Ethical Pitfalls and Malpractice Consequences of Law Firm Breakups

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ETHICAL PITFALLS AND MALPRACTICE CONSEQUENCES OF LAW FIRM BREAKUPS

Laurel S. Terry*

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It is no longer uncommon to see headlines about lawyers defecting from their firms in order to start their own firms or to join competing firms.\(^1\) Indeed,

it is not unheard of for entire firms to disappear.² All too often, these law firm “breakups”³ are not a pretty sight. What is clear from even a cursory review of the literature is that clients, ethics, and even common decency can be forgotten in these disputes.⁴

This article focuses on the ethical pitfalls and malpractice consequences that can occur when law firms break up. Ethical pitfalls are relevant in a legal malpractice symposium because, as one commentator has observed, ethics “has ceased to be a matter of homilies and is now often a matter of civil liability.”⁵

Section I contains a brief description of the problem. It sets the factual stage for the remainder of the article by showing the issues that can arise when law firms break up. Section II explores the ethical pitfalls lurking in the breakup situation. It identifies seven different categories of ethical violations. Section III focuses on the possible malpractice consequences of law firm breakups. It begins with an analysis of traditional malpractice claims and describes the ways in which these claims have arisen during a breakup. The section then explores the way ethical violations have been used in legal malpractice actions. It explains that the courts increasingly have permitted ethical violations to be used as evidence of malpractice. The section then suggests how particular ethical violations during a breakup could form the basis for a malpractice action. The final section of the article reviews the various prophylactic measures and after-the-fact steps that others have recommended to minimize these and other problems that can occur in a breakup. Among other steps, many lawyers now have available to them bar-sponsored alternative dispute resolution programs tailored for the law firm breakup.⁶


3. The term “breakup,” as used in this article, includes three different situations: where a lawyer withdraws from a firm but the partnership continues; where a law firm goes through dissolution but the remaining partners stay together and form a new partnership; and where the entire firm dissolves or breaks apart. The discussion also covers lawyers who practice in a professional corporation.

4. See infra notes 8-16 and accompanying text for a discussion of lawyer behavior in breakup disputes.


6. The focus of this article is on the ethical pitfalls and malpractice consequences of a breakup. This article does not explore the legal doctrines, such as contract, partnership, or tort law, that affect an attorney’s rights or obligations vis-a-vis other attorneys. Thus, this article does not explore issues
I. AN INTRODUCTION TO THE PROBLEM

It is indisputable that the last ten years have witnessed an explosion in publicized law firm breakups.\(^7\) The details of some of these breakups are the material of soap operas. In one case, departing partners reportedly drove up in a van in the dead of night and carted away client files.\(^8\) In another case, the firm hired a guard to watch the law offices so that nothing would be removed pending an audit.\(^9\) One lawyer charged that his partners changed the locks on the filing cabinets in an effort to force him to withdraw.\(^10\) There are reports of a partner who showed up one Thanksgiving weekend with a suitcase to carry away client files;\(^11\) of a lawyer who physically attacked his partner and threw him out of their office;\(^12\) of clients who called the firm and were misled or misinformed about the status and whereabouts of departing lawyers;\(^13\) of a departing lawyer who signed up clients by misrepresenting his association with his ex-firm;\(^14\) of a breakup caused by personality conflicts between the son of the founding partner and the remaining partners;\(^15\) and of a partner who allegedly told clients the other partner was “a crook and a cheat,” “not competent,” and “senile.”\(^16\)

such as how fees should be allocated after a dissolution or tort law limitations on solicitation of clients.

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7. See supra note 1 and accompanying text. One question, of course, is whether the actual number of breakups has increased or whether there is just increased publicity regarding those breakups that occur. The latter explanation is certainly plausible since much of the publicity appears in the National Law Journal and the American Lawyer, publications that did not exist until August 7, 1978 and February 1979, respectively. On the other hand, there may in fact be more breakups recently, as opposed to more publicity about breakups. Leading management consultants have contrasted large firm breakups, which they say are a recent phenomenon, with small firm breakups, which have always occurred: “Small firms have often been fragile arrangements with frequent breakups and reformations.” M. ALTMAN & R. WElL, HOW TO MANAGE YOUR LAW OFFICE § 16.03, at 16-13 (1986).

