary interest in holding its clientele.

Hazard, *supra* note 23, at 36; *see also* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 643 (1985) ("The State is not entitled to interfere with [access to courts] by denying its citizens accurate information about their legal rights."); *id.* at 645 n.12 ("the State is not entitled to prejudge the merits of its citizens' claims by choking off access to information that may be useful to its citizens in deciding whether to press those claims").

169. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-9 (1980) (requiring counsel to act "in manner consistent with the best interests of his client").

170. State Bar of Cal. Comm. on Professional Responsibility and Conduct, Formal Op. 1985-86, at 1 (undated), *summarized in* ABA/BNA Manual, *supra* note 2, at 901:1601 (principle stated); *see also* Florida Bar Comm. on Professional Ethics, Op. 84-1 (1984), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:2503 ("primary consideration . . . should be the interest and welfare of the client").

171. Bates v. State Bar of Ariz., 433 U.S. 350, 365 (1977) (quoting with approval Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 770 (1976)).

172. State Bar of Cal. Comm. on Professional Responsibility and Conduct, Formal Op. 1985-86 (undated), *summarized in* ABA/BNA Manual, *supra* note 2, at 901:1601 (where attorney withdraws or firm dissolves, all attorneys directly involved have duty to notify client so client can make "informed choice of counsel"); Missouri Bar, Informal Op. 17 (1978), *summarized in* DIGEST SUPP. 1980, *supra* note 63, at ¶ 11875 (clients should be advised of law firm's dissolution and of their right to select which departing attorney or other attorney will represent them in future); *cf.* North Carolina State Bar, Op. CPR-24, 21 N.C.B. 12 (1974), *summarized in* DIGEST SUPP. 1975, *supra* note 56, at ¶ 9623 (non-soliciting notice should be sent to clients advising them to indicate who should represent them).

173. Illinois State Bar Ass'n Comm. on Professional Responsibility, Op. 84-13 (1985), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:3022 (departing attorney may inform clients of right to choose who will represent them); State Bar of Wis., Op. 80-18 (1980), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:9103 (notice of change in employment may inform client that he has the right to choose who will continue or complete representation, but may not urge or recommend attorney's employment); *see also* Los Angeles County Bar Ass'n, Op. 281, 40 L.A.B.B. 196 (1965), *summarized in* DIGEST, *supra* note 56, at ¶ 520 (former partners of dissolved

tion to change counsel.

In the context of law firm departures, truthful information as to the reasons underlying an attorney's change of firms, the extent of the exiting attorney's involvement in the affairs of the client, the willingness and ability of the departing attorney (or of the lawyers remaining in the firm) to perform services for the client, and the fees the departing attorney would charge<sup>174</sup> are facts all highly relevant to the client's decision as to who should represent him. A rule which—like the formal announcement rule—restricts to a minimum the content of communications by a departing attorney deprives clients of much of the information that they need for meaningful self-determination.<sup>175</sup> Just as the Supreme Court has found that lawyer advertising limited in content to "such spartan fare [as name, address, phone number, and hours] would provide scant nourishment," so the same is true in the case of departure communications.<sup>176</sup> Clients need not, and should not, be protected from the real-life facts that law firms dissolve and that lawyers withdraw.<sup>177</sup> Information relating to those transformations directly bears on clients' ability to secure competent representation. Any rule which seeks to obscure this information embraces the dubious assumption that clients are best served by being kept ig-

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law firm may notify clients of practice of banks named as executors to retain firm which prepared will and may suggest that client may wish to instruct bank as to client's choice of firm or attorney).

174. Empirical studies concerning the impact of lawyer advertising support the conclusion that greater access to information about legal services has been shown to result in lower prices for consumers. See FEDERAL TRADE COMM'N STAFF REPORT, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING 126 (1984), reprinted in part in TEXAS BAR FOUNDATION, *supra* note 160, at § 4 (for each of five legal services studied, lower prices were found in cities where fewest restrictions on advertising existed); Jacobs, *supra* note 160, § 6, at 1:

[In the absence of lawyer advertising,] [g]athering information [about legal services] is . . . costly to consumers, and where there is less information available, there is likely to be less competition among providers. Without vigorous competition over important issues such as price, quality, and convenience, consumers are likely to be less informed about their purchases, pay higher prices, and have fewer purchasing options.

175. In the seminal decision on lawyer advertising, the Supreme Court stated:

[C]ommercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an *indispensable role* in the allocation of resources in a free enterprise system . . . . [S]uch speech serves individual and societal interests in assuring informed and reliable decisionmaking.

Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977) (emphasis added); see also Moss, *supra* note 53, at 622 ("restricting advertising to the availability and costs of legal services alone does not permit the dissemination of enough information . . . for the public to discriminate between advertisers").

176. *Bates*, 433 U.S. at 367.

177. *Id.* at 368 (lawyers need not protect clients from real-life fact that attorneys earn their livelihoods by practicing law).

norant.<sup>178</sup> The Supreme Court, in granting constitutional protection to lawyer advertising, has abjured that approach,<sup>179</sup> indicating that the "preferred remedy" for potential misunderstanding is "more disclosure, rather than less."<sup>180</sup>

Where the content of departure announcements is strictly limited, a client may of course inquire as to circumstances of an attorney's change of employment, and any attorney may respond thereto without constraint, for rules of ethics typically prohibit dissemination only of *unsolicited* advice.<sup>181</sup> Nevertheless, the client's opportunity to request information is not an adequate substitute for rules permitting more liberal disclosure of relevant facts in the first instance. To begin with, the idea that a layperson should be forced to ask for information concerning legal services has been implicitly rejected in the lawyer advertising cases;<sup>182</sup> there is, as noted above,<sup>183</sup> a constitutional right to hear, as well as a right to seek. And, as the Supreme Court has recognized, "the First Amendment does not permit a ban on certain speech merely because it is more efficient"<sup>184</sup> than other modes of communication.

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178. See *id.* at 365 (discussing *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976), which stated that advertising of prescription drug prices could not be justified on grounds of professionalism). An unwarrantedly restrictive view of what clients need to know may be found in *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175 (1978), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979). There the court found that because departing associates, who had been enjoined from making departure-based communications other than brief formal announcements, were nevertheless free to advertise in the public media, the free flow of commercial information to the public was "unimpaired." 393 A.2d at 1179.

179. See *Bates*, 433 U.S. at 375 (argument that public is best kept ignorant of information relating to prices of legal services "rests on an underestimation of the public").

180. *Id.*

181. Provisions in the Model Code bar only the giving of unsolicited advice or the acceptance of employment resulting from the same. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A), 2-104(A) (1980). Although the language in the Model Rules differs, it is generally agreed that in this regard the Model Rules do not prohibit what the Code permits. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983); Moss, *supra* note 53, at 672 (interpreting Model Code and Model Rules); see also State Bar of Cal. Comm. on Professional Responsibility and Conduct, Formal Op. 1985-86, at 2-3 (undated), summarized in ABA/BNA Manual, *supra* note 2, at 901:1601 (recognizing that attorney may respond to direct inquiries by client).

182. In holding for the first time that lawyer advertising was constitutionally protected, the Supreme Court noted that under the prior practice, where prospective clients were required to seek out information about legal services, many did not obtain counsel because of inability to locate a suitable or competent attorney or due to fears about cost. *Bates*, 433 U.S. at 370. Advertising, the Court found, could help solve these problems. *Id.* at 376.

183. See *supra* text accompanying note 163.

184. *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1921 (1988). "[T]he State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable." *Id.* at 1921-22.

Perhaps more important on a practical level, many clients receiving a terse departure announcement will not inquire further, for any of several reasons. The client may feel poorly treated, if not abandoned, where the attorney with whom he has been dealing leaves without offering an explanation for his departure. Or the client may be unaware—especially in the case of an associate's departure—that the exiting attorney played a substantial role in his affairs. Whatever the reason for the client's failure to seek further details, the effect will be the same. The client, through no fault of his own, will be deprived of information which most persons would find relevant to a decision as to who should represent them.

On similar grounds, a client's interests are not adequately protected by the fact that a firm may notify the client that, because of an attorney's departure, her file has been reassigned to another lawyer.<sup>185</sup> As one court remarked: "Having one's file transferred to a new associate . . . will undoubtedly engender additional cost and time to the client . . . . Transfer may also necessitate delays in scheduling court appointments."<sup>186</sup> A client may be unaware of these and other consequences flowing from reassignment, and, in many instances, would be best served by rules permitting full, unsolicited discussion of the impact of reassignment. Consequently, while reassignment is a reasonable response to a change in personnel, and is consistent with ethical obligations requiring protection of client interests in cases of withdrawal,<sup>187</sup> it is not a substitute for free communication of facts relevant to the client's decision as to who will provide future representation.

#### *b. Discipline Conditioned on Proof of Actual Wrongdoing*

The foregoing considerations—the client's frequent experience in dealing with the exiting lawyer, the lack of any history of widespread abuse, and the individual and public interests in informed selection of counsel—suggest that the most fructuous course for addressing any perceived risk of overreaching is not through broad prophylactic rules, but by means of standards which prohibit only actual wrongdoing.

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185. This tack has been followed by some firms. *See, e.g.,* Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 252 Pa. Super. 553, 382 A.2d 1226, 1228 n.2 (1977), *rev'd*, 482 Pa. 416, 393 A.2d 1175 (1978), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979).

186. 382 A.2d at 1232.

187. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(d) (1983) ("Upon termination of representation, a lawyer shall take steps . . . to protect a client's interests . . ."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A)(2) (1980) (similar).

ing.<sup>188</sup> A number of states have adopted this approach for dealing with solicitation problems in general.<sup>189</sup> In those jurisdictions, client solicitation is not prohibited unless accompanied by wrongful conduct, such as use of false or deceptive statements, use of undue influence, or solicitation of clients apparently incapable of exercising reasonable judgment in selecting an attorney.<sup>190</sup>

In the District of Columbia, a jurisdiction adhering to this view, an ethics committee has held that a departing attorney does not act unethically by attempting to actively persuade a client of his former firm to secure his services if the attorney's persuasive efforts do not involve prohibited types of contact.<sup>191</sup> This form of measured response to the risk that some departing attorneys will overreach clients is desirable because it harmonizes important competing concerns.<sup>192</sup> While wrongdoing is penalized wherever it occurs, the flow of infor-

188. Cf. *Adler, Barish*, 382 A.2d at 1233 (advocating this position in departure-based solicitation case); Rhode, *supra* note 91, at 329-30 (suggesting similar approach to issues in solicitation of mass disaster victims).

189. Cf. C. WOLFRAM, *supra* note 2, § 14.2.5, at 788 (states such as Illinois have much more liberal solicitation rules); Moss, *supra* note 53, at 680 (discussing "ability to exercise reasonable judgment" standard adopted in several states).

190. For example, the Texas Code of Professional Responsibility provides:

- (D) A lawyer shall not initiate contact with, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:
- (1) The lawyer knows or reasonably should know the person could not exercise reasonable judgment in employing a lawyer; or
  - (2) The person has made known to the lawyer a desire not to receive communications from the lawyer; or
  - (3) The communication involves coercion, duress, or harassment; or
  - (4) The communication contains any information prohibited by . . . [another rule defining false and misleading communications].

TEX. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103, *reprinted in* TEXAS YOUNG LAW ASS'N, TEXAS LAWYERS' PROFESSIONAL ETHICS 1-13 (2d ed. 1986). See also ILL. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(c), *reprinted in* 2 NAT'L REP. ON LEGAL ETHICS V2:IL:4; IND. RULES OF PROFESSIONAL CONDUCT Rule 7.3, *reprinted in* 2 G. HAZARD & W. HODES, *supra* note 23, app. 4, at IN6; ME. RULES OF PROFESSIONAL CONDUCT Rule 3.9(F), *reprinted in* 2 NAT'L REP. ON LEGAL ETHICS ME:Code:10; MONT. RULES OF PROFESSIONAL CONDUCT Rule 7.3, *reprinted in* 2 G. HAZARD & W. HODES, *supra* note 23, app. 4, at MT2; N.J. RULES OF PROFESSIONAL CONDUCT Rule 7.3, *reprinted in* 2 G. HAZARD & W. HODES, *supra* note 23, app. 4, at NJ17-NJ18; N.D. RULES OF PROFESSIONAL CONDUCT, *summarized in* ABA/BNA Current Reports, *supra* note 63, at 204 (July 8, 1987); PA. RULES OF PROFESSIONAL CONDUCT Rule 7.3, *summarized in* ABA/BNA Manual, *supra* note 2, at 01:27 (1987) (rule applicable to written communications); VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103 (A), *reprinted in* 2 G. HAZARD & W. HODES, *supra* note 23, app. 4, at VA3.

191. District of Columbia Legal Ethics Comm., Op. 97, at 4 (1980), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:2303.

192. "The interests that must be considered when a restriction on solicitation is involved are the individual's first amendment right to associate freely and the state's interests in preventing over-

mation to clients is not needlessly restricted. At the same time, substantial protection is afforded to clients, for such restrictions may reasonably be interpreted in light of the fact that, as stated by the California ethics committee, "[u]pon dissolution or withdrawal, the attorneys involved on both sides have a professional duty to act as fiduciaries to the clients who are affected by the withdrawal."<sup>193</sup> A standard framed in terms of whether the departing attorney engages in actual wrongdoing is consistent with the rule that commercial speech which is neither false or deceptive may be restricted only in the service of a substantial governmental interest, only through means that directly advance that end, and only to a degree that is in proportion to the interests served.<sup>194</sup> Where communications are potentially misleading, restrictions on speech by attorneys about legal services "may be no broader than reasonably necessary to prevent the deception."<sup>195</sup>

### c. *Required Disclaimers and Disclosures*

Apart from the adoption of requirements prohibiting actual wrongdoing in departure-based solicitation, a state can endeavor to minimize risks of misrepresentation or overreaching through the enactment of disclosure or disclaimer requirements tailored to the firm-switching context. Such rules do not constrict the flow of information to clients, but rather endeavor to ensure that the content of such communications is not foreseeably incomplete or one-sided. For example, a state might require a departing attorney seeking the business of a former client to advise the client of such matters as liability for fees upon termination of the former firm<sup>196</sup> or the desirability or necessity of consulting either the former firm or an independent party prior to deciding who should provide future representation.<sup>197</sup> Such an ap-

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reaching, invasion of privacy, undue influence and the like." *In re Discipline of Appert*, 315 N.W.2d 204, 211 (Minn. 1981).

193. State Bar of Cal. Comm. on Professional Responsibility and Conduct, Formal Op. 1985-86, at 1 (undated), summarized in ABA/BNA Manual, *supra* note 2, at 901:1601 (citing Blackmon v. Hale, 1 Cal. 3d 548, 463 P.2d 418, 83 Cal. Rptr. 194 (1970), and Little v. Caldwell, 101 Cal. 553 (1894)).

194. *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1921 (1988) (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985)); *In re R.M.J.*, 455 U.S. 191, 203 (1982).

195. *In re R.M.J.*, 455 U.S. 191, 203 (1982).

196. *Cf.* Florida Bar Professional Ethics Comm., Op. 66-44 (1966), summarized in DIGEST SUPP. 1970, *supra* note 59, at ¶ 6455 (former firm must be notified of departing attorney's contact with clients and attorney must tell clients that firm may have fee rights).

197. As noted earlier, this requirement has been imposed on attorneys dealing with clients in certain business or estate-related transactions. See *supra* note 154. Requiring a client to consult a

proach would be consonant with controlling case law which holds that "[s]tates may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive."<sup>198</sup>

The Supreme Court has repeatedly endorsed the use of disclosure or disclaimer requirements as a means of avoiding confusion or deception in lawyer advertising.<sup>199</sup> It has also made clear that ethical standards mandating such revelation stand on a different footing than rules which limit the content of communications about legal services.<sup>200</sup> Because the best cure for misleading statements is often more disclosure, not less,<sup>201</sup> a state need not show that the disclosure requirement is the least restrictive means of advancing an important governmental objective, but only that the required disclosure is reasonably related to a legitimate state goal.<sup>202</sup> This rational basis standard is easily satisfied, and is subject only to the limitation that the required disclosure not be so complex or cumbersome that it unreasonably burdens the attorney's exercise of first amendment rights.<sup>203</sup>

Thus far, states have not opted, either in ethical codes or judicial decisions, to adopt disclosure requirements applicable specifically to departing attorneys. This, however, is probably more attributable to the embryonic stage of jurisprudence in the field generally, than to a deliberate rejection of the approach.

third party would minimize one of the key risks in in-person solicitation, namely the pressure for "an immediate response, without . . . opportunity for comparison or reflection." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978) (discussing risk).

198. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 644 (1985) (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982) (first remedy for potentially misleading information is not prohibition, but disclaimer or explanation)); *Leoni v. State Bar of Cal.*, 39 Cal. 3d 609, 704 P.2d 183, 185, 217 Cal. Rptr. 425 (1985) (to address risks posed by personalized mass mailings promoting law firm services "the preferred and least restrictive constitutional remedy is to require [firm lawyers] to insert disclaimers or add clarifying language rather than total prohibition").

199. *Zauderer*, 471 U.S. at 651 (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

200. *Zauderer*, 471 U.S. at 651 n.14 (rejecting contention that requirements mandating disclosure about client's liability for litigation expenses were subject to least restrictive means test).

201. *In re R.M.J.*, 455 U.S. 191, 201 (1982) ("preferred remedy") (citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1977)); see also *Pearson & O'Neill*, *supra* note 80, at 334 ("Those charged with the responsibility of regulating the legal profession would do well to discontinue total bans on specific types of advertising. . . . Instead, the direction of appropriate regulation should be to require advertisers to provide more information to reduce the probability of the public being misled or deceived.").

202. *Zauderer*, 471 U.S. at 651.

203. *Id.* at 651 n.15 (attorney failed to show that disclosure requirement was intrinsically burdensome and unreasonable).



#### D. Targeted Mail

Although the preceding sections, concerning the professional relationship exception to the solicitation ban, less restrictive modes of regulation, and disclosure requirements, have not sharply distinguished between oral and written forms of communication, such a dichotomy should be drawn in light of the Supreme Court's recent decision in *Shapiro v. Kentucky Bar Association*.<sup>204</sup> In *Shapiro*, an attorney proposed to send letters to potential clients, who had had foreclosure suits filed against them, advising them of their rights under federal law and of the attorney's willingness to provide legal services.<sup>205</sup> A decision of the Kentucky Supreme Court had effectively prohibited this conduct. In reversing and remanding, the United States Supreme Court held, in a 6-3 opinion by Justice William J. Brennan, Jr., that a state may not, consistent with the first and fourteenth amendments, categorically prohibit lawyers from soliciting business for pecuniary gain by sending truthful, nondeceptive letters to potential clients known to face particular legal problems.<sup>206</sup>

While recognizing that under its decision in *Ohralik v. Ohio State Bar Association*<sup>207</sup> a state may "categorically ban all in-person solicitation,"<sup>208</sup> the Court found that solicitation by mail was subject to a

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204. 108 S. Ct. 1916 (1988).

205. *Id.* at 1919.

206. *Id.* at 1917-18. Similar results have been reached by other courts. *See, e.g.,* Adams v. Attorney Registration & Disciplinary Comm'n, 801 F.2d 968 (7th Cir. 1986); *In re Von Wiegen*, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984) (solicitation of mass disaster victims by letter).

At least one ethics opinion prior to *Shapiro* took the position that written communications addressed to present and former clients with the express purpose of obtaining their business more nearly resembled advertisements than solicitations and held, for that and other reasons, that they could not be absolutely banned. Chicago Bar Ass'n Professional Responsibility Comm., Op. 83-2 (1983), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:3203; *see also* Colorado Bar Ass'n, Op. 74 (1986), summarized in ABA/BNA Manual, *supra* note 2, at 901:1901 (newsletter sent to non-clients held permissible because its invasive potential was minimal, recipient was not faced with same pressures as person solicited in-person, and recipient could simply dispose of it). A Michigan opinion had reached a contrary result, but is of doubtful continuing validity in light of *Shapiro*. *See* Michigan State Bar Comm. on Professional and Judicial Ethics, Informal Op. CI-1133, at 3 (1986), summarized in ABA/BNA Manual, *supra* note 2, at 901:4753 (mailing new office announcement to clients of former employer would constitute a mailing to a class of potential clients with an identified legal need and would therefore be impermissible solicitation).

207. 436 U.S. 447 (1978).

208. *Shapiro*, 108 S. Ct. at 1922. *Shapiro* makes no reference to the fact that a footnote in *Ohralik* indicated that a distinction legitimately had been drawn there by the state differentiating between solicitation of unknown laypersons (which was prohibited) and solicitation of former clients (which was permissible). *See supra* notes 158-59 and accompanying text. Accordingly, despite the broad language quoted above in the text, there is no reason to conclude the *Shapiro* court intended

different standard.<sup>209</sup> It stated that the two factors underlying its decision in *Ohralik*—the strong possibility of improper lawyer conduct and the improbability of effective regulation—posed much less of a risk in the targeted, direct-mail solicitation context.<sup>210</sup> As explained by Justice Brennan:

Neither [printed advertising nor a targeted letter] involves “the coercive force of the personal presence of a trained advocate” or the “pressure on the potential client for an immediate yes-or-no answer to the offer of representation.” Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the “reader of an advertisement . . . can ‘effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes’ ” . . . . A letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded. In short, both types of written solicitation convey information about legal services [by means] that [are] more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney.<sup>211</sup>

In holding that all forms of written communication about legal services are subject to the same standards,<sup>212</sup> the Court explicitly stated that “merely 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.”<sup>213</sup> Rather, the Court determined, states are relegated to the “far less restrictive and more precise [regulatory] means”<sup>214</sup> of scrutinizing writings and penalizing only actual abuse. To facilitate such monitoring a state may require an attorney to file with it a copy of any solicitation letter

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to preclude the assertion of an argument against total prohibition of oral solicitation of present and former clients by departing attorneys, such as is advanced in Part II-C-3, *supra*.

209. *Shapiro*, 108 S. Ct. at 1922 (“In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference.”).

210. *Id.*

211. *Id.* at 1922-23 (citations omitted) (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 642 (1985); *Ohralik v. Ohio St. Bar. Ass’n*, 436 U.S. 447, 465 n.25 (1978)).

212. Justice Brennan’s statement for the Court opined:

Our lawyer advertising cases have never distinguished among various modes of written advertising to the general public. Thus, Ohio could no more prevent Zauderer from mass-mailing to a general population his offer to represent women injured by the Dalkon Shield than it could prohibit his publication of the advertisement in local newspapers. Similarly, if petitioner’s letter is neither false nor deceptive, Kentucky could not constitutionally prohibit him from sending at large an identical letter opening with the query, “Is your home being foreclosed on?,” rather than his observation to the targeted individuals that “It has come to my attention that your home is being foreclosed on.”

*Id.* at 1921 (citations omitted).

213. *Id.* at 1923.

214. *Id.*

he distributes<sup>215</sup> or to prove the accuracy of any facts stated therein.<sup>216</sup>

The import of *Shapero* for departure-based solicitation is clear. The case indicates that the arguments advanced in an earlier section<sup>217</sup> concerning regulation of potential attorney abuse by least restrictive means have been accepted by the Supreme Court insofar as they relate to *written* solicitation. Accordingly, truthful, non-deceptive letters, whether mailed by an exiting attorney to clients or to *non-clients*, may not give rise to discipline, though they may be subject to special filing,<sup>218</sup> disclosure,<sup>219</sup> and proof of accuracy<sup>220</sup> requirements. Consequently, the reasoning set forth earlier concerning the professional relationship exception to the solicitation ban need not be invoked to justify *written* solicitation, although those arguments retain their importance with respect to *oral* solicitation.

### *E. Considerations: Real and Perceived*

Various sub-topics relating to disciplinary liability have emerged from the extant primary and secondary literature dealing with departing attorneys, and others logically will be confronted by future decisions. A number of these issues are discussed below.

#### 1. "Finders Keepers" Agreements

Lawyers occasionally have attempted to grapple with the vexing problems which attend an attorney's departure from a firm not on principled grounds, but by resort to a pedestrian rule of thumb: "finders, keepers." Thus, for example, some agreements have purported to restrict a departing partner's right to practice law by precluding the attorney from thereafter representing "former clients of the partnership that were originally obtained by" another partner.<sup>221</sup> Other agreements have permitted departure-based solicitation of a firm's clients only where the exiting attorney was "principally responsible for the client being a client of the firm."<sup>222</sup>

215. See *id.*; see also *In re R.M.J.*, 455 U.S. 191, 206 (1982).

216. *Shapero*, 108 S. Ct. at 1924.

217. See *supra* Part II-C-3.

218. See *Shapero*, 108 S. Ct. at 1923-24.

219. See *supra* Part II-C-3-c.

220. *Shapero*, 108 S. Ct. at 1924.

221. See *Matter of Silverberg*, 75 A.D.2d 817, 427 N.Y.S.2d 480, 482 (1980) (agreement invalid); ABA Comm. on Professional Ethics, Informal Op. 1171 (1971) (two-year restriction unethical).

222. District of Columbia Bar Comm. on Legal Ethics, Op. 181 (undated), summarized in

The consent manifested by a firm, pursuant to such arrangements, to continued relations between a departing attorney and certain clients minimizes the chances that a dispute will arise. However, once a question of ethical propriety is raised—for example, by a disgruntled client or by a firm no longer willing to suffer a client's departure—it seems doubtful that a prior agreement between the firm and the attorney can justify recruitment efforts. If the departing attorney's actions otherwise constitute impermissible solicitation, the consent of the former firm will not save the attorney from discipline. The interests to be protected by the rules against solicitation are those of the individuals approached,<sup>223</sup> and perhaps of the community or the legal profession as a whole.<sup>224</sup> The departing attorney's former firm has no more right than the attorney himself to unilaterally decide whether those interests may be compromised.<sup>225</sup> In addition, any agreement expressly or implicitly providing that a client "belongs" to the attorney responsible for recruiting or retaining his business is repugnant to the rule that the client has an absolute right to determine who will represent him.<sup>226</sup> "A lawyer's clients are not chattels over

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ABA/BNA Manual, *supra* note 2, at 901:2307 (committee did not discuss "finders, keepers" rule in holding agreement unethical).

223. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) (solicitation rules protect consumers).

224. See *In re Primus*, 436 U.S. 412, 438 (1978) (noting state's special interest in regulating members whose profession it licenses, and who serve as officers of its courts); *Ohralik*, 436 U.S. at 460 (similar); *id.* at 464 (rules against solicitation protect public from harm).

225. See Chicago Bar Ass'n Professional Responsibility Comm., Op. 83-2 (1983), summarized in ABA/BNA Ethic Ops., *supra* note 26, at 801:3203 ("allocation of . . . cases upon the termination of the lawyer's employment should not be determined at the 'insistence' of the affected attorneys but according to the preference of the concerned clients after complete disclosure of all facts necessary for those clients to make informed decisions").

The rule in the text has broad application. Just as an intra-firm agreement cannot legitimize otherwise impermissible solicitation, a secret in-house understanding among partners cannot limit a partner's exposure to malpractice liability. See *Blackmon v. Hale*, 1 Cal. 3d 548, 463 P.2d 418, 83 Cal. Rptr. 194, 199-200 (1970) (although firm records indicated that first attorney and second attorney regarded client as client of first attorney only, in view of lack of evidence that client was aware of that understanding and evidence that attorneys held themselves out as partners, second attorney was liable for loss sustained by client when first attorney misappropriated funds).

226. See *supra* note 165. Professor Wolfram states:

Attempting to resolve the issue [of who is entitled to deal with former firm clients in the case of firm dissolution] by referring to clients as "files" and debating which client each 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

whom the attorney can exercise the dominion of a possessor."<sup>227</sup> Consequently, disciplinary authorities likely will not—and should not—regard responsibility for recruitment or retention as a determinative consideration.<sup>228</sup> Notwithstanding that fact, such matters are not entirely irrelevant. They still bear, for example, upon whether the departing attorney may justify his conduct under the professional relationship exception to the solicitation rule.<sup>229</sup>

## 2. *Necessity of Notifying or Obtaining Consent of Clients to Attorney's Departure*

Although it has been said that an exiting associate is under no general duty to advise clients for whom he has worked of a decision to

clients, breach fiduciary obligations to other partners during the existence of the partnership, or falsely disparage former colleagues.

C. WOLFRAM, *supra* note 2, § 16.2.3, at 888 (footnotes omitted).

227. *Dwyer v. Jung*, 133 N.J. Super. 343, 336 A.2d 498, 499 (Ch. Div.) (citing H. DRINKER, LEGAL ETHICS 161, 189 (1965) ("A lawyer's clients are neither chattels nor merchandise, and his practice and good will may not be offered for sale.")), *aff'd*, 137 N.J. Super. 135, 348 A.2d 208 (App. Div. 1975); *cf.* C. WOLFRAM, *supra* note 2, § 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.").

228. *Cf.* Illinois State Bar Ass'n Comm. on Professional Responsibility, Op. 84-13 (1985), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:3022 (departing associate may contact clients of firm with whom he had an attorney-client relationship to inform them that he has left firm and that they have a right to transfer their file to him, "regardless of whether he brought the clients to the firm"); Chicago Bar Ass'n Professional Responsibility Comm., Op. 83-2 (1983), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:3203 (in permitting departing salaried attorney to contact present and former clients in writing, committee noted but gave no importance to fact that while some "of the clients to be contacted were attracted to the law firm by the lawyer . . . other clients to be contacted sought the firm's services for reasons other than the lawyer's association with the firm").

A variation of the "finders, keepers" argument was raised and rejected in one recent departure-based fee dispute. *See Seale v. Sledge*, 430 So. 2d 1028, 1031 (La. App. 1983) (it could not be said that partnership had no interest in contingent fee case which ripened into fee several months following dissolution where all fees normally went into partnership accounts, all expenses were absorbed by firm, and partnership agreement made no mention of individually retained files and contained no specific language relative to dissolution, notwithstanding that case had been obtained by one partner before he joined firm); *see also* Paul L. Pratt, P.C. v. Blunt, 140 Ill. App. 3d 512, 488 N.E.2d 1062, 1067 (1986) (in affirming in part grant of preliminary injunction against solicitation by two former associates in action for tortious interference with contract, court noted, but failed to indicate degree of importance, if any, of fact that trial court specifically found that neither associate had originated any clients while with firm); *In re Silverberg*, 75 A.D.2d 817, 427 N.Y.S.2d 480, 482 (1980) (agreement cannot restrict a departing partner's "practice by precluding him from representing former clients of the partnership that were originally obtained by" another partner); ABA Comm. on Professional Ethics, Informal Op. 1171 (1971) (agreement restricting departing partner's right to practice, for two years, on behalf of firm clients other than those which he initially brought to firm held unethical).

229. *See supra* Part II-C-2.

withdraw from a firm,<sup>230</sup> such statements oversimplify governing ethical obligations. Special circumstances may necessitate a client's informed consent to the withdrawal of a lawyer—whether partner or associate—from specific tasks or assignments. Thus, rules of court may require that a client consent to an attorney's departure from a pending suit, or close contact between a lawyer and a client may logically mandate notification where work is incomplete.<sup>231</sup> In addition, consistent with the Model Code,<sup>232</sup> the Model Rules direct, in terms equally applicable to partners and associates, that “[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as *giving reasonable notice to the client, [and] allowing time for employment of other counsel.*”<sup>233</sup> The California ethics committee recently interpreted similar language in its ethics rules as meaning that:

[W]henver there is a material change in the representation of the client caused by a change in an attorney's employment status, all members of the Bar involved directly in this change have a responsibility to see that the client receives the protections required by this rule, including timely and accurate notice of the change . . . so that the client can make an informed choice of counsel.<sup>234</sup>

While other jurisdictions appear to have not yet gone this far, the California construction of the client-protection rule is sound, for it is consistent with the one clearly established principle in the jurisprudence of firm switching: namely that clients, not lawyers, have the right to determine who will represent their interests.<sup>235</sup> Wisdom would therefore urge compliance with the California interpretation.

In the case of a departing partner, there may be an added reason for notifying clients of one's termination of employment. A partner normally is held vicariously liable for the misdeeds of other partners occurring in the ordinary course of partnership business.<sup>236</sup> There is

230. Illinois State Bar Ass'n Comm. on Professional Responsibility, Op. 84-13 (1985), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:3022.

231. *Id.*

232. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A)(2) (1980) (“[A] lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel . . .”).

233. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(d) (1983).

234. State Bar of Cal. Comm. on Professional Responsibility and Conduct, Formal Op. 1985-86, at 2 (undated), *summarized in* ABA/BNA Manual, *supra* note 2, at 901:1601.

235. *See supra* note 165.

236. *See* UNIF. PARTNERSHIP ACT § 9(1), 6 U.L.A. 132 (1969).

authority that such liability may extend to wrongful acts occurring after a partner has severed relations with a firm, unless clients are informed of the withdrawal or otherwise learn of it.<sup>237</sup>

At least one state—Michigan—has taken the position that departing associates (but not departing partners) *may not* communicate with firm clients about the fact of their departure.<sup>238</sup> According to the Michigan committee, the test for determining the propriety of contact with a client is defined in terms of who directly financially benefits from the client's present patronage. Thus, in a 1986 opinion applying the rule to an associate, the Michigan committee wrote:

We presume you were paid on a salary and that the clients you wish to contact did not pay you directly for the legal services performed. If that assumption is in error, there may be some circumstances under which these clients might be considered *your* clients rather than clients of the office, and . . . [the rule then] would be inapplicable.<sup>239</sup>

This approach to ethical regulation of departure-based communications is poorly reasoned. It violates the most basic of professional principles by treating clients as the vested property of the attorney or firm presently reaping financial rewards from the lawyer-client relationship. Clients, however, are not chattels, but rather independent decision-makers to whom the law must accord equal respect, deference, and solicitude. A client's need to obtain information relevant to a decision concerning future representation, or to be protected from overreaching or undue influence, does not vary according to the status of the exiting attorney.

### 3. *Necessity of Notifying Firm of Communications with Clients or of Securing Firm's Participation in Joint Notification of Clients*

Ethics opinions in several states have indicated that where an attorney intends to leave a firm, the preferable course is for the attorney and the firm to send a joint letter announcing that fact to firm clients for whom the attorney has rendered services.<sup>240</sup> This course is

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237. *Palomba v. Barish*, 626 F. Supp. 722, 726 (E.D. Pa. 1985) (expressly indicating that such notification would not run afoul of state precedent barring departure-based solicitation).

238. See Michigan State Bar Comm. on Professional and Judicial Ethics, Informal Op. CI-662, at 3 (1981), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:4827; see also *supra* note 127.

239. See State Bar of Mich. Comm. on Professional and Judicial Ethics, Informal Op. CI-1133, at 2 (1986), summarized in ABA/BNA Manual, *supra* note 2, at 901:4753 (rule stated).

240. State Bar of Cal. Comm. on Professional Responsibility and Conduct, Formal Op. 1985-

consistent with the rule of constitutional law which provides that states may impose reasonable time, place, or manner restrictions on commercial speech by attorneys.<sup>241</sup> It also has several practical advantages. A joint notice requirement avoids the negative consequences of a secret raid on firm clientele by ensuring that the firm is placed on notice of the exiting attorney's intent to communicate with those persons. It also minimizes the risk that statements in the initial written communication will misrepresent the facts.

At the same time, however, the requirement of a joint communique may be unrealistic. It is easy to imagine the near impossibility of drafting a writing satisfactory to both the departing attorney and the firm where the departure is not on amicable terms or where the attorney insists on aggressively seeking the business of firm clients. Mindful of this fact, some ethics committees have opined that where the firm and the departing attorney cannot agree on a letter, the attorney may independently notify clients of his departure.<sup>242</sup>

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86, at 3 (undated), *summarized in* ABA/BNA Manual, *supra* note 2, at 901:1601 (to extent practicable, firm and attorneys should attempt to provide joint notice and advise clients as to who will be handling work during transition period); Florida Bar Comm. on Professional Ethics, Op. 84-1 (1984), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:2503 (preferable method when associate departs is joint notification). At least two pre-*Bates* opinions, which presumably envisioned a brief announcement akin to that permitted under formal announcement rule (*see supra* Part II-B-1), advocated the same approach. *See* Colorado Bar Ass'n, Op. 49, 1 COLO. LAW. 21 (1972), *summarized in* DIGEST SUPP. 1975, *supra* note 56, at ¶ 8003 (recommended method is joint announcement); North Carolina State Bar, Op. CPR-24, 21 N.C.B. 12 (1974), *summarized in* DIGEST SUPP. 1975, *supra* note 56, at ¶ 9623 (when partner withdraws, partners should reach agreement on notice to be sent to clients).

241. *In re Primus*, 436 U.S. 412, 438 (1978) (citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977)); *see also* Pearson & O'Neill, *supra* note 80, at 309 ("[W]hen a substantial governmental interest exists, commercial speech may be regulated as to the time, place, and manner of presentation . . .") (citing with approval *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 526 (1981)).

242. State Bar of Cal. Comm. on Professional Responsibility and Conduct, Formal Op. 1985-86 (undated), *summarized in* ABA/BNA Manual, *supra* note 2, at 901:1601 (if joint notice is not sent, each attorney involved has right and obligation to communicate with client); Florida Bar Comm. on Professional Ethics, Op. 84-1 (1984), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:2503; *see also* Colorado Bar Ass'n, Op. 49 (1972), *summarized in* DIGEST SUPP. 1975, *supra* note 56, at ¶ 8003 (rule stated); North Carolina State Bar, Op. CPR-24 (1974), *summarized in* DIGEST SUPP. 1975, *supra* note 56, at ¶ 9623 (absent agreement, withdrawing partner and remaining partners should each send notices to clients they actually served or with whom they had significant professional contact).

The Florida committee's post-*Bates* opinion went on to state that the "only communication to the client from the associate should be a notification that the associate is no longer affiliated with the firm. The notice may reflect the associate's new address, but may not solicit a response from the client regarding the disposition of the client's files." Florida Bar Comm. on Professional Ethics, Op. 84-1 (1984), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:2503. The reason for this limitation on communications by the departing attorney is not disclosed by the opinion, nor is any authority cited in support thereof. The effect of the restriction is to reaffirm the limitations of the old



Without mandating joint notification, a state presumably could require an exiting attorney to inform his former firm of the fact that he plans to contact, or has contacted, some of the firm's clients, or to provide the firm with copies of written communications soliciting employment by those persons.<sup>243</sup> Such restrictions would enable a firm to monitor the truthfulness of written expressions and to seek from the client the opportunity to respond to oral communications. In the absence of any such requirements, the more prudent course may be for a departing attorney to promptly apprise his firm of an intention to solicit clients, for as one prominent Chicago attorney has observed with respect to the withdrawal of a partner: "Who contacts clients and associates first will not make the difference, probably, in what they decide to do. The departee, however, looks better and won't be charged with any breaches of a fiduciary relationship if the lawyer is upfront with the partners."<sup>244</sup>

#### 4. *Contacting Represented Persons, Timing of Solicitation, and Acceptance of Employment Before Present Counsel is Terminated*

Provisions in both the Model Rules<sup>245</sup> and Model Code<sup>246</sup> prohibit an attorney, under certain circumstances, from contacting a person represented by counsel. Consequently, it is important to consider whether these standards bar an attorney who has left a firm from communicating with clients still represented by the attorneys who have remained behind.

In short, the answer is no. The Model Code and Model Rules provisions on contact with represented persons are designed to prevent *an opposing lawyer* from gaining an *adversarial advantage* for her

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formal announcement rule which, as previously argued (*see supra* Part II-B), may be unconstitutionally narrow. The California ethics opinion, consistent with that state's failure to embrace a professional relationship exception to the solicitation ban (*see supra* Part II-C-2), likewise envisions a brief announcement which does not "attempt to influence the decision of the client with respect to choice of counsel." State Bar of Cal. Comm. on Professional Responsibility and Conduct, Formal Op. 1985-86, at 2 (undated), *summarized in* ABA/BNA Manual, *supra* note 2, at 901:1601. This restriction, too, may be unconstitutionally infirm.

243. Cf. Florida Bar Professional Ethics Comm., Op. 66-44 (1966), *summarized in* DIGEST SUPP. 1970, *supra* note 59, at § 6455 (former firm must be notified of departing attorney's contact with clients and attorney must tell clients that firm may have fee rights).

244. Reuben, *supra* note 39, at 6.

245. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983) ("Communication With Person Represented by Counsel").

246. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A) (1980) ("Communicating With One of Adverse Interest"); *see also id.* at EC 7-18.

client by circumventing, through direct dealings with a layperson, the protections which that individual has sought to obtain by choosing to retain counsel.<sup>247</sup> Language in both codifications makes clear that the prohibition applies only where the contact occurs while the attorney is in the process of representing another person and is acting in furtherance thereof.<sup>248</sup> For example, consistent with the Model Code,<sup>249</sup>

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247. *Complaint of Korea Shipping Corp.*, 621 F. Supp. 164, 167 (D. Ala. 1985) ("The thrust of DR 7-104 'is to prevent situations in which a represented party may be taken advantage of by adverse counsel.' . . . A related purpose of the rule is to 'preserve the proper functioning of the legal profession' by ensuring that in making decisions relating to a dispute a client has the benefit of the advice of the legal expert he has employed to assist him.") (quoting *Wright v. Group Health Hospital*, 103 Wash. 2d 192, 691 P.2d 564, 567 (1984); ABA Committee on Professional Ethics, Formal Op. 108 (1934)); C. WOLFRAM, *supra* note 2, § 11.6.2, at 612 (both DR 7-104(A)(1) and Rule 4.2 "strongly imply that their prohibitions are limited to attempts by the offending lawyer, in representing his or her own client, to drive wedges between other lawyers and clients"); Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 U. PA. L. REV. 683, 684-86 (1979) ("[The rule is] concerned with the risks attending communications between lawyers and opposing clients . . . . Authorities . . . usually base the rule on the danger that lawyers will bamboozle parties unprotected by their own counsel."); *id.* at 686-87 (discussing other rationales offered in support of rule); see also ABA Committee on Professional Ethics and Grievances, Formal Op. 108 (1934) (noting rule is intended to shield adverse party from improper approaches); *id.*, Formal Op. 187 (1938) (noting that rule applies to communications about a controversy). The policy behind the rule is so strong that the protection of the rule may not be waived by the represented person in the absence of counsel. ABA Committee on Professional Ethics and Grievances, Formal Op. 108 (1934) (rule applied). Professor Wolfram suggests that, while the matter is not free from doubt, the provisions in the Model Code and Model Rules may be broad enough to bar contacts made in furtherance of the interests of a client with any represented person, not only those whose interests are known to be adverse. See C. WOLFRAM, *supra* note 2, § 11.6.2, at 611 ("Any attempt to distinguish between adverse and nonadverse parties might invite attempts to obtain uncounselled concessions from a represented but uncounselled party at a time before the differing interests of the parties became fully apparent.").

248. Where such language is absent, a different conclusion may be reached. For example, in *Frazier, Dame, Doherty, Parrish & Hanawalt v. Boccardo, Blum, Lull, Niland, Teerlink & Bell*, 70 Cal. App. 3d 331, 138 Cal. Rptr. 670, 672-73 (1977) [hereinafter *Frazier, Dame*], the court opined that under a provision, which, unlike the Model Code and Model Rules standards set forth below, did not limit its application to acts undertaken while representing a client, contacting and signing a contingent fee agreement with a represented person, without notifying that individual's present attorney, was unethical.

Similarly, additional language may also alter the analysis. See ARIZ. RULES OF PROFESSIONAL CONDUCT Rule 7.2, reprinted in 2 G. HAZARD AND W. HODES, *supra* note 23, at app. 4 (modifying model rule 7.2 to prohibit a written communication from a lawyer if it concerns a specific matter and the lawyer should know that the person is represented by a lawyer in that matter); FLA. CODE OF PROFESSIONAL RESPONSIBILITY Rule 7.3(b)(2)(a) (similar), reprinted in 2 G. HAZARD AND W. HODES, *supra* note 23, at app. 4.

249. Disciplinary Rule 7-104 states in part:

(A) *During the course of his representation of a client a lawyer shall not:*

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A) (1980) (emphasis added). Disci-

the Model Rules state: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."<sup>250</sup> A communication relating to a former client's business interests or seeking to secure that person's patronage is calculated not to obtain an advantage for one adversary over another, but merely to advance the attorney's professional interests while at the same time affording individuals a choice of counsel.<sup>251</sup> The propriety of such conduct is not within the scope of the represented person prohibitions<sup>252</sup> and, as at least one ethics opinion has expressly recog-

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pline has been imposed under this rule in a few cases. See *In re Wetzel*, 118 Ariz. 33, 574 P.2d 826, 829 (1978) (indefinite suspension based in part on improper contact with represented person); *Florida Bar v. Shapiro*, 413 So. 2d 1184, 1185-86 (Fla. 1982) (suspension and conditional reinstatement based in part on violation of DR 7-104(A)). The immediate predecessor to the Model Code contained a similar provision. CANONS OF PROFESSIONAL ETHICS Canon 9 (1908) ("A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel."). See *Steere v. State*, 445 S.W.2d 253, 254 (Tex. Civ. App. 1969) (disbarment based in part on violation of Canon 9). The genesis of the rule may be traced back as far as Baltimore practitioner David Hoffman's *Fifty Resolutions in Regard to Professional Department*, in D. HOFFMAN, A COURSE OF LEGAL STUDY 752-75 (2d ed. 1836), reprinted in H. DRINKER, *supra* note 54, app. E, at 349, XLIII ("I will never enter into any conversation with my opponent's client, relative to his claim or defense, except with the consent and in the presence of his counsel.").

250. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983) (emphasis added).

251. On related grounds, it is held that an attorney may, without consent of counsel, confer with a client already represented by counsel, where the client seeks to obtain a "second opinion" or to otherwise discuss matters relating to the client's representation by the other attorney. See *District of Columbia Bar*, Op. 28 (1977), summarized in DIGEST SUPP. 1980, *supra* note 63, at ¶ 10727 (rule applicable where client doubts adequacy of first lawyer's representation); *State Bar of Mich.*, Op. 113 (1948), summarized in DIGEST SUPP. 1980, *supra* note 63, at ¶ 1287 (lawyer may discuss pending legal matters with another lawyer's client if consulted by client, but may not take over sole handling of matter until first lawyer's employment is terminated); *New York State Bar Ass'n*, Op. 305 (1973), summarized in DIGEST SUPP. 1975, *supra* note 56, at ¶ 9065 (lawyer may properly confer with prospective client after learning that client already has counsel for same matter without first notifying lawyer previously retained); *State Bar of Texas Comm. on Ethics and Professional Responsibility*, Op. 395 (1978), reprinted in 42 TEX. B.J. 436 (May 1979) (lawyer may confer with prospective client who has solicited advice, even though client is already represented by other counsel). As Professor Wolfram has noted, from a policy standpoint this rule makes sense: "The status of client should not amount to bondage. A client should be able to seek out a professional opinion about the quality of a questioned representation . . ." C. WOLFRAM, *supra* note 2, § 11.6.2, at 612; see also *Martini v. Leland*, 116 Misc. 2d 231, 455 N.Y.S.2d. 354, 355 (Civ. Ct. 1982) (noting public interest in permitting clients to freely obtain second opinions).

252. See 1 G. HAZARD & W. HODES, *supra* note 23, at 528 (Rules 4.2 and 4.3, governing communications with represented and unrepresented persons, "assume that the communicating lawyer is already representing someone else and is attempting to gain advantage for that client. Those Rules do not apply to communications about hiring a lawyer.").

nized,<sup>253</sup> is properly addressed under the usual solicitation norms.

Put differently, it is probably not significant for disciplinary purposes that the solicitation of a law firm client takes place shortly after, rather than prior to, an attorney's departure. The same solicitation rules apply to the attorney's conduct, and the represented person rules are inapplicable. If, however, the time interval between the attorney's departure from the firm and the contact with the client becomes excessively long, the applicability of the professional relationship exception<sup>254</sup> to the solicitation ban might fairly be questioned. As time passes, it is less and less reasonable to assume that the previously discussed safeguard of client/professional familiarity is present to ward off the dangers of attorney overreaching.<sup>255</sup> Of course, even where the professional relationship exception is inapplicable, solicitation may be permitted on other grounds, as it is, for example, in states where solicitation is barred only where in-person communication is accompanied by proof of actual wrongdoing, such as the making of false representations.<sup>256</sup>

Canon 7 of the 1908 Canons of Professional Ethics (the predecessor of the 1969 Model Code) broadly condemned most conduct which in any way encroached upon the professional employment of another lawyer.<sup>257</sup> This sweeping denunciation of "interference" was rooted in what some have characterized as excessive economic protectionism of the interests of established attorneys,<sup>258</sup> and was consistent with the then-total bar against lawyer advertising. The broad ban on en-

253. State Bar of Texas Comm. on Professional Ethics, Op. 395 (1978), *reprinted in* 42 TEX. B.J. 436, 437 (May 1979) (lawyer's privilege to confer with prospective client already represented by another lawyer is rooted in "client's right to be represented at all times by counsel of his own selection," and is subject to ethical limitations on solicitation, which apply to "most cases," where contact is with present or former clients).

254. *See supra* Part II-C-2.

255. *See id.*

256. *See supra* Part II-C-3-b.

257. Canon 7 stated in part:

Efforts, direct or indirect, in any way to encroach upon the professional employment of another lawyer, are unworthy of those who should be brethren at the Bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel . . .

CANONS OF PROFESSIONAL ETHICS Canon 7 (1908); *see also* Simkins, *Lawyers' Professional Relationships*, 51 TEX. B.J. 478 (May 1988) (reprinting similar statements in 1920s lectures by University of Texas law professor); ABA Comm. on Professional Ethics and Grievances, Formal Op. 210 (1941) (periodic notices may be sent to client advising re-examination of will in light of possibly changed situation, unless lawyer has "reason to believe that he has been supplanted by another lawyer").

258. With respect to professional economic protectionism, one law professor has concluded

croachment was not, however, carried forward into the Model Code or Model Rules.<sup>259</sup> The Code<sup>260</sup> did direct that an attorney should not accept an offer of employment until the client discharged prior counsel. A number of court and ethics committee opinions have embraced this rule<sup>261</sup>—which, as discussed below, is also consistent with the standard applicable in actions for tortious interference with contract.<sup>262</sup> Consequently, if a departing attorney successfully persuades a former client to engage his services, he should not formally accept the client's offer until the client has terminated the representation of the prior firm. Whether the attorney may assist the client in that process—for example, by furnishing the client with a printed form which the client can complete and mail to effect termination—is considered below.<sup>263</sup>

### 5. *Statements Comparing Services of Departing and Remaining Attorneys, Creating Unjustified Expectations, or Unduly Emphasizing Trivial Information*

In line with Supreme Court precedent,<sup>264</sup> it is generally agreed

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that "[o]lder writers on professional ethics were more willing than those of today to equate virtue with professional self-interest." Leubsdorf, *supra* note 247, at 692.

259. See Moss, *supra* note 53, at 683 ("Model Code does not specifically prohibit interference with an ongoing attorney client relationship"); *id.* at 684 ("Model Rules . . . contain no provision directly applicable to the question of whether a presently represented person may be solicited by another lawyer."). But see *In re Appert*, 315 N.W.2d 204, 215 (Minn. 1981) (stating in dicta, without citation to authority or elaboration, that "[c]onduct that the advertising attorney knows or should know is an interference with an existing professional relationship is prohibited.").