One indication that law firm breakups have increased is that the Lawyer’s Manual on Professional Conduct began, in its February 3, 1988 index, to have a separate heading for “Withdrawal From Law Firm.” 4 Law. Man. on Prof. Conduct (ABA/BNA) No. 1, at 31 (Feb. 3, 1988).


10. Pollock, supra note 1, at 14 (alleged ouster of partner from Philadelphia’s Adler, Barish, Daniels, Levin & Creskoff).

11. Jensen, supra note 2, at 46 (experiences of Finley, Kumble lawyer); see also Attorney Grievance Comm’n v. Kahn, 290 Md. 654, 660, 431 A.2d 1336, 1339-40 (1981) (on Wednesday night before Thanksgiving, associates removed files from partner’s office for photocopying so they could inventory and evaluate cases for financial settlement with partner).

12. See Galante, Lawsuit Flurry Follows Dissolution of Belli Firm, supra note 1, at 4, col. 3 (fight between Belli and his partner).

13. Fox, 4 Lawyers Who Left L.I. Firm Barred From Seeking Its Clients, supra note 1, at 1, col. 3 (Koeppel, Sommer & Del Casino breakup).


15. Oder, supra note 1, at 32, col. 3 (breakup of Charleston, West Virginia’s Preiser & Wilson).

16. Galante, Lawsuit Flurry Follows Dissolution of Belli Firm, supra note 1, at 10, col. 3.
These disputes can cost hundreds of thousands of dollars in legal fees and can continue for decades. What is particularly distressing is that such disputes appear to be increasing. One loss prevention specialist recently estimated that among the large firms his group insures, the incidence of dissolution has increased “probably tenfold—it’s far, far beyond what anyone has experienced or anticipated.”

The explanations for this phenomenon vary. Among other factors that have been cited are increased access to financial information concerning competitors, the decreased stigma of changing law firms, weakened collegiality, the effect on firm loyalty of hiring practices (including lateral hires), the size of firms and the effect of size on stability and loyalty, the increase in big ticket cases, differences in management style, and the effect of law firm mergers that are not successful.

One thing is certain—while these breakups certainly take their toll on the

17. See Moss, When Partners Split, 10 PA. LAW. June 1988, at 9 (relating fee estimates of $1,000,000 and actual fees, in ongoing cases, of $50,000, $65,000, $80,000, and over $100,000); Pollock, supra note 8, at 60 (legal fees to settle breakup at Cleveland’s Guren, Merritt, Feibel, Sogg & Cohen); Galante, supra note 2, at 26, col. 1 (quoting former partner of Fulop & Hardee as saying, “It’s an incredible mess that has been strung out so long, the costs have become astronomical. The only person coming out of it whole is the receiver—and he’s making a bloody fortune.”).

18. See, e.g., Rosenfeld, Meyer & Susman v. Cohen, 191 Cal. App. 3d 1035, 237 Cal. Rptr. 14, 17, 22 (1987) (description of three adjudications in 13-year-old, still ongoing litigation); Handler v. Fears, 106 Dauph. 70 (1985); Handler v. Fears, 105 Dauph. 8 (1984); Gerber v. Weinstock, 102 Dauph. 50 (1980) (all involving preliminary skirmishes in the ongoing dissolution of Handler, Gerber & Weinstock); Levin v. Barish, 505 Pa. 514, 481 A.2d 1183 (1984) (issues in dispute involving lawyers who withdrew from original firm in 1976 and have gone through four firms since that time and brought suit against departing associates from their firm); Moss, supra note 17, at 9; Pollock, supra note 8, at 60; Galante, supra note 2, at 26, col. 1 (quoting receiver of Fulop & Hardee as “half-jokingly” saying matter may not be resolved in his lifetime).


20. See generally M. ALTMAN & R WEIL, supra note 7, at § 16.03; Brill, supra note 1 at 11-12 (suspected reasons for troubles at firms like Dewey, Ballantine and Donovan, Leisure); Jensen, supra note 2, at 44 (reporting Finley, Kumble breakup attributed to mismanagement, personality disputes and power struggles, media attention, banks, extension, overexpansion and greedy leaders); Kerlow, supra note 1, at 6 (firm reportedly dissolved because of disagreement over whether to emphasize government contracts or real estate development practice); Lewin, supra note 1, at D2 (quoting lawyers who point out difficulty smaller firms have in competing in national market); Mobley, supra note 1, at 6, col. 1 (sources attribute breakup of Guggenheimer & Untermyer to such things as increased lawyer mobility, weakened collegiality, increased business emphasis, departure of key partner, and differences over management and money); Galante, Partner Leads Mass Exodus, supra note 1, at 33 (partners attribute defection from Los Angeles’s Lawler, Felix & Hall to both money and style differences); Galante, supra note 2, at 26, col.2 (partners attributed dissolution, in part, to merger troubles); Stewart, supra note 1, at 1 (defections reportedly due, among other reasons, to decline in business because of drop in antitrust cases); Simon, supra note 1, at 2 (rumors of defection attributed to large cuts in income due to drop in business); Weil, Dividing the Law Firm: Take the Surprise Element Out, L.A. Daily J., Jan. 17, 1980, at 2, col. 3 (some lawyers should not be partners because of different attitudes regarding profits, time, goals and decor, among other things). Another explanation offered is the perceived decrease in “professionalism.” See generally ABA, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986).
lawyers involved, they also can take a tremendous toll on clients and third parties. One judge recently observed that the lawyers' disagreement "spawned petty and irresponsible behavior, which has spread far beyond their personal dispute. Clients, other lawyers, insurance carriers and the courts have been drawn into this unseemly mess." Another judge said that the breakup of a firm resulted in an intolerable situation "where the main loser is the innocent client." Law firm breakups have been followed by malpractice actions and disciplinary proceedings against lawyers, as well as litigation among the law-

21. See, e.g., Pollock, supra note 8, at 58 (withdrawals analogized to divorce, where friends for decades no longer speak, no one can agree on money, and feuds can get out of control); Jensen, supra note 2, at 44 (Finley, Kumble lawyers speaking of financial, emotional, and personal wreckage created by breakup, including feelings of murder, suicide, betrayal, and financial ruin); Galante, For Firms, Breaking Up Is Hard To Do, supra note 1, at 44 (lawyer stated, "The files are the children, with each side fighting over them. It's a custody battle for money."); Stewart, supra note 1, at 1, 20 (confrontation created situation where partners from factions barely disguised mutual hostility and associates believed partners' demeanor often concealed anguish).

22. Greenberg v. Gitlin, N.Y.L.J., Oct. 17, 1985, at 6, col. 1 (N.Y. Sup. Ct.). But see Graham, Busting Loose, supra note 1, at 8, col. 4 (client suffered no damage when attorney split, stating, "We didn't really notice a blip").


24. See, e.g., Blackmon v. Hale, 1 Cal. 3d 548, 463 P.2d 418, 83 Cal. Rptr. 194 (1970) (attorney responsible for conduct of his partner in divesting funds from trust account during dissolution); Redman v. Walters, 88 Cal. App. 3d 448, 152 Cal. Rptr. 42 (1979) (court reversed summary judgment for defendant attorney, finding he could be liable for malpractice committed after his withdrawal from firm); Hayden v. Green, 166 Mich. App. 352 (1988) (malpractice suit brought against firm as a result of a case ignored while attorney was a member of a firm, from which he later left), rev'd, 429 N.W.2d 604 (Mich. 1988); Vollgraff v. Block, 117 Misc. 2d 489, 458 N.Y.S.2d 437 (Sup. Ct. 1982) (attorney, in process of firm breakup, allowed statute of limitations to run; court rejected partnership's defense that firm had "dissolved"). But see Gibson v. Talley, 156 Ga. App. 593, 594-95, 275 S.E.2d 154, 155-56 (1980) (court held partner was not liable for malpractice committed after dissolution of firm).