260. Ethical Consideration 2-30 states in part: "If a lawyer knows a client has previously obtained counsel, he should not accept employment in the matter unless the other counsel approves or withdraws, or the client terminates the prior employment." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-30 (1980). There is no corresponding provision in the Model Rules.

261. *Bray v. Squires*, 702 S.W.2d 266, 271 (Tex. App. 1985) (no violation of EC 2-30 found); ABA Comm. on Professional Ethics and Grievances, Formal Op. 10 (1926) (attorney may accept employment from client who has breached contract of employment with another attorney so long as other attorney has been given notice that employment is terminated); *id.* at Formal Op. 149 (1936) (attorney may represent client who has discharged prior attorney but not yet communicated discharge); *id.* at Formal Op. 209 (1940) (attorney may accept employment where client has notified prior attorney of discharge); *id.* at Informal Op. 360A (1950) (attorney retained in matter previously handled by another should, without necessarily communicating with other attorney, make sure client has discharged attorney); *id.* at Informal Op. 834 (1965) (attorney cannot ethically proceed with case until making sure client has discharged previous attorney); New York State Bar Ass'n, Op. 305 (1973), summarized in DIGEST SUPP. 1975, *supra* note 56, at ¶ 9065 (prior attorney must approve change of counsel, withdraw, or be terminated).

262. See *infra* Part III-B-9.

263. See *infra* Part II-E-7.

264. *In re Primus*, 436 U.S. 412, 438 (1978) ("The State's special interest in regulating members of a profession it licenses, and who serve as officers of its courts, amply justifies the application

that any statements made by a departing attorney in an effort to advise clients of his former firm of their right to decide who will represent them, or to actively seek their business, must not be false or misleading.<sup>265</sup> As interpreted in some jurisdictions, this general principle may limit the use of statements comparing the legal services of exiting attorneys to those attorneys remaining in a firm. Rule 7.1(c) of the Model Rules, now in force in many states, defines as "false or misleading" any communication which "compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated."<sup>266</sup> Moreover, even where factual support is available, the expressions of a departing attorney must not run afoul of a related standard in the Model Rules which prohibits statements "likely to create an unjustified expectation about results a lawyer can achieve."<sup>267</sup> As was recently noted by Justice Brennan in *Shapero v. Kentucky Bar Association*, "To be sure, a letter may be misleading if it unduly emphasizes trivial or 'relatively uninformative fact[s],' . . . or offers overblown assurances of client satisfaction."<sup>268</sup>

#### 6. Repetitious Contacting of Clients

Where a client does not favorably respond to a departing attorney's first solicitation, the attorney may again contact the client in a renewed effort to secure the latter's business. Clearly, at some point, repetitious solicitation will be so unwelcome as to amount to harassment and call for the imposition of discipline<sup>269</sup>—though where the

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of narrowly drawn rules to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence."); see also *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1924 (1988) (targeted, direct-mail communications may not be false or misleading); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) ("Advertising that is false, deceptive, or misleading of course is subject to restraint.").

265. State Bar of Cal. Comm. on Professional Responsibility and Conduct, Formal Op. 1985-86, at 2 (undated), summarized in ABA/BNA Manual, *supra* note 2, at 901:1601 (rule stated); Illinois State Bar Ass'n Comm. on Professional Responsibility, Op. 86-16 (1987), summarized in ABA/BNA Manual, *supra* note 2, at 901:3005 (although both exiting attorney and firm may communicate with clients attorney served while in firm, communications must not contain any false or misleading statements); Association of the Bar of the City of N.Y. Comm. on Professional Ethics, Op. 80-65 (1980), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:6315 (although departing attorney may contact, by phone or in-person, clients for whom he worked at former firm, statements must be accurate).

266. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1(c) (1983).

267. *Id.* Rule 7.1(b).

268. *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1925 (1988) (quoting *In re R.M.J.*, 455 U.S. 191, 205 (1982)).

269. Addressing the subject of non-departure-based solicitation of a present or former client, one writer has stated: "In some instances, the client will ignore your [reminder] letter. In my opin-

line is to be drawn may be difficult to say. Presumably, the determination of what is ethical will vary with the particular circumstances, such as the age, health, and mental condition of the client; the nature and extent of the prior dealings between the two; and the firmness of the client's initial response, if any, or the circumstances surrounding the client's silence. Where the attorney's efforts cease to be a legitimate follow-up, and take on the odium of badgering, discipline should be imposed.

Some states prohibit solicitation of any person who has expressed a wish not to be solicited.<sup>270</sup> Accordingly, in these jurisdictions, if a client refuses to receive employment-related communications—and perhaps, also, where a client's silence reasonably may be interpreted as amounting to the same—discipline may be levied upon an attorney who nonetheless proceeds to press his case. An interesting question might arise if a firm preemptively persuades a client to instruct a departing attorney not to communicate further with the client about possible employment. Presumably the attorney would be barred by the solicitation rule from attempting to convince the client to engage his services. It might be argued, however, that a *limited* inquiry into the reasons underlying the client's no-solicitation directive to the attorney would be proper on the ground that, as with other decisions in the lawyer-client relationship, the lawyer has an obligation to test whether the client's decision is based on adequate consideration of all appropriate factors.<sup>271</sup> If, as a result of that inquiry, the client expresses new willingness to entertain solicitation, such would appear to be permissible, for there is no good reason here not to permit a client to revoke his own lack of consent. In addition, if the attorney's former firm misrepresented facts in initially inducing the client to prohibit solicitation, the firm would be subject to discipline for engaging

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ion, anything more than one letter starts bordering on [impermissible] solicitation . . . . Don't send more than one reminder (thus avoiding the problem of solicitation)." Foonberg, *supra* note 102, at 86. This is good practical advice for those seeking to avoid discipline and to maintain a high level of civility in their practice, but it is not necessarily where the line must be drawn as a matter of legal ethics.

270. See, e.g., ILL. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(C)(2), reprinted in NAT'L REP. ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY V2:IL:4; SUPREME COURT OF TEX. RULES GOVERNING THE STATE BAR OF TEX. art. X, § 9 (CODE OF PROFESSIONAL RESPONSIBILITY) DR 2-103(D)(2) (1984); cf. *In re Primus*, 436 U.S. 412 n.28 (1978) (record did not show that lawyer thrust her services on one who had communicated unambiguously a decision against litigation).

271. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980).

in deceptive conduct.<sup>272</sup>

In states lacking a provision prohibiting solicitation of a person who has expressed unwillingness to entertain the same, excessive solicitation by a departing attorney arguably might be found to run afoul of a more general provision contained in most ethics codes: the rule proscribing conduct prejudicial to the administration of justice.<sup>273</sup> Of course, in interpreting any such standards, disciplinary authorities should exercise care to avoid unnecessary chilling of departing attorneys' exercise of first amendment rights.

### 7. *Furnishing Forms to Facilitate Change of Counsel*

Some departing attorneys have endeavored to make it easier for firm clients to change counsel by furnishing them with forms which can be used to discharge their present firm and to direct a transfer of files to the attorney. The judicial response to this practice has ranged from condemnation on the one hand<sup>274</sup> to tacit approval on the other.<sup>275</sup> Notwithstanding these past expressions, it now seems clear that similar efforts in the future must be viewed in light of the Supreme Court's recent ruling in *Shapero v. Kentucky Bar Association*<sup>276</sup> which permits the use of non-deceptive targeted mail.<sup>277</sup>

In *Shapero*, the Court voiced no objection to that portion of the

272. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1983) (prohibiting dishonesty, fraud, deceit, or misrepresentation).

273. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(5) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(d) (1983).

274. See *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175 (1978), cert. denied and appeal dismissed, 442 U.S. 907 (1979). According to the court:

[A]ppellees' conduct frustrates, rather than advances, Adler Barish clients' "informed and reliable decision-making." After making Adler Barish clients expressly aware that appellees' new firm was interested in procuring their active cases, Epstein provided the clients the forms that would sever one attorney-client relationship and create another. Epstein's aim was to encourage speedy, simple action by the client. All the client needed to do was to "sign on the dotted line" and mail the forms in the self-addressed, stamped envelopes. 393 A.2d at 1181; see also *id.* at 1181 n.10 (forms and self-addressed envelopes were "a means of benefitting from a clients' immediate, perhaps ill-considered, response to the circumstances").

275. See *Koepfel v. Schroder*, 122 A.D.2d 780, 505 N.Y.S.2d 666, 668-69 (1986). Without expressly addressing the use of discharge forms, the *Koepfel* court, in a case where such forms and business reply envelopes had been enclosed with some 500 letters, held that under New York law, direct mail solicitation was constitutionally protected and that a preliminary injunction of solicitation by former partners had been improperly granted; see also *Adler, Barish*, 393 A.2d at 1187-89 (Manderino, J., dissenting) (forms "contained no arm-twisting device pressuring clients to make an immediate response").

276. 108 S. Ct. 1916 (1988).

277. See *supra* Part II-D.



proposed solicitation letter which, with taste more befitting a late-night television commercial than a professional communication, urged the client to respond. The letter stated: "Call *NOW*, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is *FREE*, there is *NO* charge for calling."<sup>278</sup> The Court opined that so long as the

petitioner's letter . . . [was] neither false nor deceptive, Kentucky could not constitutionally prohibit him from sending at large an identical letter opening with the query, "Is your home being foreclosed on?," rather than his observation to the targeted individuals that "It has come to my attention that your home is being foreclosed on."<sup>279</sup>

Based on these expressions, there appears to be no infirmity in directly or indirectly soliciting by mail a response from the client.<sup>280</sup> To the extent that that is true, there would also seem to be little objection to enclosing a blank form with a letter for the purpose of facilitating the contemplated reply. Like a letter, a form easily may be "put in a drawer to be considered later, ignored, or discarded."<sup>281</sup> It provides no risk of overreaching comparable to that which may be found in person contact, for the form "no matter how big its type . . . can never 'shou[t] at the recipient' or 'gras[p] him by the lapels,' . . . as can a lawyer engaging in face-to-face solicitation."<sup>282</sup> Accordingly, the furnishing of a discharge form by mail may be constitutionally unobjectionable. In contrast, however, a different analysis may apply where such a document is supplied to a client in person, without prior request by the client, for such a case raises all of the troublesome issues besetting one-to-one, oral solicitation.

### 8. *Personalized Communications*

The Supreme Court recently noted, in *Shapero v. Kentucky Bar Association*, that the fact that a letter "is personalized (not merely targeted) to the recipient presents an increased risk of deception, intentional or inadvertent."<sup>283</sup> According to the Court:

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278. *Shapero*, 108 S. Ct. at 1919 (emphasis in original).

279. *Id.* at 1921.

280. *Cf. In re Primus*, 436 U.S. 412, 436 n.28 (1978) (letter stating "let me know" not improper).

281. *Shapero*, 108 S. Ct. at 1923.

282. *Id.* at 1924 (quoting Brief for Respondent at 19, *Shapero* (No. 87-16)); see also *Adams v. Attorney Registration & Disciplinary Comm'n*, 801 F.2d 968, 973 (7th Cir. 1986) ("It is easier to throw out unwanted mail than an uninvited guest.").

283. *Shapero*, 108 S. Ct. at 1923; see also *id.* at 1926 (O'Connor, J., dissenting) ("Unsophistica-

[Personalization] could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case or could implicitly suggest that the recipient's legal problem is more dire than it really is. . . . Similarly, an inaccurately targeted letter could lead the recipient to believe she has a legal problem that she does not actually have or, worse yet, could offer erroneous legal advice.<sup>284</sup>

These statements make clear that care and accuracy must underlie each personalized departure letter. When an attorney is in doubt as to the present status of a client's case or the impact his message may have, the preferable course is to eschew personalization in favor of a standardized letter format.

### III. CIVIL LIABILITY

#### A. *In General*

In the few reported cases<sup>285</sup> in which law firms have sued departing attorneys based upon alleged wrongful solicitation of firm clientele, two theories of liability have figured prominently: tortious interference with contractual relations and breach of fiduciary duties under the law of agency and partnership. Notwithstanding the fact that these causes of action are to some extent interrelated—for example, whether contractual interference is tortious may depend in part on whether a fiduciary obligation has been breached<sup>286</sup>—they are, for the most part, distinct and independent actions. Therefore, to the extent possible and for purposes of clarity, they will be discussed below separately.

#### B. *Tortious Interference With Contract*

##### 1. *Basic Principles*

Although the precise contours of the tort action are not yet well-defined,<sup>287</sup> and perhaps never will be because of its breadth,<sup>288</sup> virtu-

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ted citizens, understandably intimidated by the courts and its [sic] officers, may . . . find it much more difficult to ignore an apparently 'personalized' letter from an attorney than to ignore a general advertisement.").

284. *Id.* at 1923.

285. Paul L. Pratt, P.C. v. Blunt, 140 Ill. App. 3d 512, 488 N.E.2d 1062 (1986); Koepfel v. Schroder, 122 A.D.2d 780, 505 N.Y.S.2d 666, 669 (1986); Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978), cert. denied and appeal dismissed, 442 U.S. 907 (1979); Bray v. Squires, 702 S.W.2d 266 (Tex. App. 1985).

286. See *infra* Part III-B-3.

287. See RESTATEMENT (SECOND) OF TORTS § 767 comment b (1977) (definite rules have not "crystallized"); PROSSER AND KEETON ON TORTS, *supra* note 138, at 979 ("broad and undefined

ally all jurisdictions recognize a claim for intentional interference with contractual relations.<sup>289</sup> According to the formulation in the *Restatement (Second) of Torts*, which has found significant acceptance in the courts,<sup>290</sup> this tort extends protection to fully consummated agreements.

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive and burdensome, is subject to liability to the other for the pecuniary loss resulting to him.<sup>291</sup>

In addition, the *Restatement*<sup>292</sup> and most jurisdictions<sup>293</sup> hold that these same rules (with a few minor variations in application<sup>294</sup>) apply to unconsummated, prospective contractual relations, such as negotiations or other actions preliminary to the consummation of a binding agreement.<sup>295</sup> Because somewhat greater protection is given to the

tort"); Perlman, *Interference with Contract and other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 61 (1982) ("easier to expound in the abstract than to apply in the particular"); Note, *Interference with Economic Relations of Attorneys*, 23 WASHBURN L.J. 528, 528 (1984) (few areas are as confused).

288. See Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 346 (1980) ("the tort remains an unknown tort whose rules and contours are not, and cannot be, described by law").

289. See 2 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 6.7, at 308 (2d ed. 1986) ("generally accepted"); PROSSER AND KEETON ON TORTS, *supra* note 138, at 981 ("recognized virtually everywhere"); Note, *supra* note 287, at 531 ("currently actionable to some degree in forty-nine states, Louisiana being the lone exception"). But see Dobbs, *supra* note 288, at 337 & 344-63 (expressing numerous doubts as to soundness of action as presently formulated).

290. But see Note, *supra* note 287, at 532-33 (courts vary in describing necessary elements and some jurisdictions have relevant statutes).

291. RESTATEMENT (SECOND) OF TORTS § 766A (1977); see also Frazier, *Dame*, *supra* note 248, 138 Cal. Rptr. at 673 (stating five elements applicable to tortious interference between law firms); 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 289, § 6.6, at 305 (interference must be intentional and unjustified).

292. RESTATEMENT (SECOND) OF TORTS § 766B (1977) ("Intentional Interference with Prospective Contractual Relations"); *id.* § 766B comment e (rules are "closely parallel").

293. Frazier, *Dame*, *supra* note 248, 138 Cal. Rptr. at 673 ("substantially similar"); PROSSER AND KEETON ON TORTS, *supra* note 138, at 1005 (action generally follows lines of tortious interference with contract); *id.* at 1008 ("parallel").

294. See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 768(1), (2) (1977) (privilege of competition applies to interference with prospective advantage but not with existing contracts); see also *id.* § 766B comment e (1977) ("The fact that the interference is not with a subsisting contract but only with a prospective relation not yet reduced to contract form is . . . important in determining whether the actor was acting properly in pursuing his own purposes."); PROSSER AND KEETON ON TORTS, *supra* note 138, at 1011 (more extensive privileges apply where claim is merely for interference with prospective advantage).

295. It has been held that under this rule a law firm could maintain an action for tortious

interest in an existing contract than to the interest in acquiring prospective contractual relations, "permissible interference is given a broader scope in the latter instance."<sup>296</sup> In general, the objective underlying these rules is to safeguard the expectations embraced by agreements or by agreement-producing conduct, and thereby to nurture, if not ensure, the stability and predictability that are necessary both for productive commercial life and for other endeavors conducive to individual fulfillment.<sup>297</sup>

Under the *Restatement* standards, interference is "intentional" either where the actor *desires* to invade the interests of another or where he is "*substantially certain*" that the same will result as an ancillary consequence of his conduct.<sup>298</sup> Thus, where an actor is cognizant that a contract presently exists and that his actions will, to some extent, intrude thereon—as is true where a departing attorney solicits the business of firm clients<sup>299</sup>—the critical issue will not be intent. In such situations, the interference, whether desired or not, is, by definition, substantially certain to result, and thus the intent requirement is satisfied. The pivotal inquiry consequently will be whether the resulting interference is "improper," as that term is used in the *Restatement*.<sup>300</sup>

Impropriety normally is determined by a balancing of interests,

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interference "with its relationships with clients even though no contingent fee contracts had as yet been entered into." Paul L. Pratt, P.C. v. Blunt, 140 Ill. App. 3d 512, 488 N.E.2d 1062, 1068 (1986).

296. RESTATEMENT (SECOND) OF TORTS § 767 comment j (1977); see also PROSSER AND KEETON ON TORTS, *supra* note 138, at 981 (existence of contract may narrow range of interference); 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 289, § 6.11, at 343 ("greater latitude is allowed in the disruption of expectancies than of existing contractual relations").

297. See RESTATEMENT (SECOND) OF TORTS § 767 comment f (1977) ("If the interest of the other has been already consolidated into the binding legal obligation of a contract . . . that interest will normally outweigh the actor's own interest in taking that established right from him.").

298. *Id.* at introductory note to ch. 37 (rule stated); *id.* § 8A (intent defined).

299. Solicitation in-person or by mail would clearly be a sufficient predicate for an action in tort. The *Restatement* provides:

The inducement may be any conduct conveying to the third person the actor's desire to influence him not to deal with the other. Thus it may be a simple request or persuasion exerting only moral pressure. Or it may be a statement unaccompanied by any specific request. . . . Or it may be a threat. . . . Or it may be a promise of benefit . . . .

*Id.* § 766 comment k (1977). See also *Frazier, Dame, supra* note 248, 138 Cal. Rptr. at 672 (action was stated against law firm which allegedly interfered with contract of prior counsel where alleged "capper" stated second firm could get client "more money").

300. See RESTATEMENT (SECOND) OF TORTS § 767 comment a (1977) (issue of impropriety raises "the most frequent and difficult problems of the tort"). The *Restatement (First) of Torts* used the rubric of "privilege," rather than "impropriety," and some courts continue to speak in those terms, although the analysis is essentially the same. RESTATEMENT (SECOND) OF TORTS introductory note to ch. 37.

in which the plaintiff's interest in his contractual rights or expectations must be weighed against the defendant's interest in freedom of action.<sup>301</sup> In the end, the result "depends upon a judgment and choice of values in each situation,"<sup>302</sup> with liability frequently turning upon the purpose for which the defendant acts.<sup>303</sup> According to section 767 of the *Restatement*:

In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

- (a) the nature of the actor's conduct,
- (b) the actor's motive,
- (c) the interests of the other with which the actor's conduct interferes,
- (d) the interests sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference and
- (g) the relations between the parties.<sup>304</sup>

In addition, with respect to certain recurring types of interference—such as those involving competition<sup>305</sup> or responsibility for the welfare of another<sup>306</sup>—definite privileges have crystallized.<sup>307</sup> Where these privileges are applicable, they supplant the usual balancing test under section 767.<sup>308</sup>

Mindful of the foregoing, the following analysis will argue that in a wide range of situations, and for several distinct reasons, a departing

301. *Id.* § 766 comment c (rule stated); *id.* § 767 comment f (similar).

302. *Id.* § 767 comment b.

303. PROSSER AND KEETON ON TORTS, *supra* note 138, at 979 (point stated); *id.* at 983 (similar); RESTATEMENT (SECOND) OF TORTS § 766 comment r (1977) (same).

304. RESTATEMENT (SECOND) OF TORTS § 767 (1977). While these factors are typically important, the list is not intended to be exhaustive. *Id.* at comment b. Section 767 has guided the analysis in notable departure-based solicitation cases. *See Rosenfeld, Meyer & Susman v. Cohen*, 146 Cal. App. 3d 200, 194 Cal. Rptr. 180, 199 (1983); *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175, 1184 (1978), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979). *Compare* 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 289, § 6.6, at 307-08 (quoting *Mogul Steamship Co. v. McGregor*, 23 Q.B.D. 598, 618 (C.A. 1889)):

I think that regard must be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaches the contract, and I think also the object of the person procuring the breach.

305. *See infra* Part III-B-3.

306. *See infra* Part III-B-4.

307. RESTATEMENT (SECOND) OF TORTS § 767 comment a (1977).

308. *Id.*

attorney's interference with the relationship between a law firm and its clients should not be deemed improper and no tort action should lie. Although courts have long recognized that the "[g]eneral principles regarding tortious interference with contractual relations are applicable to interference with attorney-client relations,"<sup>309</sup> only a small number of decisions have involved suits between attorneys, rather than against non-attorneys, such as insurance companies or adjusters.<sup>310</sup> Of the suits against attorneys, few have held an attorney subject to liability,<sup>311</sup> and none of those decisions provides a well-

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309. *Abrams & Fox, Inc. v. Briney*, 39 Cal. App. 3d 604, 114 Cal. Rptr. 328, 331 (1974). See also *Frazier, Dame*, *supra* note 248, 138 Cal. Rptr. at 673 (similar statement in action between law firms); *Ronald M. Sharrow, Chartered v. State Farm Mut. Auto. Ins. Co.*, 306 Md. 754, 511 A.2d 492, 498 (1986) ("great majority" of jurisdictions hold that contracts between attorneys and clients are protected from tortious interference); *MacKerron v. Madura*, 445 A.2d 680, 683 (Me. 1982) (similar); Recent Decision, *Law Firm May Obtain Injunction Barring Solicitation of Clients by Former Salaried Associates*, 24 VILL. L. REV. 770, 776 (1979) (proposition stated); Annotation, *Liability in Tort for Interference with Attorney-Client or Physician-Patient Relationship*, 26 A.L.R.3d 679 (1969). But see *Zimmerman v. Batz*, 59 A.D.2d 712, 398 N.Y.S.2d 445 (1977) (because client could dismiss attorney at will, without cause, defendant could not be liable for wrongfully inducing breach of employment agreement).

310. For a discussion of suits by attorneys against insurance companies or individuals who have bypassed counsel in directly settling or attempting to settle with the attorneys' clients, see Note, *supra* note 287, at 541-43 nn.114-26; *id.* at 544 (few cases have considered issue of interference resulting from wrongful acts of attorney leaving employment relationship); Comment, *Inducing a Breach of Attorney-Client Relationship*, 2 J. LEGAL PROF. 203, 203-10 (1977); Recent Decision, *supra* note 309, at 776 & nn.33-34; see also *Agudo, Pineiro & Kates, P.A. v. Harbert Constr. Co.*, 476 So. 2d 1311, 1317 (Fla. Dist. Ct. App. 1985), *rev. denied*, 486 So. 2d 596 (Fla. 1986) (summary judgment denied in action by attorney against client's employer); *Ronald M. Sharrow, Chartered v. State Farm Mut. Auto. Ins. Co.*, 306 Md. 754, 511 A.2d 492, 498 (1986) (discussing numerous cases and holding attorney had cause of action against insurer); *MacKerron v. Madura*, 445 A.2d 680, 683 (Me. 1982) (attorney stated claim against police officer).

311. See, e.g., *Rosenfeld, Meyer & Susman v. Cohen*, 146 Cal. App. 3d 200, 194 Cal. Rptr. 180, 192-94 (1983) (complaint sufficiently alleged interference with contractual relations resulting from former partners' departure-based solicitation of major client); *Pearlmutt v. Alexander*, 97 Cal. App. 3d Supp. 16, 158 Cal. Rptr. 762 (1979) (payment of settlement money without regard to a prior attorney's lien exposed a successor attorney and others to liability for interference); *Skelly v. Richman*, 10 Cal. App. 3d 844, 89 Cal. Rptr. 556, 562 (1970) (jury question whether, in a civil action, defendant and his attorney improperly induced plaintiff's client to breach his contract with the plaintiff-attorney through the use of false representations); *Paul L. Pratt P.C. v. Blunt*, 140 Ill. App. 3d 512, 488 N.E.2d 1062 (1986) (departure-based solicitation enjoined); *Marcus v. Wilson*, 16 Ill. App. 3d 724, 306 N.E.2d 554, 560 (1973) (law firm not liable for interference with attorney-client contract in absence of proof of defendants' knowledge of contract); *Walsh v. O'Neill*, 350 Mass. 586, 215 N.E.2d 915, 917-18 (1966) (interpreting case law as refusing to extend to attorney-client relationship principle that interference with existing business relationship, if malicious or without justification, is actionable even though relationship is not founded in contract); *Koepfel v. Schroder*, 122 A.D.2d 780, 505 N.Y.S.2d 666, 669 (1986) (injunction of departure-based solicitation reversed); *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175 (1978) (departure-based solicitation enjoined), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979).

reasoned basis for holding that a departing attorney's reasonable, non-abusive solicitation efforts may serve as a predicate for an action for tortious interference.<sup>312</sup>

## 2. *Role of Ethical Standards*

A consensus has emerged on several points regarding the assessment of the nature of the actor's conduct. It is generally agreed that the use of physical violence, misrepresentation, or threats of litigation made in bad faith are all ordinarily improper.<sup>313</sup> To the extent that such means are employed, an action for tortious interference will lie. Thus, where an attorney withdrawing from a firm resorts to duress, or to fraud, defamation, or other forms of deception,<sup>314</sup> in an effort to secure a client's business, he undoubtedly runs a serious risk of an adverse tort judgment.