25. See, e.g., Morales v. State Bar, 44 Cal. 3d 1037, 751 P.2d 457, 458, 245 Cal. Rptr. 398, 399 (1988) (court disbarred attorney; discipline "related either directly to the firm's breakup or indirectly to the financial crisis that came in its wake"); Gordon v. State Bar, 31 Cal. 3d 748, 647 P.2d 137, 139, 183 Cal. Rptr. 861, 863 (1982) (court disbarred attorney who, inter alia, misappropriated client funds, rejecting mitigation defense that attorney was under extreme financial pressure because of the dissolution of his law partnership and his assumption of partnership obligations to clients); In re Crumpacker, 269 Ind. 630, 642-43, 383 N.E.2d 36, 42 (1978) (court disbarred attorney for violating Code by, inter alia, opposing former clients in identical matters and using client confidences to disadvantage of client after dissolution of attorney's firm), cert. denied, 444 U.S. 979 (1979); Committee on Professional Ethics & Conduct v. Cook, 409 N.W.2d 469, 470 (Iowa 1987) (attorney disciplined, inter alia, for failure to file personal tax returns; court rejected excuse that delay was due to dispute over fees caused by firm dissolution); Attorney Grievance Comm. v. Kahn, 290 Md. 654, 679, 431 A.2d 1336, 1349 (1981) (associate disciplined for misappropriating information from partner's files to facilitate plan to represent partner's clients); Levi v. Mississippi State Bar, 436 So. 2d 781 (Miss. 1983) (court rejected recommended disciplinary action against attorneys who allegedly defrauded their ex-partner by secretly accepting extra money from client who "felt sorry" that attorneys had to share fee with their ex-partner); Grievance Comm. v. Lempees, 248 S.C. 47, 50-51, 148 S.E.2d 869, 871 (1966) (attorney disciplined for client neglect; mitigating factor cited was law firm dissolution); In re Norlin, 104 Wis. 2d 117, 121-22, 310 N.W.2d 789, 791, 793 (1981) (attorney
y themselves.\textsuperscript{26}

Given that the phenomenon of the firm breakup appears to be increasing, lawyers need to become sensitive not only to the law that affects their responsibilities towards each other,\textsuperscript{27} but also to their obligations to their clients and third parties, as reflected in the ethical regulations and malpractice law.\textsuperscript{28}

disciplined for, \textit{inter alia}, neglecting various matters; court rejected defenses based on dissolution of attorney's partnership and accompanying pressures and distractions).

26. See cases cited infra notes 90, 128, 145.


Some of the issues that can arise during a breakup include: access to clients and files; fee allocation for ongoing matters; notification of associates and support staff; agreements regarding malpractice responsibility; valuing and collecting receivables; allocation of assets including tangible assets such as computer disks and intangible assets such as a firm telephone number and name; disposal of closed and inactive files; liability to creditors; and arrangements with landlords, banks, insurance carriers, and communications equipment and service providers. See generally M. Altman & R. Weil, supra note 7, § 8.15, at 8-15 to 8-16 (consequences for partners when firm dissolves).

28. There has been much less written about an attorney's ethical obligations and malpractice exposure during a firm breakup. \textit{Compare} articles cited in supra note 27 with Bufford & Hubbell, \textit{The Ethical Pitfalls of Closing Up Shop}, L.A. L.AW., Apr. 1983, at 10 (survey of various ethical issues involved in law firm breakups); Comment, \textit{Attorneys Must Not Enter Into Partnership Agreements
II. ETHICAL REGULATIONS AFFECTING LAW FIRM BREAKUPS

A. Overview

Lawyers have long been subject to ethical regulation. These ethical regulations are adopted by state courts or legislatures and enforced in disciplinary

Prohibiting Themselves From Representing Former Clients Upon Termination of the Partnership, 4 FORDHAM URB. L.J. 195 (1975) (hereinafter Comment, Attorneys) (criticism of Dwyer v. Jung's refusal to enforce restrictive covenant in partnership agreement); cf. Comment, Lateral Moves, supra note 27 (evaluates ethics provisions in order to propose new test for tortious interference); Comment, Recent Developments, supra note 27 (discussing Adler v. Barish); Comment, Adler, Barish, supra note 27 (Adler, Barish). See also Bonner, supra note 27 (Uniform Partnership Act and ethics law that determine fees and disposition of client files); Hagerty, supra note 27 (partnership, fiduciary, ethics, and malpractice law as it relate to firm dissolutions, client responsibility, and firm assets); Robinson, supra note 27 (discussing Pratt v. Blunt and tort, constitutional, and ethics law regarding right of departing attorneys to contact their clients).