The use of tortious methods of interference is not, however, a *sine qua non* of liability,<sup>315</sup> and in the absence of such abuse, it is less easy to characterize the nature of the actor's conduct.<sup>316</sup> Importantly, the *Restatement* identifies two considerations especially apposite to the firm-switching context: conformance with business ethics and moderation of means. As to business ethics and customs, the *Restatement* provides: "Violation of recognized ethical codes for a particular area of business activity or of established customs and practices regarding disapproved actions or methods may also be significant in evaluating the nature of the actor's conduct . . ." <sup>317</sup> The suggestion here is clear. To the extent that one conforms with professional ethi-

312. See *infra* text accompanying notes 326-38 (criticizing Paul C. Pratt P.C. v. Blunt, 140 Ill. App. 3d 512, 488 N.E.2d 1062 (1986) and Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978), cert. denied and appeal dismissed, 442 U.S. 907 (1979)).

313. See RESTATEMENT (SECOND) OF TORTS § 767 comment c (1977) (rules stated).

314. Skelly v. Richman, 10 Cal. App. 3d 844, 89 Cal. Rptr. 556, 562 (1970) (rule stated as to "illegal detention, physical violence, defamation or fraud" in action by attorney against attorney); 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 289, § 6.7, at 309 (uniform rule that tort will lie where force, violence, or fraud are employed); see also RESTATEMENT (SECOND) OF TORTS § 766 comment c (1977) (tort originated in cases involving violence, fraud, or defamation); *id.* § 767 comment c (1977) (examples discussed).

315. See RESTATEMENT (SECOND) OF TORTS § 766 comment c (1977) ("The significance of Lumley v. Gye [2 El. & Bl. 216, 118 Eng. Rep. 749 (1853)] lies in its extension of the rule of liability to nontortious methods of inducement."); see also RESTATEMENT (SECOND) OF TORTS § 767 comment c (1977) (discussing non-tortious means of interference). But see 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 289, § 6.7, at 309 (a few courts may decline to impose liability in absence of unlawful means).

316. Bendix Corp. v. Adams, 610 P.2d 24, 30 (Ala. 1980) ("It is more difficult to predict a result where proper means are used . . . [because] decisions have not been entirely harmonious.").

317. RESTATEMENT (SECOND) OF TORTS § 767 comment c (1977), cited with approval in Ad-

cal strictures, there is an inference that one's conduct is proper, and to the extent that one violates those norms, a contrary inference arises.<sup>318</sup> Consequently, if conduct is likely to expose a departing attorney to disciplinary liability under applicable ethical rules, it may also be sufficient to raise a specter of tort sanctions.

The professional ethics factor has played a major role in at least one reported decision. In an action for tortious interference with contract, the Pennsylvania Supreme Court in *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*,<sup>319</sup> in 1978, held that the solicitation of firm clients by several former associates, in person, by phone, and by letter, ran afoul of the provisions of the formal announcement rule.<sup>320</sup> Placing substantial weight on that transgression of professional ethics, the court concluded that the associates improperly interfered with the client relations of the former firm, and thus injunctive relief was granted.<sup>321</sup> As discussed earlier, however, there is substantial reason to conclude that the formal announcement rule is an unconstitution-

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ler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175, 1184 (1978), cert. denied and appeal dismissed, 442 U.S. 907 (1979).

318. Cf. RESTATEMENT (SECOND) OF TORTS § 767 comment j (1977) ("Recognized standards of business ethics and business customs and practices are pertinent, and consideration is given to concepts of fair play and whether the defendant's interference is not sanctioned by the 'rules of the game.'").

319. 482 Pa. 416, 393 A.2d 1175, cert. denied and appeal dismissed, 442 U.S. 907 (1979). An interesting discussion of *Adler, Barish* appears in Recent Decision, *supra* note 309. See also Note, *Adler Barish: Clearly Protected or Clearly Proscribed Solicitation?*, 3 DET. C.L. REV. 477 (1979); Note, *Law Firm Associates' Contact with Their Former Firm's Clients Held Privileged*, 9 CUMB. L. REV. 601 (1978) [hereinafter Note, *Privileged Contact*]. The facts of *Adler, Barish*, as summarized in one article, are as follows:

Several associates of the *Adler* firm decided to form their own law practice. While still employed by Adler, Barish, they secured a line of bank credit by using the anticipated legal fees from cases on which they were working as collateral. Then, upon leaving Adler, Barish, they made a "concentrated attempt to procure" those cases by means of in-person, telephone, and direct mail solicitation. The Adler, Barish law firm [successfully] sought to enjoin the former associates from interfering with the firm's existing contractual relationships.

Note, *supra* note 287, at 551 (brackets added). See generally Comment, *supra* note 17 (discussing the role of ethical standards).

320. *Adler, Barish*, 393 A.2d at 1181.

321. See *id.* at 1184-86. A similar conclusion was reached in *Paul L. Pratt, P.C. v. Blunt*, 140 Ill. App. 3d 512, 488 N.E.2d 1062 (1986). In *Pratt*, former associates contacted firm clients by mail, and succeeded in obtaining the business of several persons. 488 N.E.2d at 1065, 1070. In granting a preliminary injunction against further solicitation, *Pratt* stated that it adopted the reasoning of the *Adler, Barish* court. *Id.* at 1068. However, it is unclear whether this endorsement was intended to extend only to *Adler, Barish's* discussion of the constitutionality of prohibiting solicitation by departing attorneys, or whether it also included *Adler, Barish's* reliance on ethics provisions as part of the tortious interference with contract analysis.



ally narrow restriction on commercial speech by departing attorneys<sup>322</sup> and that communication by such attorneys with clients whom they have served is ethically permissible under the professional relationship<sup>323</sup> or targeted mail<sup>324</sup> exceptions to the solicitation ban, or under a rule requiring proof of actual abuse.<sup>325</sup> These possibilities were not discussed in *Adler, Barish*. Consequently, it may be that insofar as the ultimate result is concerned, the case has little precedential value.<sup>326</sup> At least this would seem to be true where a departing attorney acts with circumspection, for as to moderation of means the *Restatement* opines:

In a case in which other factors are otherwise evenly balanced, less censurable aspects of the actor's conduct may sometimes tip the scales. Thus the manner of presenting an inducement to the third party may be significant. There is an easily recognized difference between (1) A's merely routine mailing to B of an offer to sell merchandise at a reduced price, even though A knows that B is bound by an existing contract to purchase the goods from C, and (2) A's approaching B in person and offering expressly to sell the merchandise at such a low price that B can "pay any costs of getting out of his contract with C and still profit."<sup>327</sup>

Notwithstanding the quoted language, one finds that in departing attorney cases courts have enjoined the most innocuous of communications. For example, in 1986, in *Paul L. Pratt, P.C. v. Blunt*,<sup>328</sup> the Illinois Appellate Court, relying on *Adler, Barish*,<sup>329</sup> upheld in relevant part a preliminary injunction of mail solicitation of firm clients by former associates. The letters there at issue, which were sent only to clients for whom the attorneys had worked, stated as follows:

This is to inform you that I am no longer associated with the Paul L. Pratt law firm. Attorney \_\_\_\_\_ and I have formed the law office of \_\_\_\_\_ and \_\_\_\_\_ and will be practicing at the above location.

You have the right to either leave your file with the Pratt firm for further processing by another attorney, or you may request your file be turned over to me for its continued handling.

322. See *supra* Part II-B.

323. See *supra* Part II-C-2.

324. See *supra* Part II-D.

325. See *supra* Part II-C-3-b.

326. Accord *Robinson, supra* note 17, at 559 ("result . . . [of tortious interference action against departing attorneys] is uncertain when the finding of an ethical violation has evaporated").

327. RESTATEMENT (SECOND) OF TORTS § 767 comment c (1977).

328. 140 Ill. App. 3d 512, 488 N.E.2d 1062 (1986).

329. 488 N.E.2d at 1067-68.

If you wish to leave your file with the Pratt firm, you need do nothing. However, if you wish your case to be transferred to me, you should write a letter to the Pratt firm and so indicate your preference.

If you have any questions concerning this situation, I suggest you contact the Pratt and/or this office [sic] for further information.<sup>330</sup>

Surely, there can be no objection to dissemination of this or similar information. The content of the letter is in no respect misleading, and indeed furnishes clients with information directly relevant to exercise of their rights. For a court to enjoin this type of communication subsequent to *Shapero*<sup>331</sup> would suggest not only a serious misreading of applicable ethical standards and Supreme Court precedent, but a failure to appreciate the societal interests at stake. In the departing attorney context, the paramount rights are not those of the exiting attorney or of the attorney's former firm, but of the clients whose interests are affected. Clients alone have the right to decide who shall represent them.<sup>332</sup> They cannot exercise such rights intelligently if they are deprived of relevant information.

Of course, under section 767, the interests of a firm from which an attorney has withdrawn have some role in the impropriety analysis. Thus, in *Adler, Barish*, the court noted that the conduct of the former associates had an "immediate impact" on Adler Barish and that "Adler Barish was prepared to continue to perform services for its clients and therefore could anticipate receiving compensation for the value of its efforts."<sup>333</sup> Clearly such financial considerations bear upon the economic stability of law firms as important institutions, and are not insubstantial. But it is a wholly different matter to say that such factors should outweigh the interests of clients in receiving information, the interests of the public in informed individual selection of counsel,<sup>334</sup> and the interests of departing attorneys in purveying their

330. *Id.* at 1065 (blanks substituted for names).

331. *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988); *see supra* Part II-D.

332. *See supra* note 165 and *infra* notes 349-50.

333. *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175, 1184 (1978), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979); *see also id.* at 1184-85 ("agreements with clients were a source of anticipated revenue"). Interestingly, the intermediate appellate court was less impressed by such claims. Noting that *Adler, Barish* had been formed only slightly more than a year earlier when several partners left Freedman, Borowsky with 1300 transferred case files, the court wrote: "Partners of appellee who had just severed ties with Freedman, Borowsky cannot seriously claim that an expectation grounded on the stability of the firm structure is entirely realistic." *Adler, Barish, Daniels, Levin & Creskof v. Epstein*, 252 Pa. Super. 553, 382 A.2d 1226, 1231 n.11 (1977), *rev'd*, 482 Pa. 416, 393 A.2d 1175 (1978), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979).

334. RESTATEMENT (SECOND) OF TORTS § 767 comment f (1977) (public interest is relevant

professional services.<sup>335</sup> Ultimately, there must be a decision as to which values will take precedence. In the absence of use of improper means,<sup>336</sup> or, possibly, of conduct actuated solely by ill will,<sup>337</sup> it may be argued that the choice among competing values has already been made by the Supreme Court in the lawyer advertising and solicitation cases.<sup>338</sup> As may not be true in other fields of professional endeavor in which codifications<sup>339</sup> or otherwise identifiable principles of business ethics have emerged, many of the standards governing attorneys are the result of a decades-long process of careful weighing and deliberation. Bar associations and scholars, ethics committees and courts, have labored at length over the task of fairly balancing competing interests. To the extent that rules of attorney conduct bear upon free expression, they have, very recently and extensively, been tested, indeed re-forged, in the furnace of the courts. If, then, United States Supreme Court decisions hold that departure-based solicitation is entitled to a certain degree of constitutional protection, a court should be most reluctant to circumvent or subvert those rulings by striking a different balance in the name of protecting contractual expecta-

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to balancing of interest); *id.* at comment g ("Appraisal of the private interests of the persons involved may lead to a stalemate unless the appraisal is enlightened by a consideration of the social utility of these interests.").

335. With respect to protection of the interests of departing attorneys, a possible rationale is suggested in Note, *Privileged Contact*, *supra* note 319. The author there states: "[I]n most partner-associate relationships in the legal profession, the associates maintain an equal interest in the clients on whose cases they work. When a defendant associate possesses such an equal interest in a contractual right, he may interfere with impunity." *Id.* at 605. It is important to observe, however, that precedent is cited in the Note to support the second quoted sentence, but not the first.

336. Even where constitutional rights are at issue, it is important to consider the means employed for determining whether interference is improper. "The issue is not simply whether the actor is justified in causing the harm, but rather whether he is justified in causing it in the manner in which he does cause it." RESTATEMENT (SECOND) OF TORTS § 767 comment c (1977).

337. Compare PROSSER AND KEETON ON TORTS, *supra* note 138, at 984 ("where the defendant has a proper purpose in view, the addition of ill will toward the plaintiff will not defeat his privilege") and *id.* at 1009-10 (similar) with RESTATEMENT (SECOND) OF TORTS § 766 comment r (1977) ("Satisfying one's spite or ill will is not an adequate basis to justify an interference and keep it from being improper.") and *id.* § 767 comment d (if desire to interfere is sole motive, interference is "almost certain to be held improper"). But see PROSSER AND KEETON ON TORTS, *supra* note 138, at 1011-12 (recent Supreme Court decisions concerning other communicative torts raise questions as to whether spite or ill will may be taken into account at all).

338. See generally *Shapiro v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *In re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

339. See R. GORLIN, CODES OF PROFESSIONAL RESPONSIBILITY (1986) (compiling codes applicable to dentists, nurses, social workers, educators, realtors, bankers, architects, and others).

tions.<sup>340</sup> Of course, where a professional custom or ethical rule is not of constitutional lineage—as would be true, perhaps, in the case of such customs among attorneys as those which sometime govern the drawing of settlement checks<sup>341</sup>—no high degree of deference is warranted.

### 3. Competition as Proper Interference

#### a. In General

Aside from the foregoing, the *Restatement* provisions<sup>342</sup> and other authorities<sup>343</sup> strongly suggest that public policy considerations favoring business competition in a free enterprise society bar imposition of liability based on solicitation by departing attorneys. Section 768 of the *Restatement* provides in relevant part that:

(1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue *an existing contract terminable at will* does not interfere improperly with the other's relation if

(a) the relation concerns a matter involved in the competition between the actor and the other and

(b) the actor does not employ wrongful means and

(c) his action does not create or continue an unlawful restraint of trade and

(d) his purpose is at least in part to advance his interest in competing with the other.<sup>344</sup>

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340. *But see* Robinson, *supra* note 17, at 558 ("A finding that the letters are permissible under the disciplinary rules, however, does not automatically absolve the associates from any liability since an improper interference with a contractual relationship may still be actionable even though the method of interference is not improper.").

341. In *Skelly v. Richman*, 10 Cal. App. 3d 844, 89 Cal. Rptr. 556 (1970), one attorney brought an action against another attorney for violating a professional custom concerning the making and delivery of settlement checks. The court, though deeming custom relevant, indicated that the depth of inquiry into custom may vary with the particular case. 89 Cal. Rptr. at 569-70.

342. *Cf.* RESTATEMENT (SECOND) OF TORTS § 767 comment g (1977) ("it is thought that the social interest in competition would be unduly prejudiced if one were to be prohibited from in any manner persuading a competitor's prospective customers not to deal with him"); *id.* § 768 comment e ("competition is a necessary or desirable incident of free enterprise").

343. *See* PROSSER AND KEETON ON TORTS, *supra* note 138, at 1012 ("The policy of the common law has always been in favor of free competition.").

344. RESTATEMENT (SECOND) OF TORTS § 768 (1977) (emphasis added); *see also* PROSSER AND KEETON ON TORTS, *supra* note 138, at 987-88 (rule recognized); *id.* at 1012 ("In short, it is no tort to beat a business rival to prospective customers."); Dobbs, *supra* note 288, at 338 ("either of two competitors may seek the business of the same customer").

As concerns contracts terminable at will,<sup>345</sup> the *Restatement* commentary explains:

If the third person is free to terminate his contractual relation with the plaintiff when he chooses, there is still a subsisting contract relation; but any interference with it that induces its termination is primarily an interference with the future relation between the parties, and the plaintiff has no legal assurance of them [sic]. As for the future hopes he has no legal right but only an expectancy; and when the contract is terminated by the choice of the third person there is no breach of it. The competitor is therefore free, for his own competitive advantage, to obtain the future benefits for himself by causing the termination.<sup>346</sup>

The application of the competition provisions of section 768, which the *Restatement* indicates take precedence over the usual section 767 balancing test,<sup>347</sup> depends, in the departing attorney context, upon whether the attorney-client contract may be classified as terminable at will.<sup>348</sup> Clearly, this is so. Abundant case law<sup>349</sup> and com-

345. As to tortious interference with contracts terminable at will, see generally 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 289, § 6.7, at 310-13.

346. RESTATEMENT (SECOND) OF TORTS § 768 comment i (1977); see also PROSSER AND KEETON ON TORTS, *supra* note 138, at 1012 ("any other rule would tend to establishment of trade monopolies").

347. See RESTATEMENT (SECOND) OF TORTS § 767 comment a (1977) (rule stated). *But see* Franklin Music v. American Broadcasting Companies, 616 F.2d 528 (3d Cir. 1979). The court in *Franklin Music* discussed *Adler, Barish*, noting that:

The [*Adler, Barish*] court applied the standards of section 767 rather than the specific treatment of interference by a competitor dealt with in section 768 . . . . This suggests that when the interference involves the activity of a present or former employee the general standards of section 767 rather than those of 768 apply, even though the employee is a potential or actual competitor.

*Id.* at 543-44.

Although *Franklin Music* cited no authority in support of this construction, some support might be found in the rule of agency which bars an agent (here, the departing associate or partner) from competing with his principal (here, the firm) during the duration of his agency. See *infra* Part III-C-2. As will be discussed below, however, some authorities have argued that this rule and other similar fiduciary duty standards are inapplicable in the context of attorney departures for reasons of public policy. See *infra* Part III-C-4.

348. See RESTATEMENT (SECOND) OF TORTS § 768(2) (1977), which provides: "The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will." *Id.*; *id.* at comment a (similar); *id.* at comment h (social interest in security of transactions and definiteness outweighs actor's interest in freedom of action).

349. See, e.g., *Rosenfeld, Meyer & Susman v. Cohen*, 146 Cal. App. 3d 200, 194 Cal. Rptr. 180, 197 (1983) ("it is a basic term of the contract, implied by law into it by reason of the special relationship between the contracting parties, that the client may terminate that contract at will"); *Frazier, Dame, supra* note 248, 138 Cal. Rptr. at 673 (rule stated in tortious interference action between law firms); *Fracasse v. Brent*, 6 Cal. 3d 784, 494 P.2d 9, 13, 100 Cal. Rptr. 385 (1972) (client has absolute right to discharge attorney with or without cause); *Fowler v. Jordan*, 430 So. 2d

mentary<sup>350</sup> recognize that, subject to a few minor limitations (such as the necessity of court permission in the case of pending litigation<sup>351</sup>), a client may discharge an attorney *at any time, with or without cause*. The import of this rule, as a number of authorities have recognized,<sup>352</sup> is that the attorney-client relation or contract is terminable at the will of the client. Undoubtedly, a client who discharges an attorney may be held liable for unpaid fees,<sup>353</sup> but as one court aptly remarked in refusing to impose liability for tortious interference with an attorney-client relation, that "is beside the point."<sup>354</sup> The attorney's right to

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711, 715 (La. App. 1983) (rule stated); *Salem Realty v. Matera*, 10 Mass. App. Ct. 571, 410 N.E.2d 716, 719 (1980) ("inherent" right of client), *aff'd*, 384 Mass. 83, 426 N.E.2d 1160 (1981); *Koeppel v. Schroder*, 122 A.D.2d 780, 505 N.Y.S.2d 666, 669 (1986) ("client has an absolute right on public policy grounds to terminate the attorney-client relationship at any time without cause); *Commonwealth v. Scheps*, 361 Pa. Super. 566, 523 A.2d 363, 367 (1987) (rule stated); *Bray v. Squires*, 702 S.W.2d 266, 272 (Tex. App. 1985) (rule stated in unsuccessful tortious interference action against departing associates); *see also supra* note 165 and accompanying text.

350. *See C. WOLFRAM, supra* note 2, § 9.5.2 (client may discharge attorney for any reason); Recent Decision, *supra* note 309, at 777 ("universally recognized that clients are free to change attorneys").

351. *C. WOLFRAM, supra* note 2, § 9.5.1, at 544 (rule stated).

352. Professor Wolfram states: "It is now uniformly recognized that the client-lawyer contract is terminable at will by the client." *C. WOLFRAM, supra* note 2, § 9.5.2, at 545; *see also In re Collins*, 246 Ga. 325, 271 S.E.2d 473, 473 (1980) (discharged lawyer who persisted in representing client was disciplined since client had right to terminate employment at will); *Demov, Morris, Levin & Shein v. Glantz*, 53 N.Y.2d 553, 428 N.E.2d 387, 389, 444 N.Y.S.2d 55 (1981) ("in spite of a particularized retainer agreement between the parties" client may discharge attorney at will), *cited with approval* in *Koeppel v. Schroder*, 122 A.D.2d 780, 505 N.Y.S.2d 666, 669 (1986) (rule stated).

353. The proper measure of damages has been subject to some dispute. *See Potts v. Mitchell*, 410 F. Supp. 1278, 1282 (W.D.N.C. 1976) (attorney discharged without cause may recover reasonable fee for services actually rendered); *Rosenberg v. Levin*, 409 So. 2d 1016, 1021 (Fla. 1982) (recovery is limited to value of services to extent that that amount does not exceed attorney's contractual expectation); *Salem Realty v. Matera*, 384 Mass. 83, 426 N.E.2d 1160, 1160-61 (1981) (quantum meruit rule applies, at least in absence of bad faith); *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969) (liability for discharge without cause is measured according to benefit contract would have conferred on attorney).

354. *Walsh v. O'Neill*, 350 Mass. 586, 215 N.E.2d 915, 918 (1966). In *Walsh*, no action was held to lie where an attorney, connected with a corporation's special counsel, induced the corporation to fire its house counsel and instead retain him. The court stated:

There is, we think, a strong public policy to assure one in need of legal help freedom to select an attorney, to change attorneys, and to seek and obtain advice as to the competency and suitability of any attorney for the particular need of the client. . . . We need not pause to consider whether a contract purporting to bar the seeking of other counsel would be contrary to public policy. That the attorney's lien . . . may tend to discourage changing counsel is beside the point.

*Id.* (citations omitted). *See also Kallen v. Delug*, 157 Cal. App. 3d 940, 203 Cal. Rptr. 879, 885 (1984) (action between attorneys based on alleged breach of contract pertaining to fees where court found client to have "an absolute right to substitute one attorney for another for any reason, whether or not the client owes the attorney money").

fees upon termination merely guarantees compensation for *past* services; it does not oblige the client to continue the relation in the *future*, nor does it create for that attorney any legitimate expectation of the same.

Once the attorney-client contract is recognized as terminable at will, there can be little doubt as to the applicability of section 768 to departure-based solicitation,<sup>355</sup> for the *Restatement* indicates that: "[T]he rule . . . entitles one not only to seek to divert business from his competitors generally but also from a particular competitor. And he may seek to do so directly by express inducement as well as indirectly by attractive offers of his own goods or services."<sup>356</sup> *Koepfel v. Schroder*,<sup>357</sup> a 1986 decision of the New York Appellate Division, expressly held section 768 applicable to the departing attorney context and in so doing overturned the grant of a preliminary injunction against mass mail solicitation of firm clients by former partners.

#### *b. Timing of Solicitation and Use of Confidential Information*

In the typical attorney departure case, three of the four conditions<sup>358</sup> imposed by section 768 readily will be established. Evidence will show that the departing attorney and firm are in competition for the business of firm clients, that there is no unlawful restraint of trade, and that the solicitation efforts are actuated, at least in part, by a desire to advance the departing attorney's interest in competing with the firm. The only remaining question will then be the use of wrongful means, for "both social and private interests concur in the determination that persuasion only by suitable means is permissible."<sup>359</sup> Fraud, defamation, physical violence, and duress all undoubtedly would be deemed wrongful,<sup>360</sup> as would any action undertaken in vio-

355. *Accord* Robinson, *supra* note 17, at 560 (endorsing competition rationale); Recent Decision, *supra* note 309, at 777 (arguably applicable); *id.* at 782 (colorable argument can be made for application of privilege afforded competitors).

356. RESTATEMENT (SECOND) OF TORTS § 768 comment b (1977).

357. 122 A.D.2d 780, 505 N.Y.S.2d 666, 669 (1986) (in holding that competition was not accomplished through unlawful means, court noted that under New York precedent direct mail solicitation of clients was constitutionally protected).

358. See RESTATEMENT (SECOND) OF TORTS § 768(1)(a)-(d) (1977) quoted in text *supra* Part III-B-3-a.

359. *Id.* § 767 comment g.