29. The history of this regulation is well documented. The first lawyers' ethics code was promulgated in 1887 by the Alabama State Bar Association. See ALA. CODE OF ETHICS, 118 Ala. xxiii (1899) (Code of Ethics adopted by Alabama State Bar Association published); H. DRINKER, LEGAL ETHICS 352-363 (1953); C. WOLFRAM, MODERN LEGAL ETHICS 53-54 & nn.20-21 (Practitioner's ed. 1986).

It was over 20 years later, in 1908, before the American Bar Association, relying on the Alabama ethics code, adopted its first ethics code. This code was known as the "Canons of Ethics." See H. DRINKER, supra, at 21-25; C. WOLFRAM, supra, § 2.6.2, at 54. Both the Drinker and Wolfram works contain informative and entertaining accounts of the background of the Canons, although each approaches the topic from a different perspective. Mr. Drinker attributed the passage of the Canons to "the realization by thoughtful leaders of the bar of the growing commercialism all over the country. The consequent weakening of an effective professional public opinion clearly called for a more definite statement by the bar of the accepted rules of professional conduct." H. DRINKER, supra, at 25. In contrast, Professor Wolfram said that the Canons "seem to have been a statement of professional solidarity—an assertion by elite lawyers in the ABA of the legitimacy of their claim to professional stature. . . . [The document was] intended primarily to celebrate the ancient lineage of the bar's professional stature." C. WOLFRAM, supra, at 54.

It was approximately 50 years before criticisms of the Canons prompted the ABA to consider revising them. In 1964, former ABA President Lewis F. Powell appointed a committee to consider amendments to the Canons. C. WOLFRAM, supra, § 2.6.2, at 54. This committee, known as the "Wright Committee," responded by drafting the Model Code of Professional Responsibility. Id. § 2.6.3, at 56. The ABA adopted this Model Code of Professional Responsibility in 1969. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (Final Draft 1969).

Within less than ten years, however, the Model Code was being redrafted to adequately address increasingly complex ethical problems. See ABA, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES V PREFACE (1987) [hereinafter LEGISLATIVE HISTORY OF THE MODEL RULES]. Six years after starting the revision process, in 1983, the ABA adopted the Model Rules of Professional Conduct. See C. WOLFRAM, supra, at 62.

30. C. WOLFRAM, supra note 29, § 2.6.3, at 57. The federal courts often, by local rule, adopt the ethics regulations of the state in which they sit to govern the behavior of lawyers practicing in their courts. See, e.g., United States v. Klubock, 832 F.2d 649, 650 & n.3 (1st Cir. 1987) (local rules of district court incorporated by reference ethical regulations adopted by Massachusetts Supreme Judicial Court, including rule requiring prior court approval before grand jury subpoenas were served on attorneys to obtain information regarding clients), vacated per curiam, 832 F.2d 664 (1st Cir. 1987) (en banc) (upholding validity of rule regarding grand jury subpoenas); Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1342 n.1 (9th Cir. 1981) (district court adopted by local rule disciplinary rules of Oregon; court used these provisions in evaluating disqualification motions); E.D. PA. R. 14
actions. If a violation is found, the state may impose a penalty ranging from a private admonition to disbarment. The stated purpose of these regulations is the maintenance of standards within the profession for the protection of the public and the administration of justice.

Forty-nine states base their ethical regulations on either the Model Code of Professional Responsibility ("Model Code" or "Code") adopted by the American Bar Association ("ABA") in 1969, or the Model Rules of Professional Conduct ("Model Rules" or "Rules"), adopted in 1983 by the ABA to replace the Model Code. Because so many states use the Model Code or the Model Rules, albeit with some significant changes, these provisions are used in this article to


32. C. Wolfram, supra note 29, § 3.5.1, at 118; Standards, supra note 31, at 33-43.

33. Standards, supra note 31, § 1.1. But see Morgan, The Evolving Concept of Professional Responsibility, 90 Harv. L. Rev. 702, 704 (1977) (lawyers' ethics codes are self-serving); Schnapper, The Myth of Legal Ethics, 64 A.B.A. J. 202, 203 (1978) (because lawyers are responsible for enforcement of the Model Code, there is dissimilarity between Model Code as written and as enforced).