360. *Koepfel v. Schroder*, 122 A.D.2d 780, 505 N.Y.S.2d 666, 669 (1986) (fraud and threats); RESTATEMENT (SECOND) OF TORTS § 767 comment g (1977) (violence and fraud); *id.* § 768 comment e (violence, fraud, civil suits, and criminal prosecution).

lation of statute.<sup>361</sup> The same is true where the actor's conduct is directed *solely* to the satisfaction of his spite or ill will,<sup>362</sup> although the mere fact that the actor derives incidental malicious pleasure from an intrusion otherwise intended to advance legitimate competitive interests does not make the actor's conduct wrongful.<sup>363</sup>

The more difficult questions relating to the issue of wrongful means concern the timing of the solicitation and the use of confidential information gained by the exiting attorney while working at the firm. As discussed below, it may be argued that it is a breach of fiduciary obligation for an attorney to surreptitiously compete with his firm prior to termination of his employment<sup>364</sup> or to make personal use of confidential information.<sup>365</sup> Where such a breach is found, it is likely that a court will hold that the attorney has employed wrongful means and that his conduct is not exempt from liability under the competition rule. Of course, even where that is true, the actor may still endeavor to justify his actions under other privileges considered below, or under the general balancing test of section 767, discussed above.<sup>366</sup>

#### 4. *Responsibility for Client Welfare*

Under some circumstances, departure-based solicitation may be justified under the rule in section 770 of the *Restatement*, the privilege applicable to situations where one individual is responsible for the welfare of another. Section 770 provides that:

One who, charged with responsibility for the welfare of a third person, intentionally causes that person not to perform a contract or enter into a

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361. See *Schulman v. Anderson Russell Kill & Olick, P.C.*, 117 Misc. 2d 162, 458 N.Y.S.2d 448, 456 (1982) (in action against attorney by accountant who had dealt with attorney's clients, attorney's solicitation of laypersons to join action against accountant, in violation of Judiciary Law, constituted use of unlawful means); see also *Duggin v. Adams*, 234 Va. 221, 360 S.E.2d 832 (1987) detailing elements of tortious interference:

Methods of interference considered improper are those means that are illegal or independently tortious, such as violations of statutes, regulations, or recognized common-law rules. . . . Improper methods may include violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information, or breach of a fiduciary relationship.

*Id.* at 836.

362. RESTATEMENT (SECOND) OF TORTS § 768 comment g (1977) (rule stated).

363. *Id.* (rule stated).

364. See *infra* Part III-C-4.

365. See *infra* Part III-C-5.

366. RESTATEMENT (SECOND) OF TORTS § 767 comment j (1977) (recognizing option).



prospective contractual relation with another, does not interfere improperly with the other's relation if the actor

- (a) does not employ wrongful means and
- (b) acts to protect the welfare of the third person.<sup>367</sup>

The *Restatement* commentary indicates that this rule, which applies to statements whether volunteered or requested,<sup>368</sup> "deals with cases in which, by ordinary standards of decent conduct, one is charged with some responsibility for the protection of the welfare of another."<sup>369</sup> It further states that the rule is "frequently applicable to those who stand in a fiduciary relationship,"<sup>370</sup> and expressly lists attorney and client<sup>371</sup> as a typical relation to which this qualified privilege<sup>372</sup> may apply. A number of cases involving good faith advice given by attorneys to clients have embraced principles consistent with this rule in non-departure contexts.<sup>373</sup> Undoubtedly, the thrust of these cases is sound for, as some courts have reasoned, failure to recognize a privilege sheltering honest advice by attorneys "would have the undesirable effect of creating a duty to third parties which would

367. *Id.* § 770; see also PROSSER AND KEETON ON TORTS, *supra* note 138, at 985 (discussing "agent protecting the interests of his principal").

368. RESTATEMENT (SECOND) OF TORTS § 770 comment c (1977).

369. *Id.* § 770 comment b.

370. *Id.*; see also Johnson, *Fraud and Deceit*, in PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES (1988) (attorney is fiduciary).

371. RESTATEMENT (SECOND) OF TORTS § 770 comment b (1977).

372. *Cf.* Rosenfeld, Meyer & Susman v. Cohen, 146 Cal. App. 3d 200, 194 Cal. Rptr. 180 (1983), which states:

An attorney has no absolute privilege to interfere with contractual relations, whether those of his client or anyone else. To the contrary, the existence of an attorney-client, or some other fiduciary relationship with a party to the contract is, at most, the beginning not the end of the inquiry.

*Id.* at 198.

373. See, e.g., McDonough v. Kellogg, 295 F. Supp. 594, 599 (W.D. Va. 1969) (honest advice relating to validity of voting proxies not actionable); Gold v. Vasileff, 160 Ill. App. 3d 125, 513 N.E.2d 446, 448 (1987) (rule applied in action by grocery store buyers against sellers' attorney); Salaymeh v. Interqual, Inc., 155 Ill. App. 3d 1040, 508 N.E.2d 1155, 1159-60 (1987) (stating, in action arising from physician's denial of operating privileges at hospital, that basis of qualified privilege is not act of licensure but attorney's fiduciary duty to client and that privilege may be defeated by proof of actual malice); Schott v. Glover, 109 Ill. App. 3d 230, 440 N.E.2d 376, 379 (1982) (advice relating to acquisition of real estate); Royal Abstract Corp. v. Golenbock and Barell, 129 Misc. 2d 929, 494 N.Y.S.2d 613, 616 (1985) (attorney's advice to client regarding designation of title insurance company did not give rise to tortious interference action by third party), *aff'd without op.*, 121 A.D.2d 852, 503 N.Y.S.2d 702 (1986); see also Potts v. Mitchell, 410 F. Supp. 1278, 1281 (W.D.N.C. 1976) (second attorney not liable for rendering opinion that client could discharge first attorney); *cf.* Trepel v. Pontiac Osteopathic Hosp., 135 Mich. App. 361, 354 N.W.2d 341, 350-51 (1984) (claim for tortious interference stated where plaintiff alleged attorney was personally involved in wrongful conduct).

take precedence over an attorney's fiduciary duty to his client."<sup>374</sup>

Insofar as concerns clients whom an attorney actively represents at the time he leaves a firm, section 770 would appear to permit disclosure, by reasonable means, of the client's right to decide who shall provide future representation and of information legitimately bearing upon that decision.<sup>375</sup> However, as obliquely suggested by subsection (b) and made more specific in the commentary, such a privilege may arise only where danger to the client's "welfare is threatened by the relation that he seeks to sever or prevent."<sup>376</sup> This qualification may limit the usefulness of the rule to departing attorneys, for in many instances lawyers remaining in the firm will be equally well qualified—if not better qualified—to provide future representation. As stated by one tribunal, in a suit involving departure-based solicitation, "The courts of this and other states have consistently rejected a defendant's attempt to use the existence of some special relationship with a party to the contract as a cloak for his own self-serving interference with the contract."<sup>377</sup>

On the other hand, where there is a legitimate question as to whether remaining attorneys can adequately attend to the interests of a client without undue expense or delay, the fact that a departing attorney may incidentally benefit from the advice which he gives to a client concerning the client's right to change counsel would seem to be irrelevant. The Ninth Circuit, in dismissing a claim against an attorney based on a non-departure-related inducement of a breach of contract, recently wrote:

We believe that advice by an agent to a principal is rarely, if ever, motivated purely by a desire to benefit only the principal. An agent naturally hopes that by providing beneficial advice to his principal, the agent will benefit indirectly by gaining the further trust and confidence of his principal. If the protection of the privilege were denied every time that

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374. *Schott v. Glover*, 109 Ill. App. 3d 230, 440 N.E.2d 376, 379 (1982).

375. For example, in *Rosenfeld, Meyer & Susman v. Cohen*, 146 Cal. App. 3d 200, 194 Cal. Rptr. 180 (1983), two departing partners informed a patent antitrust client that they were essential to the case and that the remaining attorneys in the firm could not adequately represent the client. *Id.* at 194. This appears to have been correct in that no other partner had anything more than a "passing acquaintance" with the case after more than five years of representation, and that the remaining partners acknowledged to the client that the firm might have to associate knowledgeable counsel in order to continue to provide adequate legal services. *Id.* at 184-85. If the statements mentioned above had been the only interference at issue in the case then arguably the § 770 privilege could have been applied.

376. RESTATEMENT (SECOND) OF TORTS § 770 comment e (1977); *see also id.* (if actor's conduct is not directed at protecting welfare of person induced, then actor is not protected by rule).

377. *Rosenfeld, Meyer*, 194 Cal. Rptr. at 198.

an advisor acted with such a mixed motive, the privilege would be greatly diminished and the societal interests it was designed to promote would be frustrated.<sup>378</sup>

No case has yet invoked the welfare-of-another rule to justify departure-based solicitation.<sup>379</sup>

## 5. Defenses

### a. Provocation

In *Paul L. Pratt, P.C. v. Blunt*,<sup>380</sup> an action for tortious interference with contract, former associates allegedly commenced solicitation of firm clients by mail only after "clients who called the Pratt firm asking for them were misled or misinformed as to their status or whereabouts."<sup>381</sup> In addition, an attorney remaining in the firm purportedly disseminated to clients "disparaging information about the [attorneys who had left] . . . in an attempt to retain them as clients."<sup>382</sup> In affirming the grant of a preliminary injunction against the former associates, the *Pratt* court, without citation to authority, brushed aside these allegations, stating: "[T]his conduct by the plaintiff [firm] will not serve to cancel out similar unrelated acts of unethical conduct by the defendants. . . . We therefore reject the defendant's contention that the plaintiff should have been denied relief on the basis of 'unclean hands.'"<sup>383</sup>

The correctness of this ruling is open to question. Section 767 of

378. *Los Angeles Airways, Inc. v. Davis*, 687 F.2d 321, 328 (9th Cir. 1982). Here, the attorney's advice was allegedly motivated by desire to enhance his own standing in the corporation, and to enable the corporation to buy assets at otherwise unavailable liquidation prices. The Ninth Circuit "seriously doubt[ed] that a desire to advance one's career with an employer (even at the expense of a fellow employee's) would in any event constitute the type of motivation that causes loss of the privilege." *Id.* at 328; *cf. Oliver v. Frischling*, 104 Cal. App. 3d 831, 164 Cal. Rptr. 87 (1980) (defendants induced a breach of contract by action intended to benefit only the defendants and not their principal); *Furlev Sales and Associates, Inc. v. North American Automotive Warehouse, Inc.*, 325 N.W.2d 20, 27 (Minn. 1982) (in upholding tortious interference judgment in favor of non-client against attorney, court stated attorney "was acting in his own personal interests" and that "[i]nterference is unjustifiable when it is done for the indirect purpose of injuring the plaintiff or benefiting the defendant").

379. *But see Bray v. Squires*, 702 S.W.2d 266, 272 (Tex. App. 1985) (bank director not liable for inducing bank to terminate its employment of plaintiff-attorney and to hire his associates, for "there was no contract or other basis that prevented [client] from changing lawyers" and "[the director's] actions were undertaken to achieve legitimate business or personal goals").

380. 140 Ill. App. 3d 512, 488 N.E.2d 1062 (1986).

381. 488 N.E.2d at 1065.

382. *Id.* at 1069.

383. *Id.* The former associates also alleged other miscellaneous acts of unethical conduct by the plaintiff. Those actions appear to fall more accurately within the appellate court's use of the

the *Restatement* indicates that an actor's motive<sup>384</sup> (here, at least in part, a desire to correct falsehood) and the interests sought to be advanced by the actor<sup>385</sup> (here, again at least in part, intelligent selection of counsel) both bear upon the assessment of impropriety under the standard balancing test. Further, these considerations also arguably go to the issue of whether an actor has employed wrongful means and is therefore prohibited from claiming a privilege to compete with another or to protect the welfare of a third person. Consequently, both the *Restatement* and basic equitable principles suggest that provocation is relevant.

In addition, authorities hold that the privileges applicable to an action for defamation (except perhaps those constitutional privileges relating to the issues of fault and falsity) are equally applicable to an action for tortious interference with contract.<sup>386</sup> Where the latter action is based upon communication of a defamatory idea, this would appear to be sound for "if important interests exist sufficient to limit or preclude recovery for defamation, the plaintiff should not, in the absence of special circumstances, be able to undercut the judicial recognition of those interests merely by calling his suit by a different name."<sup>387</sup> It is well established under the law of defamation that an individual acts pursuant to a qualified privilege, and is therefore immune from liability in the absence of abuse,<sup>388</sup> where he speaks out in reply to an attack upon his personal or business reputation.<sup>389</sup> To the

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term "unrelated" than the defamatory statements or misrepresentations as to the former associates' whereabouts, mentioned above in the text.

384. RESTATEMENT (SECOND) OF TORTS § 767(b) (1977).

385. *Id.* § 767(d).

386. *Williams v. Burns*, 540 F. Supp. 1243, 1248, 1252 (D. Colo. 1982) (in action by potential seller against potential buyer's attorney, court held that qualified privilege to protect interests of third parties applied to both defamation and tortious interference suits); *Drummond v. Stahl*, 127 Ariz. 122, 618 P.2d 616, 619 (judicial proceedings privilege providing absolute immunity to defamatory statements also bars action for tortious interference), *cert. denied*, 450 U.S. 967 (1981); *Lebbos v. State Bar of Cal.*, 165 Cal. App. 3d 656, 211 Cal. Rptr. 847, 854 (1985) (absolute statutory privilege conferred upon otherwise defamatory publication made in official proceeding bars action for tortious interference); PROSSER AND KEETON ON TORTS, *supra* note 138, § 129, at 98-99.

387. *Johnson, Defamation (Libel and Slander)*, in PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 1.01[4], at 38-39 (1986); see also *Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988) (first amendment considerations which bar liability for defamation based solely on bad motive, also bar action for intentional infliction of mental distress on same grounds).

388. The privilege may be abused in many ways, including by excessive publication, use of information for an improper purpose, or deliberate falsification of data. See generally *Johnson, supra* note 387, § 4.04[4][a][ii].

389. *Id.* § 4.04[4][e]; at 663-65 RESTATEMENT (SECOND) OF TORTS § 594 comment k (1977) (discussing defense against defamation).

extent that this situation arises in the departing attorney context, communications with former clients should not give rise to an action for interference with contract, so long as they are made in good faith and state no more than is reasonably necessary to protect the departing attorney's interests.<sup>390</sup>

*b. Equitable Estoppel Based on Acquiescence in Conduct Where an Agreement Leaves Solicitation Issues Unresolved*

Partnership and employment agreements which *do not* purport to settle solicitation questions may create special problems under the doctrine of equitable estoppel. One recent case, *Koepfel v. Schroder*,<sup>391</sup> involved two agreements (one pre-departure and another post-departure) which, to the apparent dismay of the attorneys involved, admittedly failed to agree upon "a list of clients 'not to be disturbed.'" <sup>392</sup> According to pre-litigation correspondence, the partners remaining in the firm which succeeded the original partnership ("remaining partners") manifested in a letter their belief that the agreements had the effect of leaving all of the former partners (those remaining, as well as those who had split off) "free to continue the solicitation 'dance.'" <sup>393</sup> Notwithstanding those expressions, the remaining partners later brought suit to enjoin further client solicitation by the partners who had left. In reversing the grant of a preliminary injunction, the New York Appellate Division relied upon equitable estoppel as an alternative ground for decision. The court reasoned that the remaining partners, through their conduct—which included participating in the two agreements, acknowledging by letter the continuation of the "solicitation dance," executing numerous change of counsel forms, relinquishing files, and failing to object for more than a year to mass mail client solicitation by the departing partners—had

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390. Johnson, *supra* note 387, § 4.04[4][e], at 665 ("privilege is applicable . . . only where the reply is not the product of actual malice and states no more than is reasonably necessary to protect the defendant's own interests").

391. 122 A.D.2d 780, 505 N.Y.S.2d 666 (1986).

392. 505 N.Y.S. 2d at 668. The provisions of the first agreement, which were re-affirmed in the second agreement, permitted "a disassociating partner to remove from the firm the files of those clients which he or she had originated, following his or her substitution for the firm upon the client's consent." *Id.* Subsequent to the departures in question, the exiting attorneys solicited by mass mailing the business of several hundred clients with whom they had had personal or professional relationships. Upon receiving numerous "consent to change attorney" forms, the remaining partners, who themselves had conducted at least one mass mailing, executed many substitution forms and apparently relinquished the appropriate files. *Id.* at 667-68.

393. *Id.* at 668.

recognized the validity of the contracts of employment entered into by the departing attorneys and former clients of the firm.<sup>394</sup> Accordingly, the remaining partners were equitably estopped, the court found, from impeaching the validity of those agreements.<sup>395</sup> Further, the court wrote, "In view of their lack of equitable standing, the plaintiffs should have been denied the preliminary injunction they sought."<sup>396</sup>

Because the estoppel finding in *Koeppel* was based on an extensive course of conduct, it is not possible to say, except on the basis of speculation, how significant a role was played by the existence of the inconclusive agreements. The court may, however, have misunderstood the issue at hand. Although the remaining partners may well have relinquished through acquiescence any right to contest the validity of consummated employment agreements, what they appear to have sought was not that, but an injunction against further solicitation of their other clients.<sup>397</sup> The latter question is wholly different from the former, and it is not immediately apparent why prompt failure to protest should result in a forfeiture of the right to complain about later solicitation, especially in view of the public interests implicated by such conduct. Nonetheless, any error on the part of the court may ultimately be harmless. To the extent that case law recognizes that exiting attorneys have a right to contact the clients of their former firm, in writing or orally, the issue of equitable estoppel will be rendered moot in future litigation.

## 6. *Inactive Client Files*

The *Restatement (Second) of Torts* makes clear that for an action to lie for tortious interference with present contractual rights, "the actor must have knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract."<sup>398</sup> Arguably, this requirement is not met where a departing attorney contacts persons previously served by his former firm

394. *Id.* at 669.

395. *Id.*

396. *Id.*

397. The relief requested is not entirely clear from the opinion. Compare *id.* at 668 (plaintiffs sought "to permanently enjoin the defendants from continuing to willfully and knowingly solicit and interfere with the plaintiffs' clients") with *id.* at 667 (plaintiffs sought to "permanently enjoin the defendants from contacting and/or communicating with those persons who, up to . . . [a certain post-departure date], had active legal matters pending with and were represented by the [reconstituted] law firm . . . or its predecessor firms") (emphasis added).

398. RESTATEMENT (SECOND) OF TORTS § 766 comment i (1977); see also *Frazier, Dame,*

and reasonably believes their files to be inactive. In that situation, the attorney is without knowledge that services are presently being rendered, and thus it is impossible to find that he acts with the intent to intrude on an existing relation that is an essential element of the tort.

A firm may consider individuals with inactive files still to be clients in the sense that, having once procured the firm's services, they may at some uncertain future date again seek the firm's assistance in some undefined task. But from a legal standpoint, such subjective views would appear to be irrelevant. What the law protects is existing contract rights, or active relations *reasonably probable* to result in the creation of such interests.<sup>399</sup> In a wide range of tortious interference cases, where there was "no sufficient degree of certainty that the plaintiff ever would have received the anticipated benefits," recovery has been denied.<sup>400</sup> An inactive file represents nothing more than the vague, indefinite hope of future benefit to the firm, and as such, may not rise to the level of importance sufficient to warrant the law's protection. *De minimis non curat lex.*<sup>401</sup> Consequently, it is doubtful that a tort action may be based on solicitation of future business from an inactive client of the attorney's former firm.

### 7. *Client-Initiated Requests for Information or Contractual Offers*

As a number of attorney cases have recognized, a person does not become liable for tortious interference merely by offering good faith advice in response to a request by a party to a contractual relation.<sup>402</sup> So too, liability will not attach solely because one accepts an

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*supra* note 248, 138 Cal. Rptr. at 673 (stating similar rule in action between law firms); *Marcus v. Wilson*, 16 Ill. App. 3d 724, 306 N.E.2d 554, 559 (1973) (same).

399. See *Frazier, Dame*, *supra* note 248, at 673 (in action between law firms, with respect to interference with prospective economic advantage, plaintiff must show "an economic relationship between attorney and client containing the *probability* of future economic benefit to the attorney") (emphasis added); PROSSER AND KEETON ON TORTS, *supra* note 138, § 130, at 1006-07 (referring to "probable expectancies," "strong probability," and "high degree of probability"); 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 289, § 6.11, at 342 ("The interest protected [by the rule against precontractual interference] . . . is the interest in *reasonable expectations* of economic advantage.") (emphasis added); see also Note, *supra* note 287, at 565 ("plaintiff should be required to establish a legitimate expectancy").

400. PROSSER AND KEETON ON TORTS, *supra* note 138, § 130, at 1006.

401. "The law does not concern itself about trifles." BLACK'S LAW DICTIONARY 388 (5th ed. 1979).

402. See *Potts v. Mitchell*, 410 F. Supp. 1278, 1281 (W.D.N.C. 1976) (no liability where second attorney, upon request, advised client that he could discharge first attorney); RESTATEMENT (SECOND) OF TORTS § 772(b) and comments c, d & e (1977) (rule stated; example involving lawyer);

offer of employment or other advantage with knowledge that the offeror cannot perform both the offered consideration and pre-existing obligations.<sup>403</sup> Typically, for liability to arise, a third person, rather than a party to an extant agreement,<sup>404</sup> must set in motion those forces which disrupt legitimate expectations surrounding that contract.<sup>405</sup> Absent proof of such an intrusion by an outsider, liability may not be imposed.<sup>406</sup>

As applied to the exiting attorneys, the foregoing rules produce results in civil litigation which parallel those which would be reached in disciplinary actions. Just as an attorney may not be disciplined for responding to communications initiated by a prospective client, for acceptance of an offer of employment resulting from that conduct,<sup>407</sup> or for rendering a second opinion,<sup>408</sup> so too he cannot be enjoined or mulcted in damages in a tort suit predicated upon the same actions.

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*id.* at 767 comment i (1977) (example involving business advisor); PROSSER AND KEETON ON TORTS, *supra* note 138, at 985 (rule stated). As the *Restatement* commentary indicates, the only requirements for the existence of the privilege to respond are: "(1) that advice be requested, (2) that the advice given be within the scope of the request and (3) that the advice be honest." RESTATEMENT (SECOND) OF TORTS § 772 comment c (1977).

403. *Cf.* Potts v. Mitchell, 410 F. Supp. 1278, 1281 (W.D.N.C. 1976) (substituted attorney drafted letters discharging first attorney); RESTATEMENT (SECOND) OF TORTS § 766 comment n (1977); *see also id.* § 767 comment c ("A's active solicitation of B's business is more likely to make his interference improper than his mere response to an inquiry from B.").

404. *See Note, supra* note 287, at 535 ("At the risk of stating the obvious, the interfering party must be a third party who is unrelated to the contract."). *But cf.* Rosenfeld, Meyer & Susman v. Cohen, 146 Cal. App. 3d 200, 194 Cal. Rptr. 180, 195 (1983) ("while a party to a contract may not be held liable in tort for *interfering* with his own contract by breaching it, he may be held liable in tort for interference with his own contract if he conspires with a third party to breach it") (emphasis in original).

405. *Cf.* Skelly v. Richman, 10 Cal. App. 3d 844, 89 Cal. Rptr. 556, 570 (1970) (discussing "primary issue of inducement" in action between attorneys); RESTATEMENT (SECOND) OF TORTS § 766 comment k (1977) (discussing inducement requirement).

406. *See* Potts v. Mitchell, 410 F. Supp. 1278, 1281 (W.D.N.C. 1976) (no "intentional inducement" where client, rather than second attorney, initiated discussion of whether first attorney could be discharged); Rosenfeld, Meyer & Susman v. Cohen, 146 Cal. App. 3d 200, 194 Cal. Rptr. 180, 193 (1983) (inducement lies at "heart" of cause of action); Marcus v. Wilson, 16 Ill. App. 3d 724, 306 N.E.2d 554, 559 (1973) (inducement defined as essential element in action between law firms).

Conversely, "the fact that there is an available action against the party who breaks the contract is no defense to the one who induces the breach." PROSSER AND KEETON ON TORTS, *supra* note 138, § 129, at 1003.

407. *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A) (1980) (barring employment resulting from *unsolicited* advice); *see also supra* note 181 and accompanying text (lawyer may respond to layperson's request for information).

408. *See supra* note 251.



## 8. *Constitutional Considerations and Dissemination of Truthful Information*

The action of tortious interference with contractual relations has yet to be fully reconciled with constitutional guarantees of free expression.<sup>409</sup> As one respected treatise states, "[T]here is a question whether the First Amendment, which has had a very sizeable impact in the defamation cases, might restrict liability to those [tortious interference] cases in which some degree of personal fault and some false statements of fact are shown."<sup>410</sup> Similarly, Professor Dan R. Dobbs of the University of Arizona has argued that "so far as tort liability [for interference] is imposed for the communication of facts, opinions or arguments, that liability is simply inconsistent with the law's long commitment to free speech."<sup>411</sup>

In apparent sympathy with the view that tort liability may not be imposed based on the dissemination of truthful information, the *Restatement* commentary, in elucidating a brief phrase in the black-letter,<sup>412</sup> sweepingly states with virtually no elaboration:

There is *of course* no liability for interference with a contract or with a prospective contractual relation on the part of one who merely gives truthful information to another . . . . This is true even though the facts

409. Compare RESTATEMENT (SECOND) OF TORTS § 772(a) (1977) (dissemination of truthful information is not improper interference) with PROSSER AND KEETON ON TORTS, *supra* note 138, at 979 ("neither interference with contract relations nor interference with prospective advantages necessarily involves falsehood"). Professor Harvey S. Perlman has stated:

The lines between truthful information, advice, and improper inducement . . . are far from clear. May a third person announce truthful information that a contract is unenforceable and then offer better terms? Or may he solicit a request for advice? If either of these two approaches is privileged, but direct encouragement to breach is improper, form has triumphed over substance.

Perlman, *supra* note 287, at 90 n.128.

410. PROSSER AND KEETON ON TORTS, *supra* note 138, at 988.

411. Dobbs, *supra* note 288, at 361. Although expressions of opinion are wholly immune from liability in the defamation field, courts are probably less willing to extend the same latitude to opinions which are part of attorney speech because of the potential of such statements to mislead the public. See Johnson, *supra* note 387, § 1.02[1][a]; Bates v. State Bar of Ariz., 433 U.S. 350, 383-84 (1977) ("claims as to quality of services . . . may be so likely to be misleading as to warrant restriction"); see also Moss, *supra* note 53, at 621-26 (discussing statements about or comparisons of quality of legal services). For example, court-promulgated rules of ethics in some states prohibit the expression of opinions as to the quality of legal services. TEX. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A)(2), reprinted in TEXAS YOUNG LAW. ASS'N, TEXAS LAWYERS' PROFESSIONAL ETHICS 1-12 (2d ed. 1986). Accordingly, the statement quoted in the text may fall slightly broad of the mark when applied to departure-based, attorney-initated communications.

412. Section 772 states in part: "One who intentionally causes a third person not to perform a contract . . . does not interfere improperly with the other's contractual relation, by giving the third person (a) truthful information." RESTATEMENT (SECOND) OF TORTS § 772 (1977).

are marshaled in such a way that they speak for themselves and the person to whom the information is given immediately recognizes them as a reason for breaking his contract or refusing to deal with another. It is also true whether or not the information is requested.<sup>413</sup>

To the extent that the *Restatement* rule is accepted by the courts,<sup>414</sup> some departure-based communications may well fall within its terms.<sup>415</sup> For example, at least the first three paragraphs, and perhaps all four paragraphs, of the letter quoted above from *Pratt v. Blunt*<sup>416</sup> consisted exclusively of truthful information about the attorney's departure and the client's right to change counsel. No case appears to have yet considered the application of this rule to solicitation by departing attorneys, or to have probed the formidable question of at what point a communication begins to exceed the bounds of "truthful information" and is misleadingly incomplete. Nevertheless, it seems clear that "one who accepts free speech as a fundamental part of our way of life must have at least some [constitutional] doubts about the liability for persuading another person to terminate a contract."<sup>417</sup>

### 9. *Acceptance of Employment Prior to Client's Termination of Prior Counsel*

In 1977, in *Frazier, Dame, Doherty, Parrish & Hanawalt v. Boccardo, Blum, Lull, Nilland, Teerlink & Bell*,<sup>418</sup> a suit between law firms involving a claim of tortious interference with contractual relations, the court held that liability may arise where a firm induces the execution of a contingent fee agreement with knowledge of the fact

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413. *Id.* § 772 comment b (1977) (emphasis added) ("Compare § 581A, on the effect of truth in an action for defamation.").

414. The present degree of acceptance is unclear. Characteristic of the confusion pervading this area, the Prosser and Keeton treatise states:

Although there may be no liability for interference with contract by a mere truthful statement of fact, liability has been imposed without much question where there is no misstatement of fact at all and the defendant has merely advised or persuaded another to breach his contract with the plaintiff, or where the defendant has merely made the other an offer better than the plaintiff's contract.

PROSSER AND KEETON ON TORTS, *supra* note 138, at 988. Arguably, the policies underlying the Supreme Court's decision in *Shapiro v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988), mandate that truthful written communications should not give rise to disciplinary liability.

415. See Recent Decision, *supra* note 309, at 782 (describing truthful advice privilege as colorable).

416. See *supra* note 330 and accompanying text.

417. Dobbs, *supra* note 288, at 363.

418. 70 Cal. App. 3d 331, 138 Cal. Rptr. 670, 673-74 (1977).

that the layperson is already represented and has not terminated the prior representation. This holding parallels the rule of ethics that an attorney *should not* accept an offer of employment until a client discharges prior counsel.<sup>419</sup> *Frazier, Dame* did not discuss the privileges of competition,<sup>420</sup> protecting the welfare of another,<sup>421</sup> responding to requests for information,<sup>422</sup> or disseminating truthful information,<sup>423</sup> and thus how it is to be reconciled with those rules is subject to some doubt.<sup>424</sup> However, as a matter of courtesy and good preventative lawyering, the safe course is also simple. An attorney who has left a firm should postpone consummation of an agreement until the client terminates present counsel.

Of course, there is a difference between contacting or consulting with a represented person and finalizing a contract of representation. Regardless of the rules applicable to the latter, solicitations and consultations should be governed by the standards earlier discussed, rather than by the rule of *Frazier, Dame*.

### C. Breach of Fiduciary Obligations Under Law of Agency and Partnership

#### 1. In General

In granting<sup>425</sup> or denying<sup>426</sup> relief to aggrieved firms or in allowing claims to go to the jury,<sup>427</sup> a few cases dealing with departure-based solicitation have taken some account of alleged breaches of fidu-

419. See *supra* Part II-E-4.

420. See *supra* Part III-B-3. The *Frazier, Dame* court did, however, note that the contract at issue was terminable at will, but found that that did not permit the second firm to "improperly induce the exercise of the power." *Frazier, Dame*, 138 Cal. Rptr. at 673-74.

421. See *supra* Part III-B-4.

422. See *supra* Part III-B-7.

423. See *supra* Part III-B-8.

424. It might be argued that the competition privilege does not apply because unethical means (signing the agreement prior to the client's termination of the first firm) were employed to secure the competitive advantage. In this regard, however, it should be noted that the Model Code embraced the no-signing rule only as part of its aspirational, non-mandatory Ethical Considerations (EC 2-30), and that the no-signing rule has not been carried forward into the Model Rule. Of course, state precedent may differ. See *supra* note 261 and accompanying text.

425. See *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175, 1185 (1978) (injunction granted), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979); see also *Paul L. Pratt, P.C. v. Blunt*, 140 Ill. App. 3d 512, 488 N.E.2d 1062, 1067 (1986) (in affirming grant of preliminary injunction against former associates, court noted that associates had gained relevant information through position of trust and responsibility in firm).

426. See *Bray v. Squires*, 702 S.W.2d 266 (Tex. App. 1985) (former associates did not breach fiduciary duties).

427. *Rosenfeld, Meyer & Susman v. Cohen*, 146 Cal. App. 3d 200, 194 Cal. Rptr. 180 (1983)

ciary obligations by exiting partners and associates. In some instances, the alleged breach has been raised as an independent cause of action,<sup>428</sup> whereas in others it has been invoked simply as a consideration relevant to a claim for tortious interference with contract.<sup>429</sup> A reading of these various decisions and of other relevant scholarship<sup>430</sup> reveals jurisprudential uncertainty as to the nature of the fiduciary obligations owed by an exiting attorney to her former colleagues. In particular, there is a critical, largely unanswered, question as to whether the usual principles of agency and partnership are applicable to law firms *in the context of firm dissolutions or attorney departures* or whether those normally apposite principles must yield to special rules more closely tailored to protecting the interests of clients and of the public as a whole.

Notable exceptions to the uncertainty in this field are the rules which have crystallized concerning the distribution of fees resulting from work transferred by clients to attorneys who have departed from firms.<sup>431</sup> As observed earlier,<sup>432</sup> that subtopic is beyond the scope of this work, but will be considered below to the extent that it is relevant to solicitation issues.

## 2. *Basic Duties of Associates and Partners*

Under the law of agency, a fiduciary relationship exists between a law firm and its associate attorneys.<sup>433</sup> Thus, during the course of the employment relation, each associate normally owes to his firm the duties of care and skill,<sup>434</sup> good conduct,<sup>435</sup> and obedience.<sup>436</sup> In addition, an associate is obliged to deal openly and make full disclosure to

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(action against former partners based on interference with contractual relations, conspiracy, breach of fiduciary duties, and wrongful dissolution).

428. *See id.*; *Bray*, 702 S.W.2d 266.

429. *See Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175, 1185 (1978), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979); *see also Paul L. Pratt, P.C. v. Blunt*, 140 Ill. App. 3d 512, 488 N.E.2d 1062, 1067 (1986).

430. *See generally Gross, supra* note 1, at 262-67.

431. *See supra* note 34.

432. *See supra* text accompanying note 34.

433. *See Bray v. Squires*, 702 S.W.2d 266, 270 (Tex. App. 1985) (rule stated); *see also H. REUSCHLEIN & W. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP* 121 (1979) (discussing agent as fiduciary).

434. *See* RESTATEMENT (SECOND) OF AGENCY § 379 (1957); H. REUSCHLEIN & W. GREGORY, *supra* note 433, at 121 (skill and diligence).

435. *See* RESTATEMENT (SECOND) OF AGENCY § 380 (1957).

436. *See id.* § 385.

members of the firm of information affecting the firm's business,<sup>437</sup> and to not compete with the firm by usurping business opportunities rightfully belonging to the firm.<sup>438</sup>

Similarly, partners are mutual agents<sup>439</sup> and are fiduciaries to one another.<sup>440</sup> Accordingly, a partner is under a duty not to prefer his own economic interests to those of his partners,<sup>441</sup> to disclose facts concerning business opportunities,<sup>442</sup> and to not compete with the partnership.<sup>443</sup> At times, the rhetoric of the courts has been sweeping. Thus, it has been stated that:

"Partners are trustees for each other, and in all proceedings connected with the conduct of the partnership every partner is bound to act in the *highest* good faith to his copartner and may not obtain *any* advantage over him in the partnership affairs by the *slightest* misrepresentation, concealment, threat or adverse pressure *of any kind*."<sup>444</sup>

### 3. *Pre-Departure Preparations to Compete*

The foregoing principles might suggest that neither a partner nor an associate may quietly make plans prior to departure to compete

437. See *Bray*, 702 S.W.2d at 270 (rule stated in action by firm against former associates); cf. *Pollack v. Lytle*, 120 Cal. App. 3d 931, 175 Cal. Rptr. 81, 85 (1981) (rule stated in action by firm against associated outside counsel).

438. See *Bray*, 702 S.W.2d at 270 (rule stated); *Pollack*, 175 Cal. Rptr. at 86 (1981) (similar); see also RESTATEMENT (SECOND) OF AGENCY § 393 (1957) (discussing duty not to compete); *id.* § 387 comment a (similar); see also H. REUSCHLEIN & W. GREGORY, *supra* note 433, § 68 (discussing duty of loyalty).

439. See H. REUSCHLEIN & W. GREGORY, *supra* note 433, at 254.

440. See generally *id.* at 267-68 ("relationship of partners is that of mutual agents . . . [and] is one of a fiduciary nature"); *id.* at 277-80 ("Partner as Fiduciary"); cf. *Fox v. Abrams*, 163 Cal. App. 3d 610, 210 Cal. Rptr. 260, 265 (1985) ("There is no reason to hold that when lawyers decide to practice together in corporate form rather than partnership, they are relieved of fiduciary obligations toward each other with respect to the corporation's business"; fees earned by former partners after dissolution are divided, absent agreement, according to shares each attorney owned in firm); *Rosenfeld, Meyer & Susman v. Cohen*, 146 Cal. App. 3d 200, 194 Cal. Rptr. 180, 189-90 (1983) (until dissolved partnership is wound up, partners continue to owe fiduciary duties to one another, including duties to wind up business and to not take any action leading to purely personal gain); C. WOLFRAM, *supra* note 2, § 16.2.3, at 887 ("Whatever the emotions involved, the law and the lawyer codes require that partners deal with each other fairly and as fiduciaries in the course of breakup and in winding up partnership affairs.") (footnote omitted).

441. H. REUSCHLEIN & W. GREGORY, *supra* note 433, at 278 (rule stated).

442. *Id.* (discussing duty to disclose); *id.* at 280 (duty is not limited to occasions where information is requested).

443. *Id.* at 278 (rule stated).

444. *Rosenfeld, Meyer & Susman v. Cohen*, 146 Cal. App. 3d 200, 194 Cal. Rptr. 180, 188 (1983) (quoting *Page v. Page*, 55 Cal. 2d 192, 197, 10 Cal. Rptr. 643, 359 P.2d 41 (1961) (emphasis added)); see also H. REUSCHLEIN & W. GREGORY, *supra* note 433, at 121 ("an agent is under duty to act solely and entirely for the benefit of his principal in every matter connected with his agency").

with the firm he intends to leave. This, however, is not the case. The commentary to the *Restatement (Second) of Agency* squarely provides that:

Even before the termination of the agency, [an agent] is entitled to make arrangements to compete, except that he cannot properly use confidential information peculiar to his employer's business and acquired therein. [I]t is normally permissible for employees of a firm, or for some of its partners, to agree among themselves, while still employed, that they will engage in competition with the firm at the end of the period specified in their employment contracts.<sup>445</sup>

More directly on point is *Bray v. Squires*.<sup>446</sup> There, in 1985, the Texas Court of Appeals held that associates were not precluded from making preparations for a future business among themselves or from planning to compete with their law firm after termination of employment.<sup>447</sup> In reaching that conclusion, the court took pains to point out that the associates, who later secured the business of a major firm client, had not engaged in pre-departure solicitation.<sup>448</sup> A representative of the client had raised the issue of giving its business to the associates,<sup>449</sup> and only thereafter did the associates announce to the firm partner that the representative (an uncle of one of the associates) had "told us we could come in and tell you now that we are leaving and we are taking your largest client."<sup>450</sup> The clear implication of *Bray* is that not all pre-departure dealings with clients concerning possible post-departure representation constitute a breach of fiduciary obligations.

#### 4. *Pre-Departure and Post-Departure Solicitation of Firm Clients*

Whether an attorney's *pre-departure* preparations to offer competing legal services may include solicitation of firm clients is a difficult and important question which has not yet been resolved. The *Restatement (Second) of Agency* indicates that such conduct is prohibited. "[An agent] is not . . . entitled to solicit customers for [a planned] rival business before the end of his employment nor can he

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445. RESTATEMENT (SECOND) OF AGENCY § 393 comment e (1957).

446. 702 S.W.2d 266 (Tex. App. 1985).

447. *Id.* at 270.

448. *Id.* at 270-71. The court also noted that there was no evidence that the associates took any pending matters with them, or that their new firm billed a major client which transferred its work to them for work performed while they were employed at the former firm. *Id.* at 271.

449. *Id.* at 269.

450. *Id.* at 268.

properly do other similar acts in direct competition with the employer's business."<sup>451</sup> A few recent cases involving attorneys have tended to endorse this view.<sup>452</sup> These same decisions, however, generally also have held that departure-based solicitation is improper as a matter of professional ethics,<sup>453</sup> or have failed to consider related first amendment issues.<sup>454</sup> To the extent that it is ultimately established that client solicitation by exiting attorneys is entitled to constitutional protection, these early decisions will require reconsideration. Frequently their findings or intimations of a fiduciary duty breach appear to be inextricably linked to assumptions or determinations that the disputed solicitation was ethically impermissible.<sup>455</sup>

Reassessment notwithstanding, there is professorial and judicial commentary which argues that ordinary fiduciary obligations must give way to special principles in the context of departure-based attorney speech. In the view of Professor Geoffrey Hazard of Yale Law School, the interests of clients in obtaining information relevant to deciding who shall provide future representation must take precedence over the usual fiduciary duty rules. Professor Hazard states:

Since the client has . . . [the right to determine whether a departing attorney will represent him], it ought to follow that the client can negotiate with lawyers in the firm prior to their exiting on matters of future representation. Correlatively, the lawyer should have the right to negotiate with a firm client on the same subject. In most businesses other than law practice such negotiations would probably constitute breach of the

451. RESTATEMENT (SECOND) OF AGENCY § 393 comment e (1957).

452. See *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175, 1185 (1978) (discussing misuse of confidential information), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979); *In re Silverberg*, 81 A.D.2d 640, 438 N.Y.S.2d 143, 144 (1981) ("The solicitation of a firm's clients by one partner for his own benefit, prior to any decision to dissolve the partnership, is a breach of the fiduciary obligation owed to each other and the partnership, and a breach of the partnership agreement in general."); see also *Paul L. Pratt, P.C. v. Blunt*, 140 Ill. App. 3d 512, 488 N.E.2d 1062, 1067 (1986) (in affirming in part preliminary injunction against further solicitation by former associates, court noted former associates "were able to make contacts with clients and gain knowledge of cases to which they were assigned because of the position of trust and responsibility they had enjoyed as salaried employees of the plaintiff").

453. See *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175, 1184 (1978) (point stated), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979); see also *Paul L. Pratt, P.C. v. Blunt*, 140 Ill. App. 3d 512, 488 N.E.2d 1062, 1068 (1986) (endorsing *Adler, Barish's* reasoning).

454. See *In re Silverberg*, 81 A.D.2d 640, 438 N.Y.S.2d 143 (1981).

455. See, e.g., *Adler, Barish*. The court's finding that "[n]o public interest [was] served [by the former associate's pre- and post-departure] use of confidential information," 393 A.2d at 1185, appears to be directly related to its finding that "nothing in the 'rules of the game' which society has adopted' [sanctioned] appellees' conduct." *Id.* at 1184 (quoting *Glenn v. Point Park College*, 441 Pa. 474, 272 A.2d 895, 899 (1971)).

common law obligation of loyalty to the firm on the part of a partner or employee. In the case of law practice, however, *the public policy favoring client freedom of choice in legal representation should override the firm's proprietary interest in holding its clientele.*<sup>456</sup>

This argument finds substantial support in the conflict of interest provisions of both the Model Code<sup>457</sup> and the Model Rules,<sup>458</sup> which provide that a client is entitled to the undivided, infrangible loyalty of his attorney. If an exiting lawyer believes in good faith that the interests of his client will be best served by pre-departure disclosure of the facts and circumstances of his departure, then he should not be dissuaded from making those revelations by reason of conflicting obligations to his firm.<sup>459</sup> "[I]ndependent professional judgment is the most crucial area of expertise which an attorney owes his or her client even in co-counsel cases."<sup>460</sup> As a justice of the California Court of Appeal stated in a thoughtful dissent, "[A] client's right to the undivided loyalty of his or her attorneys must be protected, even when the result of such rule is the denial of an attorney's cause of action against another attorney."<sup>461</sup> Where a proposed cause of action would create "potentially burdensome conflicts of interest for an attorney representing a

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456. Hazard, *supra* note 23, at 36 (emphasis added). *But see* C. WOLFRAM, *supra* note 2, § 16.2.3, at 888 (footnotes omitted) ("In the case of an associate who is not a partner, the preferable view is that the associate breaches a fiduciary obligation of loyalty to the firm by attempting to persuade existing- or former-firm clients to retain the former associate after his or her withdrawal."). Professor Wolfram's statement appears to address only pre-departure solicitation. If the same reasoning applied to an associate who already left a firm, the rule would be inconsistent with the policies underlying the ethical prohibition against non-competition agreements. *See generally infra* Part IV-A.

457. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1980) ("The professional judgment of a lawyer should be exercised, within the bounds of the law, *solely for the benefit of his client and free of compromising influences and loyalties.*") (emphasis added); *cf. id.* at EC 5-13 ("A lawyer should not . . . be influenced by any organization of employees that undertakes to prescribe, direct, or suggest . . . how he should fulfill his professional obligations to a person or organization that employs him as a lawyer."); *id.* at EC 5-107(B) ("A lawyer shall not permit a person who . . . pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.").

458. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983) (general rule on conflict of interest); *id.* at Rule 2.1 comment 1 ("A client is entitled to straightforward advice expressing the lawyer's honest assessment.").

459. *Cf.* C. WOLFRAM, *supra* note 2, § 16.2.3, at 886 (footnote omitted) ("As employees and agents of the partnership, associates have a fiduciary obligation to protect the interests of the firm *when that does not conflict with dictates of client loyalty.*") (emphasis added).

460. Pollack v. Lytle, 120 Cal. App. 3d 931, 175 Cal. Rptr. 81, 90 (1981) (Johnson, J., dissenting).

461. 175 Cal. Rptr. at 88-89 (Johnson, J., dissenting). In *Pollack*, the court permitted an attorney to sue an associated outside counsel for breach of fiduciary obligations relating to the alleged mishandling of a trial. Justice Johnson stated in dissent:



client, public policy dictates that such a cause of action should be barred.<sup>462</sup>

Logically, any exception to the usual fiduciary obligation rules should be no larger than necessary to accommodate competing interests. Consequently, while there may be good reason for permitting an exiting attorney to communicate with or solicit firm clients prior to departure, there may be little justification for the view that an attorney must be permitted to do so surreptitiously. In the usual case, an agent is obliged to furnish his principal with information relevant to the affairs entrusted to him,<sup>463</sup> especially where the information affects his relationship with the principal.<sup>464</sup> He is also under a duty to reveal his own adverse interests,<sup>465</sup> to not take unfair advantage of his principal because of his position or the opportunities that it affords,<sup>466</sup>

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The majority opinion applies principles of agency and fiduciary law for the first time to cases which involve lawsuits between co-counsel. . . .

....

[In *Mason v. Levy & Van Bourg*, 77 Cal. App. 3d 60, 143 Cal. Rptr. 389, 392 (1978), we held that:] "It is fundamental to the attorney-client relationship that an attorney have an undivided loyalty to his clients. (See ABA Code of Professional Responsibility, Canon 5.) *This loyalty should not be diluted by a duty owed to some other person, such as an earlier attorney.* While, as a practical matter, both the client and former attorney stand to benefit from any recovery in the client's action, their interests are not identical. . . . *It would be inconsistent with an attorney's duty to exercise independent professional judgment on behalf of his client to impose upon him an obligation to take into account the interests of predecessor attorneys.* . . ."

....

In terms of *Mason's* public policy rationale, I see no logical distinction that should be based on litigant's status as co-counsel as opposed to successor counsel. . . .

....

The majority opinion creates serious in-roads into the body of law concerning lawyer disputes which has as its overriding consideration the maintenance of the duty of an attorney to maintain undivided loyalty to his client.

*Id.* at 88-90 (emphasis in original). Compare Justice Spencer's opinion for the majority which holds that where an associated outside counsel or junior associate in a firm differs with the principal attorney as to the proper course, the associate attorney's options are to advise the principal attorney of his views and, if the differences are irreconcilable, to withdraw. *Id.* at 86-87. Justice Spencer stated that to hold otherwise "would create the potential for a battle of wills over promotion of the client's interest, a situation which could well redound to the client's detriment." *Id.* at 87. As applied to departure-based solicitation, this view is subject to challenge on the ground that it rests on a view already rejected by the Supreme Court, namely that clients are best served by being kept ignorant of options affecting their affairs. See *supra* notes 178-79.

462. *Pollack*, 175 Cal. Rptr. at 90 (1981) (Johnson, J., dissenting).

463. See RESTATEMENT (SECOND) OF AGENCY § 381 (1957) (rule stated).

464. See *id.* § 381 comment a (rule stated).

465. See *id.* § 381 comment d (rule stated).

466. See *id.* § 381 comment b (rule stated); see also *Ellerby v. Spiezer*, 138 Ill. App. 3d 77, 485 N.E.2d 413, 416-17 (1985) (A partner in a dissolving firm is "not entitled to take any action with

and to deal fairly where there is an unavoidable conflict of interest.<sup>467</sup> These considerations suggest that, in the absence of special facts,<sup>468</sup> although pre-departure solicitation should be permitted, the departing attorney should be obliged to disclose such efforts to his firm.

A compromise along these lines would safeguard affected clients from deprivation of information relevant to selection of counsel or subjugation to a one-sided presentation of the facts, while at the same time allowing both departing attorneys and firms to protect their own legitimate interests through non-deceptive, non-overreaching conduct. Such an approach would also be consistent with normal agency principles which provide that where an agent (here, the exiting attorney) owes duties to two parties (here, both the client and the firm),<sup>469</sup> the agent must "act with a view to protecting them equally."<sup>470</sup>

Because fiduciary obligations are subject to alteration by agreement of the parties involved,<sup>471</sup> and because rules of professional ethics may affect the extent of fiduciary duties,<sup>472</sup> it may be important to take into account the understandings of the parties and applicable professional standards. Where it is understood that an agent will compete with her principal, such conduct breaches no fiduciary duty.<sup>473</sup> And where rules of attorney conduct specify that an attorney must notify her firm concerning pre-departure solicitation, or, alternatively, need not do so, those rules may well define the extent of both legitimate expectations and assertable legal rights.<sup>474</sup>

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respect to the unfinished business leading to purely personal gain, such as having the client discharge the partnership and hire him individually."

467. See RESTATEMENT (SECOND) OF AGENCY § 393 Comment d (1957) (rule stated).

468. See *infra* notes 471-74 (discussing effect of rules of ethics and agreements between agent and principal).

469. Technically, an associate attorney owes a duty to a firm client because he is a subagent of the client. "[O]ne who agrees with the agent to act for the principal in a transaction becomes a subagent, and owes to the principal all the duties of a fiduciary to a beneficiary." RESTATEMENT (SECOND) OF AGENCY § 428 comment a (1957).

470. *Id.* § 394 comment c.

471. See *id.* § 376 comment a (rule recognized); see also H. REUSCHLEIN & W. GREGORY, *supra* note 433, at 120 (ordinarily contract between principal and agent governs their rights and duties).

472. Cf. RESTATEMENT (SECOND) OF AGENCY § 385 comment a (1957) (agent is obliged to obey reasonable orders, but reasonableness of order depends in part on professional ethics).

473. See *id.* § 393 comment a; *id.* § 394 comments a & b.

474. To a large extent, fiduciary obligations under the law of agency are a function of what the parties to the relationship may legitimately expect from each other. See RESTATEMENT (SECOND) OF AGENCY § 376 comments a & b (1957) (agency duties, in absence of contrary agreement, are based on conduct reasonable persons would expect, and may be affected by illegality of employment, fraud on part of principal, and fact that one party is subject to disability); *id.* § 394 comment b

To the extent that fiduciary obligations may prohibit undisclosed pre-departure solicitation of firm clients, they may impose a more stringent standard of conduct upon an exiting attorney than either applicable ethical standards or governing tort principles. As noted earlier, those norms generally draw no distinction on grounds independent of fiduciary duties between pre-departure and post-departure solicitation,<sup>475</sup> and typically do not require a departing attorney to notify his firm of communications with firm clients.<sup>476</sup>

Although some fiduciary duties survive the termination of an agency relationship,<sup>477</sup> in the absence of a valid covenant not to compete,<sup>478</sup> *post-departure* solicitation of the clients of one's former principal does not constitute a breach of fiduciary obligations.<sup>479</sup>

### 5. *Use of Confidential Information*

It has been suggested, in at least one case,<sup>480</sup> that the impropriety of departure-based solicitation stems in part from the fact that such communications involve the misuse of confidential information. The theory underlying this complaint is captured in the *Restatement (Second) of Agency*:

To permit an agent to use, for his own benefit or for the benefit of others in competition with the principal, information confidentially given or acquired by him in the performance of or because of his duties as an agent would tend to destroy the freedom of communication which should exist between the principal and the agent.<sup>481</sup>

Regardless of what standards may apply in other contexts,<sup>482</sup> the

(1957) (with respect to competition, agent commits no breach of duty if, at time of employment, principal has reason to know that agent believes that such conduct is privileged).