34. Model Code of Professional Responsibility (1980) [hereinafter Model Code]. The Model Code includes Canons, Ethical Considerations ("ECs") and Disciplinary Rules ("DRs"). The DRs are mandatory and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Id. Preliminary Statement. The EC's "are aspirational in character and represent the objectives toward which every member of the profession should strive." Id. The Canons "embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived." Id. Although technically only the DRs are mandatory, some courts have treated the ECs as binding. See C. Wolfram, supra note 29, § 2.6.3, at 59 n.60 (and cases cited therein).

35. Model Rules of Professional Conduct (1983) [hereinafter Model Rules]. The Model Rules use a Restatement format, consisting of black letter Rules accompanied by explanatory Comments. The reasons offered in support of this format were that it would be more convenient for resolving professional responsibility questions, it would remedy the problem of inconsistent application of the Canons and ECs, and it was a format with which lawyers are familiar. See Legislative History of the Model Rules, supra note 29, at 3-4.

36. As of fall 1988, 19 states used ethical regulations based on the ABA Model Code of Professional Responsibility and 30 states used ethical regulations based on the ABA Model Rules of Professional Conduct. See [4 Current Reports] Law. Man. on Prof. Conduct (ABA/BNA) 77 (Mar. 16, 1988); id. at 93 (Mar. 30, 1988); id. at 208 (July 6, 1988). California uses ethical regulations based on its own format. See Cal. R. Prof. Conduct § 1-100. The ABA Center for Professional Responsibility reports that four states and the District of Columbia have pending proposals to adopt the Model Rules.

37. The initial version of the Model Code was adopted almost in toto by the vast majority of states. See C. Wolfram, supra note 29, § 2.6.3, at 56-57. However, many states declined to adopt the Model Code amendments. Id. at 57. Similarly, many states adopted the Model Rules with significant changes. See generally 2 G. Hazard & W. Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct app. No. 4 (Supp. 1987) (state variations of Model Rules, for 22 states, are contained in hundreds of pages of changes). Penn-
analyze the ethical issues affecting law firm breakups.  

B. Applicable Ethics Principles

A common mistake lawyers can make during a breakup is to view clients as "property" in which the lawyers have an interest, or as "files," which are subject to negotiation, barter, or sale.  Lawyers must guard against this somewhat understandable perspective because it is contradictory to the underlying principles of both the client-lawyer relationship and ethics law.

The client has the right both to select a lawyer and to discharge that lawyer at any time for any reason.  If the firm the client initially retained breaks up, sylvania, for example, has required many fee contracts to be in writing, unlike the Model Rules.  Compare PA. R. PROF. CONDUCT 1.5, 42 PA. CONS. STAT. ANN. (Purdon Supp. 1988) with MODEL RULES, supra note 35, Rule 1.5.  Pennsylvania has also changed dramatically the confidentiality rule.  Compare PA. R. PROF. CONDUCT 1.6 with MODEL RULES, supra note 35, Rule 1.6.  In order to demonstrate some of these changes, the Pennsylvania version of the Model Rules of Professional Conduct have been included throughout this article for comparison purposes.  (Pennsylvania was selected not necessarily because it is typical, but because Pennsylvania is the state in which this article is published).

38. The goal of this article is to analyze the ethics issues that could arise during a breakup.  This doctrinal approach should provide a checklist of ethics issues that courts and attorneys may consult.  Moreover, even if the problems that occur during a breakup change, this doctrinal approach provides a framework for analyzing the unexpected.  It should be clear, however, that the goal of this article is to provide an analysis of the relevant ethics principles, rather than an analysis of the breakup situation.  Hence, this article does not attempt to analyze how the ethics principles will be balanced against other, sometimes competing, principles that may be relevant in a breakup.