475. See *supra* text preceding note 254 and text accompanying notes 364-66.

476. See *supra* Part II-E-3.

477. See RESTATEMENT (SECOND) OF AGENCY § 396 (1957) (discussing use of confidential information after termination of agency).

478. Such agreements are generally invalid between lawyers. See *infra* Part IV-A.

479. H. REUSCHLEIN & W. GREGORY, *supra* note 433, at 123, 124 (rule stated).

480. See Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979). The court there stated: "[The departing associates'] contacts unduly suggested a course of action for Adler Barish clients and unfairly prejudiced Adler Barish. No public interest is served in condoning use of confidential information which has these effects." 393 A.2d at 1185 (emphasis added); see also *id.* (agent may not take advantage of subsisting confidential relation).

481. RESTATEMENT (SECOND) OF AGENCY § 395 comment a (1957).

482. See H. REUSCHLEIN & W. GREGORY, *supra* note 433, at 124 (agent may not use written lists of customers which he compiled during employment and took with him when he departed); Annotation, *Former Employee's Duty, in Absence of Express Contract, Not to Solicit Former Em-*

argument against free use of information is difficult to accept in the case of a departing attorney, where the allegedly confidential data is the identities or addresses of firm clients.<sup>483</sup> Even under the antiquated formal announcement rule in legal ethics, it was anticipated that departing attorneys could make use of such information.<sup>484</sup> Moreover, the *Restatement (Second) of Agency* provides that while the use of confidential information by an agent normally is prohibited, whether during or after termination of an agency relationship, such rules do not apply where it has been agreed otherwise by the principal and agent.<sup>485</sup> Under these provisions, it might reasonably be postulated that insofar as a departing attorney and law firm are concerned, there *is* an agreement to the contrary: all of the attorneys involved, by reason of practicing law subject to the disciplinary authority of the state, have agreed to be bound by rules of professional ethics which, in virtually all jurisdictions, permit the use of such names and addresses for proper departure-based communications. Where, however, client names and addresses are not used to communicate with those individuals, but some other purpose—such as, for example, to secure a line of credit from a bank based on the cases of clients who have not, and may never, transfer their business to the departing attorneys—a different result may obtain.<sup>486</sup> Rules of professional ethics have never approved of such conduct.

Aside from client names and addresses, the confidential information which a present or former agent is obliged to hold inviolate may be segregated into at least two categories: trade secrets and client secrets. Trade secrets typically concern “unique business methods”<sup>487</sup>

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*ployer's Customers or Otherwise Use His Knowledge of Customer Lists Acquired in Earlier Employment*, 28 A.L.R.3d 7 (1969); Silberberg & Lardiere, *Eroding Protection of Customer Lists Under the Uniform Trade Secrets Act*, 42 BUS. LAW. 487 (1987); see also *Moss, Adams & Co. v. Shilling*, 179 Cal. App. 3d 124, 224 Cal. Rptr. 456, 457 (1986) (use of rolodex by accounting firm employees to obtain client names and addresses did not constitute unfair competition).

483. *Accord* Recent Decision, *supra* note 309, at 784 (arguing that client list should not be protectible in departing attorney context).

484. See *supra* Part II-B-1. The *Restatement (Second) of Agency* draws a distinction between names of customers casually retained in memory (which may be used by an agent after termination of the agency relation) and written or memorized lists of names (which may not be used). See RESTATEMENT (SECOND) OF AGENCY § 396 & comment b (1957). Rules of legal ethics, perhaps mindful of lawyerly proclivities for writing things down and for saving written records, have never purported to embrace this distinction.

485. See RESTATEMENT (SECOND) OF AGENCY §§ 395-96 (1957).

486. *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175, 1177 (1978) (list of 88 cases used to obtain \$150,000 line of credit for new firm; injunction granted), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979).

487. RESTATEMENT (SECOND) OF AGENCY § 395 comment b (1957).

or "processes which the employer has kept secret from other manufacturers"<sup>488</sup> or competitors. It is difficult to imagine what trade secrets might be learned in the course of legal representation that would be relevant to departure-based solicitation, for ordinary skills, general information, and gradually-acquired expertise do not fall within this category.<sup>489</sup> The law does not "compel a man who changes employers to wipe clean the slate of his memory."<sup>490</sup> Consequently, the trade secret ban may have little relevance to the questions here at issue.<sup>491</sup>

As to client secrets—information about the nature or facts of the client's case or the client's own idiosyncrasies—the right to object to the disclosure or use thereof should logically rest with the client, not with the firm. Absent complaint by the client, it reasonably might be contended that there is no independent breach of fiduciary obligation which the firm may deem actionable when such information is used only in communicating with the clients to whom it pertains. Especially is this true where, as in the departure context, there are at stake strong first amendment interests in commercial speech and dissemination of truthful information. At present, there appear to be no cases on the question.

In the end, the issue of misuse of confidential information is one of prioritization of values. Courts must decide whether, in view of both the attendant risks of overreaching and the available safeguards, it is more important for clients to receive departure-related information bearing upon their rights to select counsel than for firms to be insulated from the risk of losing clientele. If so, then presumably that conduct will be deemed lawful, even when the action is cast in terms of breach of fiduciary duties, for as the *Restatement* has recognized, "[a]n agent is privileged to reveal information confidentially acquired by him in the course of his agency in the protection of a superior

488. *Id.* § 396 comment b.

489. *See id.* § 395 (rule does not apply to general knowledge); *id.* § 395 comment b (rule does not apply to "matters of common knowledge in the community nor to special skill which the employee has acquired because of his employment"); *id.* § 396(b) (after termination, "agent is entitled to use general information concerning the method of business of the principal"); *id.* § 396 comment b (former agent may use "methods of doing business and processes which are but skillful variations of general processes known to the particular trade").

490. *Peerless Pattern Co. v. Pictorial Review Co.*, 147 A.D. 715, 132 N.Y.S. 37, 39 (1911).

491. *Cf.* Recent Decision, *supra* note 309, at 783-84 (noting that in *Adler, Barish* there was "no indication" that departing associates used any allegedly confidential information other than names of clients and knowledge that those clients had active cases). *But see id.* at 778 (suggesting contrary).

*interest* of himself or of a third person."<sup>492</sup> Whether this is the choice which will be made—as this Article advocates<sup>493</sup>—must await future court decisions.

### 6. *Improperly Acquired Information or Client Files*

The use of information acquired though improper means, such as by eavesdropping or unauthorized examination of records, will readily be deemed to be a breach of fiduciary duties.<sup>494</sup> Consequently, it seems clear that a departing attorney may not solicit the business of firm clients whom she has not personally served, where information about those persons is secured through improper channels.<sup>495</sup>

Similarly, unauthorized removal of client files appears certain to be regarded as a breach of fiduciary duties, for throughout all of the literature on attorney conduct, such conduct is uniformly condemned.<sup>496</sup> Indeed, even where the attorney acts out of fear that former partners will refuse to turn over files at the client's request, unconsented removal has been deemed improper.<sup>497</sup> Of course, once a client has transferred her representation to a former attorney of the firm, the firm is normally obliged to surrender the client's papers and to assert any lien that it may have against the proceeds of any pending litigation.<sup>498</sup>

492. RESTATEMENT (SECOND) OF AGENCY § 395 comment f (1957) (emphasis added).

493. See *supra* Part II-C-3-a.

494. See RESTATEMENT (SECOND) OF AGENCY § 396 comment c (1957).

495. Interestingly, virtually none of the precedent dealing with the civil and disciplinary liability of departing attorneys has considered situations involving the solicitation of firm clients by attorneys who have not worked for those individuals. Apparently, few attorneys consider the likelihood of successful solicitation of such "strangers" sufficiently high to offset the risks of discipline or civil prosecution. Undoubtedly, in the case of oral solicitation, those risks would be substantial, for in addition to the rule noted in the text, the formal announcement rule and the professional relationship exception to the solicitation ban are inapplicable to communications with persons not previously served by the departing attorney. See *supra* Parts II-B-1 & II-C-2-b. *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988), held that non-deceptive targeted mail is constitutionally protected. Under this holding, written forms of solicitation would likely subject defendants to more limited liability.

496. *Attorney Grievance Commission of Md. v. Kahn*, 290 Md. 654, 431 A.2d 1336, 1348 (Ct. App. 1981) (salaried associate's removal and photocopying of records summarizing clients' files, in anticipation of subsequent representation of clients due to disbarment of sole partner in firm, was illegal and unethical); ABA Comm. on Professional Ethics, Informal Op. C-787 (1964) (removal of files by associate is "highly improper, unethical and a violation of his obligation to his former employers"); see also Idaho State Bar Comm. on Ethics, Formal Op. 108 (1981), summarized in ABA/BNA Ethics Opinions, *supra* note 26, at 801:2902 (departing associate may not take client files).

497. Michigan State Bar Comm. on Professional and Judicial Ethics, Informal Op. CI-681, at 3-4 (1981), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:4830 (rule stated).

498. See *supra* note 165 (citing *Dinkes, Mandel, Dinkes & Morelli v. Ioannou*, N.Y. Sup. Ct.,

### 7. *Effect of Client's Retention of Departing Attorney on Firm's Claim for Breach of Fiduciary Duties*

There is authority that an action for breach of fiduciary duties is not defeated by proof that an affected client has discharged the plaintiff-firm in favor of a departing attorney. Thus, in *Rosenfeld, Meyer & Susman v. Cohen*,<sup>499</sup> two partners allegedly wrongfully dissolved a law partnership<sup>500</sup> and then entered into an employment agreement with a major patent antitrust client of the former firm, which subsequently yielded a multi-million dollar fee.<sup>501</sup> The California Court of Appeal held that the client's post-dissolution discharge of the dissolved firm did not bar an action based in part on alleged breach of the departing partners' fiduciary obligations to wind up firm affairs and to take no action with respect to unfinished business leading to purely personal gain.<sup>502</sup>

## IV. EFFORTS TO AVOID DEPARTURE-BASED DISPUTES OVER CLIENTS

### A. *Contractual Limitations on Solicitation of or Acceptance of Employment by Firm Clients*

Despite attempts by practitioners to the contrary,<sup>503</sup> there is little

1st Dept., N.Y. County, *summarized in ABA/BNA Current Reports, supra* note 63, at 255-56 (Aug. 19, 1987), and other authorities).

499. 146 Cal. App. 3d 200, 194 Cal. Rptr. 180 (1983).

500. 194 Cal. Rptr. at 187.

501. *Id.* at 185.

502. *Id.* at 190; *id.* at 191 ("a partner completing unfinished business cannot cut off the rights of the other partners in the dissolved partnership by the tactic of entering into a 'new' contract to complete such business"); *see also supra* note 34 (citing similar cases).

503. *See Lavine, supra* note 2, at 8, col. 3:

Litigation over allegedly "stolen" clients has led at least one lawyer to develop precautionary measures.

Windle Turley, a personal injury specialist in Dallas, got into a dispute over clients when an associate, R. Edward Pfister, Jr., left the firm in 1976.

Mr. Pfister sued Mr. Turley, claiming his former boss "orally and in writing" had attempted to cajole some of the disputed clients back to the parent firm. The case was settled out of court.

Determined to avoid such a confrontation again, Mr. Turley added a clause to the contract he requires all new employees to sign. The clause stipulates that all clients that have hired the firm while the associate was an employee "will be neither solicited nor sought" by the departing attorney.

*See also Hildebrandt & Bright, A Practical Primer on Withdrawal*, in WITHDRAWAL, RETIREMENT & DISPUTES 11-12 (E. Berger ed. 1986) (setting forth language which can be included in partnership or shareholder agreement to govern a departing partner's contact with firm clients upon termination).

reason to think that disputes over solicitation of firm clients can be avoided through provisions in employment or partnership agreements if the parties thereto later choose not to be bound. Such contractual terms would likely run afoul of the ethical standards against non-competition agreements.<sup>504</sup> Rule 5.6 of the Model Rules states in part: "A lawyer shall not participate in offering or making: (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."<sup>505</sup> This language is substantially identical to that included in the Model Code.<sup>506</sup> A violation of the prohibition stated in either codification will subject an attorney to discipline<sup>507</sup> and render the restrictive covenant unen-

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504. See generally ABA Comm. on Professional Ethics, Formal Op. 300 (1961) (covenant restricting practice in city and county for two years held unethical); *id.* Informal Op. 521 (1962) (covenant restricting acceptance of employment offered by client of attorney's former firm held unethical); *id.* Informal Op. 1072 (1968) (partnership agreement restricting withdrawing partners from performing legal services within the same county as the remaining partners for period of five years is unethical); *id.* Informal Op. 1171 (1971) (partnership agreement prohibiting departing attorney from accepting employment by certain clients for two years held unethical); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1301 (1975) (agreement between non-lawyer-employer and lawyer-employee prohibiting lawyer from accepting employment with competitor after termination is unethical); *id.* Informal Op. 1417 (1978) (agreement prohibiting withdrawing partner from hiring or being associated with, for period of years, associates working in firm at time of partner's departure held invalid). The leading case in the field is *Dwyer v. Jung*, 133 N.J. Super. 343, 336 A.2d 498, 499 (Ch. Div.) (covenant restricting practice by former partners held void as against public policy), *aff'd*, 137 N.J. Super. 135, 348 A.2d 208 (App. Div. 1975). For a thoughtful critique of *Dwyer* and discussion of the history and judicial treatment of restrictive covenants relating to law practice and other fields, see Note, *Attorneys—Professional Responsibility—Restrictive Covenants*, 4 *FORDHAM URBAN L.J.* 195, 208 (1975) (criticizing *Dwyer* holding on basis that it presumes without proof that clients are injured by lawyer restrictive covenants and also discourages firms from employing associates and lawyers from creating new partnerships). One earlier decision, criticized in *Dwyer*, upheld a restrictive covenant ancillary to the sale of a law practice. *Hicklin v. O'Brien*, 11 Ill. App. 2d 541, 138 N.E.2d 47 (1956). However, another pre-*Dwyer* case struck down a provision in an employment agreement prohibiting practice for ten years within ten miles of a county. *Alexander v. Flick*, 154 Kan. 446, 119 P.2d 464, 465 (1941). More recent cases follow *Dwyer*. See *In re Silverberg*, 75 A.D.2d 817, 427 N.Y.S.2d 480, 481-82 (1980) (agreement prohibiting departing attorney from representing some former client's of partnership held invalid).

505. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1983).

506. Disciplinary Rule 2-108(A) provided: "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." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(A) (1980).

507. Where a non-competition provision is *unwillingly* foisted upon another attorney as a take-it-or-leave-it condition of employment, it reasonably might be argued that only the employer-attorney(s), not the employee-attorney, should be subject to discipline. As noted below in the text, the rule is intended, at least in part, to protect vulnerable lawyers seeking employment from the imposition of such restrictions on their right to practice. Accordingly, it would be ironic, if not legally



forceable as against public policy.<sup>508</sup>

The reasons underlying the ethical rule are twofold.<sup>509</sup> On the one hand, it protects the public from having only a restricted pool of attorneys from which to select counsel.<sup>510</sup> On the other, the rule protects attorneys, particularly young practitioners, from bargaining away an important aspect of their right to open offices of their own upon leaving a firm or other employer.<sup>511</sup> These considerations dictate that ordinary commercial standards not be used to evaluate the reasonableness of lawyer restrictive covenants.<sup>512</sup>

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unsound, to discipline the employee-attorney under the very rule intended to safeguard her from her inability to protect herself. In other areas, including the law of torts, the law has been reticent to base liability on a statutory violation, where the statute was intended to protect the class of which the violator was a member. See RESTATEMENT (SECOND) OF TORTS § 483 comment c (1965). *But see* ABA Comm. on Professional Ethics, Formal Op. 300 (1961) (stating that "it would be improper for the [employer] lawyer to require . . . [a covenant not to compete for two years] and likewise for the employed lawyer to agree to it") (emphasis added).

508. *Hagen v. O'Connell, Goyak & Ball*, 68 Or. App. 700, 683 P.2d 563, 565 (1984) (invalid restrictive covenant severed and remainder of law corporation buy-sell agreement enforced); *Dwyer v. Jung*, 133 N.J. Super. 343, 336 A.2d 498, 499 (Ch. Div.) (a restrictive covenant which parceled out named clients to specific partners upon dissolution and prevented one partner from intruding upon another's clients for a period of five years was void as against public policy), *aff'd*, 137 N.J. Super. 135, 348 A.2d 208 (App. Div. 1975); *Hazard*, *supra* note 23, at 32 ("The rationale is that such restrictions limit the opportunity of present clients of the firm, and of prospective clients, to select the lawyer of their choice. Entering into such an agreement is itself professional misconduct, and under prevailing legal principles the contract is unenforceable as against public policy.").

509. A third potential justification is that restrictive covenants "lead to a bartering of clients." ABA/BNA Manual, *supra* note 2, at 51:1201.

510. See *Hagen v. O'Connell, Goyak & Ball*, 68 Or. App. 700, 683 P.2d 563, 565 (1984) (quoting *Gray v. Martin*, 63 Or. App. 173, 663 P.2d 1285, 1290) ("disciplinary rule is designed to 'govern the relationships between attorneys for the protection of the public' . . . [and embodies] the public policy of making legal counsel available, insofar as possible, according to the wishes of a client"); *Dwyer v. Jung*, 133 N.J. Super. 343, 336 A.2d 498, 501 (Ch. Div.) (restrictive covenant held invalid where it interfered with clients "unlimited choice of counsel"), *aff'd*, 137 N.J. Super. 135, 348 A.2d 208 (App. Div. 1975); 1 G. HAZARD & W. HODES, *supra* note 23, at 486 (rule stated); see also State Bar of Texas Comm. on Professional Ethics, Op. 422 (1984), reprinted at 48 TEX. B.J. 209, 210 (Feb. 1985) (recognizing that rule supports "right of informed choice by the client of an attorney of competence and integrity"); District of Columbia Legal Ethics Comm., Op. 181 (undated), summarized in ABA/BNA Manual, *supra* note 2, at 901:2307 (the "ABA and courts have repeatedly found ethical problems with restrictive covenants in lawyer's employment agreements because they interfere with the client's freedom to choose counsel").

511. 1 G. HAZARD & W. HODES, *supra* note 23, at 486 (rule stated); ABA/BNA Manual, *supra* note 2, at 51:1201 (quoting Model Rule 5.6) (restrictive covenants limit "professional autonomy"); see also ABA Comm. on Professional Ethics, Formal Op. 300 (1961) (covenant restricting practice in city and county for two years is "an unwarranted restriction on the right of a lawyer to choose where he will practice and inconsistent with our professional status").

512. *Dwyer v. Jung*, 133 N.J. Super. 343, 336 A.2d 498, 500 (Ch. Div.) (rule stated), *aff'd*, 137 N.J. Super. 135, 348 A.2d 208 (App. Div. 1975); ABA/BNA Manual, *supra* note 2, at 51:1201 (same).

The language in the Model Code and the Model Rules has been construed liberally to accomplish the objectives of the rule. As such, the rule has been held to bar not only simple geographic or time limitations on the right to practice,<sup>513</sup> but many sophisticated contrivances designed to achieve similar ends. Agreements purporting to broadly prohibit the use of confidential information or general knowledge gained while working at a firm,<sup>514</sup> or to forbid "interference" with a firm's business,<sup>515</sup> or to require a former attorney to divide fees received from the firm's former clients for work performed after the attorney's withdrawal,<sup>516</sup> or to mandate payment of liquidated dam-

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513. See, e.g., *Alexander v. Flick*, 154 Kan. 446, 119 P.2d 464, 465 (1941) (employment contract provision barring practice within ten miles of county for ten years held invalid); Idaho State Bar Comm. on Ethics, Formal Op. 108 (1981), summarized in ABA/BNA Ethics Opinions, *supra* note 26, at 801:2902 (stating rule that geographic restrictions are prohibited); New Jersey Supreme Court Advisory Comm. on Professional Ethics, Op. 147, 92 N.J.L.J. 177 (1969) (agreement barring practice in county for five years held unethical); see also ABA Comm. on Professional Ethics, Formal Op. 300 (1961) (covenant restricting practice in city and county for two years held invalid).

514. See District of Columbia Legal Ethics Comm., Op. 181, at 12-13 (undated), summarized in ABA/BNA Manual, *supra* note 2, at 901:2307 (provisions requiring confidentiality of information related to internal operations and methodology of clients and of firm, and of pleading and practice forms, documents, correspondence, and other written materials prepared by firm were "too sweeping" and "seriously reduce[d] a departing attorney's right to practice-law" by prohibiting the use of general knowledge as to the practice of law that he gained at firm, documents that were publicly filed, and generally available information on firm clients.").

515. District of Columbia Legal Ethics Comm., Op. 181, at 11-14 (undated), summarized in ABA/BNA Manual, *supra* note 2, at 901:2307 (agreement requiring attorney "not to disrupt, impair or interfere with the business of the firm in any way, whether by way of interfering with or raiding its employees, or disrupting or interfering with the firm's relationship with its clients," under penalty of injunctive relief and \$150,000 liquidated damages, was "grossly overreaching," "truly oppressive," and violative of DR 2-108(A)).

516. See *In re Silverberg*, 75 A.D.2d 817, 427 N.Y.S.2d 480, 481-82 (1980); see also District of Columbia Legal Ethics Comm., Op. 122 (1983), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:2307 (memorandum agreement may not require departing attorney to share percentage of his fees from specific clients for specific period of time after attorney departs); District of Columbia Bar Legal Ethics Comm., Op. 65 (1979), summarized in DIGEST SUPP. 1980, *supra* note 63, at § 10761 (agreement requiring lawyer who performs legal services for firm's former clients to pay firm 40% of net billings for such services for two years is unethical restriction on right to practice). In a state, such as Illinois, with an ethics code not containing a non-competition provision parallel to DR 2-108(A) of the Model Code or Rule 5.6(a) of the Model Rules, the same result may be reached under rules limiting fee splitting with outside attorneys. See Illinois State Bar Ass'n Comm. on Professional Responsibility, Op. 86-16 (1987), summarized in ABA/BNA Manual, *supra* note 2, at 901:3005 ("A law firm has no ethical or legal right to the continued patronage of any client, and attempts to require a division of fees without proportionate division of services or responsibilities are contrary to Rule 2-107" and are thus improper.); see also Illinois State Bar Ass'n Comm. on Professional Responsibility, Op. 84-15 (1985), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:3023 (professional corporation lawyer-employees may not be required to sign agreement providing that upon termination "each lawyer will remit to the corporation 25 percent of all legal fees

ages,<sup>517</sup> all have been held invalid.

More directly on point, the Texas ethics committee has squarely held that an agreement is unethical if it attempts to prohibit a departing attorney from soliciting firm clients.<sup>518</sup> The committee reasoned that problems appendant to attorney solicitation were adequately addressed by the ethics rules governing solicitation, and that a restrictive covenant was "not needed to assure compliance of a lawyer therewith."<sup>519</sup> The committee further held, in line with other authorities,<sup>520</sup> that an attorney could not be barred from accepting employ-

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collected from any entity or individual who was a client of corporation at time of lawyer's departure.").

517. District of Columbia Legal Ethics Comm., Op. 181 (undated), *summarized in* ABA/BNA Manual, *supra* note 2, at 901:2307 (*in terrorem* effect would inhibit a lawyer from pursuing his profession); State Bar of Mich. Comm. on Professional and Judicial Ethics, Op. CI-1145 (1986), *summarized in* ABA/BNA Manual, *supra* note 2, at 901:4754 (liquidated damages intended to reimburse former employer for lost goodwill of clients who chose to retain departing lawyer are unethical).

518. State Bar of Texas Comm. on Professional Ethics, Op. 422 (1984), *reprinted in* TEX. B.J. 209, 210 (Feb. 1985); *see also* 1 G. HAZARD & W. HODES, *supra* note 23, at 487 (criticizing court decision which enjoined departure-based solicitation by associates on ground that if solicitation is not allowed former firm will have a "de facto covenant not to compete"); Hazard, *supra* note 23, at 36 ("The implication of Model Rule 5.6 is that there should be no such restriction on post-termination soliciting. . . . [P]retermination negotiation should also be said to be legitimate. There may also be a First Amendment basis for this proposition.").

*But see* District of Columbia Legal Ethics Comm., Op. 77 (undated), *cited in* District of Columbia Legal Ethics Comm., Op. 181, at 5 (undated), *summarized in* ABA/BNA Manual, *supra* note 2, at 901:2307 (employment agreement requiring departing attorney who solicits clients of his former firm other than by general announcement to pay liquidated damages for period of three years does not unethically restrict right to practice in violation of DR 2-108 inasmuch as departing lawyer may, without penalty, service clients who arrive in response to mailed announcements); District of Columbia Legal Ethics Comm., Op. 97, at 6 (1980), *summarized in* ABA/BNA Ethics Ops., *supra* note 26, at 801:2303 (firm may enter into agreement with associate which limits associate's right to solicit firm clients upon termination, so long as right to send formal announcement is preserved). The reasoning of Opinion 97 is open to question. The Committee there stated that because the firm did not object to mailed announcements, "clients will receive information *sufficient* to allow them to choose whether they wish to be represented by the firm or by the departing attorney." *Id.* (emphasis added). If the mailed announcement envisioned by this opinion is as terse as those communications permitted under the classic formal announcement rule (*see supra* Part II-B-1), the sufficiency of the information disclosed to assist the client's decision making process may reasonably be doubted.