39. See e.g., Corti v. Fleisher, 93 Ill. App. 3d 517, 519, 417 N.E.2d 764, 767 (1981) (agreement said all files shall remain "sole and absolute property" of certain clients and that certain attorneys were "owners" of certain files); Dwyer v. Jung, 133 N.J. Super. 343, 345, 336 A.2d 498, 499 (Ch.) (agreement said certain clients "shall be designated to certain individual partners" if partnership terminated), remanded, 68 N.J. 177, 343 A.2d 464, aff'd per curiam, 137 N.J. Super. 135, 348 A.2d 208 (App. Div. 1975); Saltzberg v. Fishman, 123 Ill. App. 3d 447, 449, 462 N.E.2d 901, 903-04 (1984) (parties resolved dispute over breakup by agreeing in settlement documents that fees from files defendant-lawyer brought into firm were "defendant's property" and fees from firm files defendant worked on were to be split by defendant and firm); Frates v. Nichols, 167 So. 2d 77, 82 (Fla. Dist. Ct. App. 1964) (partnership agreement said withdrawing partner would have no other interest in cases of firm; court observed that contracting parties intended that withdrawing partner would leave all pending cases for the remaining partners); see also Jewel v. Boxer, 156 Cal. App. 3d 171, 179, 203 Cal. Rptr. 13, 18 (1984) ("no compensation" rule discourages former partners from scrambling to take physical possession of files); Mobley, supra note 1, at 16, col. 4 (stating many attorneys leaving Guggenheimer, & Untermeyer firm after breakup took their personal clients).

40. See ABA Comm. on Professional Ethics and Grievances, Formal Op. 300 (1961) "Clients are not merchandise," and lawyer cannot "barter in clients"); see also Kochler v. Wales, 16 Wash. App. 304, 311-12, 556 P.2d 233, 238 (1976) (observing that attorney properly abandoned theory based on proprietary interest in former clients because attorney-client relationship is personal and confidential).  C. WOLFRAM, supra note 29, § 16.2 at 888, states, Attempting to resolve the issue [of who deals with which clients] by referring to clients as "files" and debating which client each lawyer "owns" or to which lawyer a client "belongs" obscures and distorts the lawyer-client relationship.  The compelling fact is that the client-lawyer relationship is personal; clients should accordingly have a free choice of counsel.

Id. See also cases cited infra notes 41-44.

41. See, e.g., Fracassee v. Brent, 6 Cal. 3d 784, 791, 494 P.2d 9, 13, 100 Cal. Rptr. 385, 389
the client, not the lawyer, must select the group that thereafter will represent the client. While the lawyers may negotiate regarding how the client is notified, by whom, and who will keep temporary physical custody of the files, the client should be notified of the change in circumstances and given the opportunity to select the counsel it prefers. If lawyers remember these overriding principles during a breakup, they are more likely to comply with the applicable ethical regulations.

In addition to these overriding principles, there are at least seven "categories" of ethical regulations that could be violated during a law firm breakup. These categories are as follows: 1) a lawyer's continuing obligations to the client; restricts fees and fee division; publicity; 5) confidentiality and communication; 7) client confidentiality and protection.

(1972) (client has right to hire and discharge attorney at will); Resnick v. Kaplan, 49 Md. App. 499, 509, 434 A.2d 582, 588 (1981) (client has the right to select counsel he prefers); Simon, Corne & Block v. Duke, 429 So. 2d 507, 508 (La. App.) (in suit between firm and client, client has right to discharge attorneys at any time, with or without cause), cert. denied, 437 So. 2d 1147 (La. 1983).

42. Missan v. Schoenfeld, 111 Misc. 2d 1022, 1026, 445 N.Y.S.2d 856, 859 (1981) (clients, not partners, choose their counsel, thus partner had no "property right" to clients which would permit him to sue for client's departure); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1457 (1980) (Code permits letter to clients advising them of attorney's withdrawal if, inter alia, it notifies clients of client's right to decide who will complete representation); id., Informal Op. 910 (1966) (there are no ethical problems in representing ex-clients of former firm because "it is for the client to decide who will represent him"); Chicago Bar Ass'n Comm. on Professional Responsibility, Op. 83-2 (1984) (allocation of ongoing cases at termination of lawyer's employment "should not be determined at the 'insistence' of the affected attorneys" but at client's preference).