519. State Bar of Texas Comm. on Professional Ethics, Op. 422 (1984), *reprinted in* TEX. B.J. 209, 210 (Feb. 1985).

520. *See In re Silverberg*, 75 A.D.2d 817, 427 N.Y.S.2d 480, 482 (1980) (an agreement cannot restrict a departing partner's "practice by precluding him from representing former clients of the partnership that were originally obtained by" another partner); ABA Comm. on Professional Ethics, Informal Op. 1171 (1971) (partnership agreement prohibiting departing attorney from accepting employment by certain clients for two years held unethical); District of Columbia Legal Ethics Comm., Op. 181 (undated), *summarized in* ABA/BNA Manual, *supra* note 2, at 901:2307 ("a departing lawyer cannot ethically be restricted from responding to unsolicited questions about representation from firm clients or from representing them if they request it"); New York County

ment offered by clients of his former firm.<sup>521</sup> Any restriction on the attorney's ability to accept employment, the Texas committee found, would "contravene the right of informed choice by the client of an attorney of competence and integrity."<sup>522</sup> This approach to issues in departure-based solicitation and acceptance of employment reflects a policy-sensitive application of the rule.

Based on a plain reading of its language, the proviso concerning retirement benefits, stated in the Model Code<sup>523</sup> and the Model Rules<sup>524</sup> versions of the restrictive covenant rule, presumably is applicable only where the departing attorney intends to retire *from practice entirely*, not merely retire *from a firm*.<sup>525</sup> To hold otherwise would be to substantially undercut, essentially by grammatical slight of hand, the protections conferred *on the public* by the main portion of the rule. Accordingly, it is unlikely that a tribunal would hold that a payment of "benefits" to a departing attorney who still intends to practice is sufficient to validate a non-competition or non-solicitation agreement.<sup>526</sup> Thus, the Oregon Court of Appeals has held that a

Lawyers Ass'n, Op. 621 (1974), summarized in DIGEST SUPP. 1975, *supra* note 56, at ¶ 9212 (attorney may not enter into agreement not to accept employment from former firm client); see also ABA Comm. on Professional Ethics, Informal Op. 521 (1962) (contract of employment may not restrict departing attorney from subsequently handling work of client of attorney's former firm); District of Columbia Legal Ethics Comm., Op. 122 (1983), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:2307 (partnership agreement may not prohibit departing attorney from representation of firm clients for certain duration of time); Idaho State Bar Comm. on Ethics, Formal Op. 108 (1981), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:2902 (right to practice law cannot be restricted with respect to potential clientele).

521. State Bar of Texas Comm. on Professional Ethics, Op. 422 (1984), reprinted in TEX. B.J. 209, 210 (Feb. 1985).

522. *Id.*

523. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(A) (1980) ("except as a condition to the payment of retirement benefits").

524. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1983) ("except an agreement concerning benefits upon retirement").

525. *Cf.* 1 G. HAZARD & W. HODES, *supra* note 23, at 486:

The purpose and meaning of the last clause of Rule 5.6(a) is not crystal clear. It appears to mean that when a lawyer is retiring and winding up his affairs with a firm, he may be required to "stay retired" as a condition of the settlement. Such an agreement appears to contradict the spirit (if not the letter) of the rest of the Rule, for it would prevent a lawyer from having a change of plans and making himself available to clients again.

526. *Cf.* Virginia State Bar Standing Comm. on Legal Ethics, Op. 428 (1983), summarized in ABA/BNA Ethics Ops., *supra* note 26, at 801:8807 (provision in partnership agreement may not condition member's right to receive termination compensation on covenant against competition, since such provision restricts right to practice law). *But see* Virginia State Bar Standing Comm. on Legal Ethics, Op. 880 (1987), summarized in ABA/BNA Manual, *supra* note 2, at 901:8715 (restriction on lawyer who left firm from practicing within geographic radius while collecting benefits under

provision in a partnership agreement conditioning a portion of a withdrawing partner's right to compensation on non-practice in three counties was unethical under DR 2-108(A) and unenforceable under the law of contracts.<sup>527</sup> The court wrote:

This is certainly a restriction on . . . [the attorney's] right to practice. The agreement is not a condition to payment of retirement benefits as plaintiffs claim. If retirement has the same meaning as withdrawal in DR 2-108(A), then the disciplinary rule has no meaning. Every termination of a relationship between law partners would be a retirement, and agreements restricting the right to practice would always be allowed.<sup>528</sup>

*B. Partnership and Employment Agreements Purporting to Mandatorily Allocate Clients Upon Departure of Attorney*

An attorney may not lawfully enter into an agreement with his firm which provides that upon termination of his association therewith he shall receive certain files without client consent.<sup>529</sup> Such an agreement is void as against public policy in that it deprives clients of their "untrammelled" right to be represented by counsel of their choice.<sup>530</sup> In refusing to enforce one such agreement, which provided that upon departure an associate would receive the files of those clients whom he had secured for the firm, the Appellate Court of Illinois vividly summarized the issue. To uphold the provisions in question, the court stated, "would allow clients to be unknowingly treated like objects of commerce, to be bargained for and traded by merchant-attorneys like beans and potatoes."<sup>531</sup> Moreover, not only will such

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deferred compensation plan is unethical; however it is ethical for lawyer to receive benefits derived from funding by employer corporation or third parties).

527. *Gray v. Martin*, 63 Or. App. 173, 663 P.2d 1285, 1290-91 (1983); *see also Hagen v. O'Connell, Goyak & Ball*, 68 Or. App. 700, 683 P.2d 563, 565 (1984) (stock valuation clause which provided for 40% penalty in value of stock if terminating attorney did not enter into noncompetition agreement was unenforceable).

528. *Gray*, 663 P.2d at 1290; *see also Kentucky Bar Ass'n Ethics Comm., Op. E-326* (1987), summarized in ABA/BNA Manual, *supra* note 2, at 901:3903-04 (not every termination of or withdrawal from a professional relationship can be treated as a retirement within the meaning of DR 2-108(A); provision in partnership agreement conditioning payment to departing partner on non-practice in state for two years would conflict with disciplinary rules).

529. *Corti v. Fleisher*, 93 Ill. App. 3d 517, 417 N.E.2d 764, 767-68 (1981) (agreement giving departing attorney control of files for clients he recruited held invalid where complaint failed to allege that the clients were aware of or consented to the agreement or that an attorney-client relationship ever existed between him and the clients). *But see Feerick, Avoiding and Resolving Lawyer Disputes*, in WITHDRAWAL, RETIREMENT & DISPUTES 7 (E. Berger ed. 1986) ("[A written partnership] agreement provides an excellent opportunity for defining . . . rights upon withdrawal").

530. *Corti*, 417 N.E.2d at 768-69.

531. *Id.* at 769. *See also id.* (a lawyer may not "stake claim to . . . [clients] as a merchant

an agreement be unenforceable, but knowing use thereof may subject the attorney to discipline. In other areas of legal ethics, authorities have held that the knowing use in a document of a provision void as against public policy is itself unethical conduct prejudicial to the administration of justice.<sup>532</sup>

### C. *Viable Alternatives in Human Relations*

The foregoing sections might suggest that there is little that a firm can do to protect itself from the loss of clients to departing partners or associates. That, fortunately, is not the case, as indeed there are several important options which lie not in the sphere of legal maneuvers but in the field of personal relations.

First, law firms can and should address the often needless problems in job satisfaction which give rise to many departures. As observed earlier in the margin,<sup>533</sup> the reasons underlying the great recent increase in attorney mobility are myriad. But as much as that is the case, the factors triggering decisions to leave—and to compete with one's former firm—are often within a law firm's reach and influence.<sup>534</sup> To the extent that attorneys are inadequately paid, have little control over their work, are discourteously treated, or are excluded from critical decision-making processes, they surely are both more

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might regard goods or chattels"); *Palmer v. Breyfogle*, 217 Kan. 128, 535 P.2d 955, 965-66 (1975) ("Members of the public who seek the services of an attorney cannot be treated by him as mere merchandise or articles of trade in the market place. A client is not an article of property in which a lawyer can claim a proprietary interest, which he can sell to other lawyers expecting to be compensated for the loss of a property right.").

532. See T. Shaffer, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* 454 (1985):

If a waiver in a contract has been held by a court of last resort to be void as against public policy as a matter of law, . . . [a lawyer must refuse a client's request to include it in a contract] for if he should comply with his client's request he would thereby become a party to possible deception of the other party to the contract.

(quoting an ethics opinion of the Association of the Bar of the City of New York); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c), (d) (1983) ("It is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty . . . [or] (d) engage in conduct that is prejudicial to the administration of justice.").

533. See *supra* note 8.

534. Cf. Early & Long, *A Look at Mid-Career Change*, XIX A.B.A. SECTION ON LEGAL EDUC. AND ADMISSIONS TO BAR SYLLABUS 1, 3 (1988) ("Emphasis on law as requiring management and economic approaches should not hide the fact that it is also built on personal relationships. . . . [L]aw firms, corporations, and other practice environments can do much to nurture and enhance satisfaction.").

likely to go elsewhere and to be less loyal upon their departure.<sup>535</sup> In contrast, where fair working conditions and genuine personal concern are the hallmarks of intra-firm relations, it is undoubtedly the case that fewer attorneys will wish to leave and that those who do will typically bear less enmity. Commentators on the legal profession report that some firms, especially "mega-firms," look upon young associates as replaceable commodities.<sup>536</sup> Where that is true, problems attending departures should come as no surprise. Most attorneys ask more of their professional lives than a handsome paycheck on a regular basis. They seek, in many instances, intellectual stimulation, camaraderie, a stake in the future, and a sense of community.<sup>537</sup> If a firm ignores these human yearnings, it does so at its peril.

Second, when the firm is the party to make the decision that it is necessary for an attorney to leave, it must proceed thoughtfully. Notification of the attorney and structuring of the winding-down period must bespeak a considerate understanding of human nature and the realities of the job market if needless scars and ill will are to be avoided.<sup>538</sup>

Clients, too, deserve—indeed, demand—to be well treated.<sup>539</sup> The firm which fails to recognize that fact runs a serious risk that when a client is given the option of following a departing attorney, rather than staying with the firm, greener fields may beckon.

One practice which undoubtedly exacerbates the risk of depar-

535. See Nelson, *supra* note 2, at 109, 141 (firms now offer associates alienating work in litigation, greater distance from clients, higher rates of turnover, and less certainty about making partner).

536. Cf. Rehnquist, *supra* note 4, at 153 ("[O]ne might argue that such a firm [which requires associates to bill more than 2000 hours per year] is treating the associate very much as a manufacturer would treat a purchaser of one hundred tons of scrap metal."); Gilson & Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 350 (1985) ("the firm earns additional profit by buying the associates' time at 'wholesale' and selling it to the client at 'retail'"); Nelson, *supra* note 8 (discussing partner-associate ratios and fact that associates are critical source of revenue for partnership); Ponce, *Rehnquist Raps Lawyers' Financial Arrogance*, Wash. Times, Sept. 2, 1988, at A5, col. 1 ("Big firms have become obsessed with 'billable hours.'").

537. Cf. *The Glass Ceiling*, 74 A.B.A. J., June 1988, at 49 ("[women] desert the megafirms in droves for lack of mentors, client contact, camaraderie, and flexible hours").

538. See Richardson, *For Graceful Parting, Follow Corporate Model*, Nat'l L.J., Sept. 5, 1988, at 14, col. 4 (in contrast to an ambiguous "quiet and kind" approach which can mislead the attorney, "an open, clearly defined agenda results in less threatened or actual litigation and engenders more good will between all parties").

539. See Buckner, *What Your Clients Think of You*, 17 J. MO. B. 468, 480 (1961) (clients like lawyers to be friendly, appreciate honest interest in their cases, and resent attitudes of superiority); see also T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* 142 (1976) (discussing "Qualities of a Good Attorney" stated in handbook of National Organization of Women).

ture-based loss of clients is that of over-delegation of responsibility to junior attorneys. To the extent that senior attorneys fail to maintain client contact or to supervise the work of subordinates, it is not surprising that junior attorneys should regard clients as their own or that clients should feel a special bond to those junior attorneys. Accordingly, senior attorneys often might be well-advised to maintain a greater degree of participation in the affairs of firm clients. Undoubtedly, the correct balance may be difficult to strike. To the extent that senior attorneys intervene in the details of representation they risk generating job dissatisfaction among junior attorneys who may feel either distrusted by their seniors or dissatisfied because they have been given little control or responsibility. The task, however, is not impossible, only difficult. At a minimum, it demands genuine personal concern for the welfare of both clients and other attorneys in one's firm.

## V. SYNTHESIS

### A. Summary of Arguments

The preceding sections illustrate the doctrinal complexity of the issues raised by departure-based solicitation. At the risk of omission and simplicity, however, the salient points of the analysis may be summarized as follows:

As to disciplinary liability, the formal announcement rule, which once fully defined the ethical contours for communications by exiting attorneys (and which remains in force in a number of states), is of doubtful continuing validity.<sup>540</sup> The restrictions it purports to impose on the form and content of departure announcements are inconsistent with recent Supreme Court expressions concerning speech about legal services.<sup>541</sup> The proper measure of departure communications is undoubtedly that defined by the rules which have emerged from the Supreme Court cases dealing with in-person solicitation and use of targeted mail. However, the application of these standards to the phenomena of firm-switching and firm dissolution is presently at a nascent stage, and thus many difficult questions remain open.

There is substantial support for the view that *oral* communications initiated by a departing attorney with firm clients whom the attorney has served should normally be deemed permissible under the

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540. See *supra* Part II-B-1.

541. See *supra* Parts II-B-2 & II-B-3.



professional relationship exception to the solicitation ban.<sup>542</sup> They should not give rise to discipline, unless accompanied by actual wrongdoing, such as use of deceptive statements or exercise of undue influence.<sup>543</sup> As to *written* communications, the regnant standard is set by the Supreme Court's decision in *Shapero v. Kentucky Bar Association*,<sup>544</sup> which held that targeted direct-mail communications by attorneys are within the ambit of the first amendment. Under *Shapero*, it seems clear that non-deceptive writings mailed by departing attorneys to individuals known to need legal services, including firm clients (previously served by the departing attorney or not), will be constitutionally protected and thus insulated from disciplinary sanctions.

The issue of civil liability—whether based on tortious interference with contract<sup>545</sup> or breach of fiduciary duties<sup>546</sup>—is inextricably linked to the disciplinary analysis, for each of the two prevailing theories of liability takes some account of the professional propriety of allegedly wrongful attorney conduct.<sup>547</sup> If developing precedent ultimately rejects the view that in-person, departure-based solicitation is under some circumstances permissible, then it is likely that such conduct, if undertaken with regard to active firm clients<sup>548</sup> and not initiated at the request of such persons,<sup>549</sup> will also give rise to civil liability as conduct constituting tortious interference with a protected relationship (regardless of whether the solicitation occurs before or

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542. See *supra* Part II-C-2.

543. See *supra* Part II-C-3. As noted earlier, some states proscribe solicitation—even solicitation of unknown laypersons—only where the solicitation is accompanied by evidence of wrongdoing. See *supra* Part II-C-3-b. Accordingly, such jurisdictions may permit an attorney to contact firm clients whom the attorney has *not* served, provided the attorney refrains from abusive conduct. The absence of a professional relationship between the departing attorney and the solicited firm client may, however, deprive the attorney of the benefit of certain arguments relevant to issues of civil liability. Illustratively, under such facts, the privilege of acting to protect the welfare of another will presumably be unavailable to avoid liability for tortious interference. The attorney may not colorably contend that an obligation of undivided loyalty to the client warrants an exception to rules of fiduciary obligation which might otherwise preclude pre-departure solicitation. See *supra* Parts III-B-3 & III-C-4.

544. 108 S. Ct. 1916 (1988).

545. See *supra* Part III-B.

546. See *supra* Part III-C.

547. See *supra* Part III-B-2 (discussing the role of ethical standards in tortious interference actions) and Parts III-C-4 & III-C-5 (discussing relationship of professional standards to fiduciary obligations).

548. As to tortious interference with a firm's relationship to inactive clients, see *supra* Part III-B-6.

549. An attorney may respond to a client-initiated request for information without fear of liability for tortious interference. See *supra* Part III-B-7.

after the departure)<sup>550</sup> and a breach of fiduciary duty (where the solicitation is pre-departure).<sup>551</sup>

To the extent, however, that in-person, departure-based solicitation is deemed to be constitutionally protected, and therefore ethically permissible, the prospect of civil liability predicated upon such conduct will be placed in doubt. As to tortious interference with contract, judicial recognition that in-person solicitation of former clients is ethically enomic would tend to establish both that the departing attorney's conduct is socially valuable and that resort by the attorney to in-person communication does not constitute use of an improper means for advancing that interest.<sup>552</sup> An action for tortious interference therefore might be defeated either pursuant to the general balancing test for assessing whether alleged interference is improper<sup>553</sup> or under the specially-defined privileges which permit an individual to engage in fair competition,<sup>554</sup> to act to protect the welfare of another,<sup>555</sup> to disseminate truthful information,<sup>556</sup> or to reasonably respond to defamatory or misleading statements.<sup>557</sup> Similarly, if in-person, departure-based solicitation of former clients is held to be ethically acceptable, then it might be persuasively urged that such conduct, even when undertaken prior to departure, is not a violation of fiduciary obligations, either because the rules of professional ethics modify otherwise applicable principles of the law of agency and partnership<sup>558</sup> or because public policy dictates that such communications must be permitted in order to facilitate intelligent exercise by clients of their rights to determine who will represent them.<sup>559</sup> Although

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550. As long as there is a subsisting relationship between the firm and the client, a departing attorney is not saved from liability for tortious interference merely by reason of the fact that he has terminated his association with the firm. In the eyes of the law, the law firm-client relationship is just as valuable and worthy of protection after the attorney departs as before that step is taken. The attorney's departure may, however, affect the alleged wrongfulness of the means of interference. Because an attorney owes fiduciary obligations to his firm prior to termination which are not owed subsequent thereto, pre-departure solicitation may be considered more wrongful and may more readily give rise to liability. *See supra* Part III-B-3-b.

551. Post-departure solicitation by a former agent generally does not constitute a breach of fiduciary obligations. *See supra* Part III-C-4.

552. *See supra* Part III-B-2.

553. *See supra* Part III-B-1.

554. *See supra* Part III-B-3-a.

555. *See supra* Part III-B-4.

556. *See supra* Part III-B-8.

557. *See supra* Part III-B-5.

558. *See supra* Part III-C-5, discussing how ethics rules may limit standards otherwise governing use of confidential information.

559. *See supra* Part III-C-4, discussing arguments by Professor Hazard and others.

*post*-departure, in-person solicitation, under proper facts, may give rise to professional discipline and to liability for tortious interference, such conduct generally cannot support an action for fiduciary breach, since the relevant fiduciary obligations normally expire with the termination of an agency relationship.<sup>560</sup>

To the extent that targeted mail communications are constitutionally protected under *Shapero* and its progeny,<sup>561</sup> they too may escape civil liability under an analysis similar to that proffered above as applicable in the case where in-person solicitation is recognized as entitled to constitutional protection.<sup>562</sup>

Finally, efforts to avoid departure-based solicitation disputes must conform with rules of ethics which govern actions that restrict an attorney's right to practice or infringe upon a client's right to select his own counsel. These provisions make clear that agreements among attorneys purporting to prohibit a departing attorney from soliciting or accepting employment by a firm client,<sup>563</sup> or to mandatorily allocate clients based on credit for recruitment of the clients or other grounds,<sup>564</sup> will normally be deemed both unethical and unenforceable as against public policy.

### *B. Proposed Amendment to Model Rules*

Much of the human and professional wreckage which can result from a bitter contest over clients could be minimized by the adoption of a rule of ethics expressly addressing the issues which attend departure-based solicitation and defining the rights of the attorneys involved. Undoubtedly, this would be a desirable course, for as one practitioner has stated:

A partnership controversy that erupts into a lawsuit is the ultimate loss of prestige to all. Disappearing into the mist is the desired self-portrait of the lawyer: unflappable, a cool hand, always in control, and devoted to solving clients' problems. . . . The primary objective, then, . . . is always to solve the difficulties quietly and in the cool confines of an office.<sup>565</sup>

Mindful of this admonition and of the preceding discussion—particularly those principles of constitutional law which permit time, place,

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560. See *supra* Part III-C-4.

561. See *supra* Part II-D.

562. But see *supra* note 543.

563. See *supra* Part IV-A.

564. See *supra* Part IV-B.

565. Reuben, *supra* note 39, at 5.

and manner restrictions on commercial speech<sup>566</sup> or encourage the use of disclaimer or disclosure requirements<sup>567</sup>—the following provision is offered as a proposed amendment to the Model Rules.<sup>568</sup> Reasonable minds may of course differ as to the details of such an amendment, though several of the terms are surely beyond fair dispute, rooted as they are in constitutional precedent. The importance of or justification for various aspects of the proposed amendment are discussed in the margin.

**Rule 7.6 Communication with Firm Clients By Attorney Leaving Firm<sup>569</sup>**

- (a) Subject to the provisions of Rule 7.1,<sup>570</sup> a partner or associate<sup>571</sup> who withdraws from a firm (as a result of firm dissolution or otherwise) may orally inform any firm client for whom the lawyer has performed substantial legal services,<sup>572</sup> or by writing not involving in-person contact inform any firm client,<sup>573</sup> of:

566. See *supra* Part II-E-3.

567. See *supra* Part II-C-3-c.

568. Where applicable ethical codifications differ from the ABA Model Rules, the proposed amendment might be undesirable, for it assumes that other code provisions tightly regulate lawyer solicitation, as does Model Rule 7.3. In those states which ban solicitation only under limited circumstances, adoption of the proposed amendment could have the unwanted effect of imposing greater restrictions on an attorney's communicating with his former clients than with total strangers. See *supra* Part II-C-3-b.

569. The proposed rule is numbered 7.6 because it is logically related to the rules concerning "Information About Legal Services," which are numbered 7.1 to 7.5 in the ABA Model Rules.

570. This prefatory clause incorporates the provisions of Rule 7.1, which prohibit the use of false or misleading statements and expressly address issues of affirmative misrepresentation of fact, omission of fact, creation of unjustified expectations, and comparison of legal services.

571. As noted earlier, at least one state has refused to permit exiting associates to communicate with firm clients with respect to their departure. See *supra* note 127. This position is not well-reasoned and has been rejected by the great majority of jurisdictions. See *supra* text following note 239. See generally *supra* Part II-B-1. The specific reference to "associates" in the text of the proposed rule is included for the purpose of putting the issue to rest.

572. The clause permitting oral communication only with clients whom the lawyer has served is consistent with the parameters of the professional relationship exception to the solicitation ban. See *supra* Part II-C-2-b. The term "substantial" is intended to preclude oral solicitation when the attorney's association with the client or cause has been so *de minimis* as to render the safeguard of professional familiarity illusory. See *id.* Similar standards for identifying and addressing issues raised by nominal participation in legal representation are employed in other areas of professional ethics. See *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 756 (2d Cir. 1975) (no conflict of interest required disqualification where attorney's participation in case was "at most, limited to brief, informal discussions on a procedural matter or research on a specific point of law").

A colorable alternative approach—consistent with the view that departure-based solicitation should be policed only by use of the least intrusive means of regulation—would be to permit oral solicitation of all firm clients (and perhaps others as well), subject only to discipline for actual abuse. See *supra* Parts II-C-3-a & II-C-3-b.

573. This clause would allow the use of targeted direct-mail, consistent with *Shapero v. Ken-*

- (1) the fact and circumstances of the lawyer's departure;
  - (2) the lawyer's willingness to provide future legal services for the client;
  - (3) the client's right to decide who shall provide future representation and information relevant thereto.<sup>574</sup>
- (b) A lawyer may not accept an offer of employment resulting from such communication:
- (1) unless the lawyer has reasonably informed the client in writing<sup>575</sup> of the desirability of obtaining independent advice concerning any change of counsel<sup>576</sup> and of any liability for fees which may arise from termination of the client's present counsel;<sup>577</sup>
  - (2) where the lawyer knows or should know that the client cannot exercise reasonable judgment in employing a lawyer;<sup>578</sup>
  - (3) where the client has previously made known to the lawyer a desire not to receive such communications;<sup>579</sup>
  - (4) where the communication involves coercion, duress, or harassment.<sup>580</sup>
- (c) Prior to a lawyer's departure from a firm, no communication may be initiated by the lawyer pursuant to subsection (a), unless prompt notice thereof is provided by the lawyer to the firm, before or after the communication.<sup>581</sup>
- (d) A written communication made pursuant to subsection (a) may include a form which may be executed by a client to effect a change of counsel.<sup>582</sup>

## VI. CONCLUSION

As this Article has argued throughout, there is good reason to conclude that sound legal and ethical principles permit a broad range of departure-based solicitation activities. To say, however, that such conduct should not give rise to disciplinary or civil liability is not to state that the public interest is always best served by such action. In

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tucky Bar Ass'n, 108 S. Ct. 1916 (1988). It would also permit, for example, communication by telegram, but not by letter or other written instrument hand delivered by the attorney. The purpose of the clause—consonant with the reasoning in *Shapiro*—is to permit only those forms of written communication devoid of the intrusive personal presence of an attorney or his agent.

574. See *supra* note 165.

575. The requirement of a writing is imposed here in an effort to call importance to the facts in question and to minimize the risk of hasty action on the part of a client.

576. See *supra* note 197.

577. See *supra* note 196.

578. See *supra* note 190.

579. See *supra* note 270 and accompanying text.

580. See *supra* note 190.

581. The rationale for this provision is set forth in the text accompanying notes 463 and 466, *supra*. See also *supra* text accompanying notes 243-44 and 477-79.

582. See *supra* Part II-E-7.

the end, decisions must be made on a case-by-case basis, by individual attorneys—both those departing from firms and those remaining—as to how departure-based issues may most effectively be resolved. In making such decisions, the words of Justice O'Connor offer thoughtful guidance:

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life. Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms.<sup>583</sup>

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583. *Shapiro v. Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1929-30 (1988) (O'Connor, J., dissenting).