43. A discharged lawyer, without a lien, must honor a client's request to turn files over to new counsel; pending client action, however, the law regarding temporary physical custody is unclear. See, e.g., Dinkes, Mandel, Dinkes & Morelli v. Ioannou, N.Y.L.J., July 22, 1987, at 11, col. 3 (N.Y. Sup. Ct.) (court ordered attorneys to turn over files to departing associate who had obtained substitution of counsel forms from certain clients; plaintiff firm at most has charging lien rather than retaining lien); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 787 (1964) (lawyer acted improperly in removing client files from firm without permission of firm or clients); Chicago Bar Ass'n Comm. on Professional Responsibility, Op. 83-11 (1984) (in discussing sale of good will, committee said transfer of active files may be done only if appropriate safeguards are taken pending client consent); District of Columbia Bar Legal Ethics Comm., Op. 168 (1986) (upon demand, firm must release files to clients' current counsel, an ex-associate, if withholding files would lead to prejudice to client). This issue of file custody, which is not directly addressed in the ethics regulations, is beyond the scope of this article. See supra note 38. Compare Bonner, When Partnerships Dissolve, supra note 28. Obviously, the ideal solution is for the lawyers to negotiate who will keep temporary physical custody of the files pending client action so that this legal issue need not be decided.

44. See, e.g., Koehler v. Wales, 16 Wash. App. 304, 311 n.6, 556 P.2d 233, 238 n.6 (1976) (in situation where attorney temporarily took over another's practice, attorney should allow the clients to choose who represents them); State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1985-86 (attorneys going through breakup are required to notify client and advise it of right to have all files delivered to client or to whomever client wishes to handle representation). See also cases cited supra note 43.

45. These "categories" do not appear in the ethical regulations, per se. Rather, they are categories identified by the author. They are grouped together according to their themes or concerns.

46. This category would include MODEL RULES, supra note 35, Rule 1.1 (Competence), Rule 1.3 (Diligence), Rule 1.4 (Communication), Rule 1.16 (Declining or Terminating Representation). The Model Code counterparts include MODEL CODE, supra note 34, DR 6-101 (Failing to Act
flicts of interest; confidentiality; and 7) a lawyer's duties with respect to safekeeping property. Categories one through four are likely to present the most difficult and troublesome issues.

1. Continuing Obligations Owed to Clients

Although phrased differently, both the Model Code and the Model Rules impose on a lawyer an ethical obligation to represent the client competently. The Model Code is framed in the negative and prohibits neglect and incompetence, although competence is never defined. The Model Rules, on the other hand, are framed in the affirmative and require a lawyer to be competent (which is defined), diligent and to communicate regularly with the client.

Competently), DR 2-110 (Withdrawal from Employment). See infra notes 53-85 and accompanying text.

47. This category includes MODEL RULES, supra note 35, Rule 5.6 (Restrictions on Right to Practice). The Model Code counterpart is MODEL CODE, supra note 34, DR 2-108 (Agreements Restricting the Practice of a Lawyer). See infra notes 86-129 and accompanying text.

48. This category includes MODEL RULES, supra note 35, Rule 1.5 (Fees). The Model Code counterparts are MODEL CODE, supra note 34, DR 2-106 (Fees for Legal Services), DR 2-107 (Division of Fees Among Lawyers). See infra notes 130-72 and accompanying text.

49. This category includes MODEL RULES, supra note 35, Rule 7.1 (Communications Concerning a Lawyer's Services), Rule 7.2 (Advertising), Rule 7.3 (Direct Contact with Prospective Clients), Rule 7.5 (Firm Names and Letterheads). The Model Code counterparts are MODEL CODE, supra note 34, DR 2-101 (Publicity), DR 2-102 (Professional Notices, Letterheads and Offices), DR 2-103 (Recommendation of Professional Employment), DR 2-104 (Suggestion of Need of Legal Services). Of course, these provisions must be applied in a manner consistent with the United States Supreme Court's line of cases involving lawyers and the first amendment right of commercial speech. See infra notes 185-224 and accompanying text for a discussion of a lawyer's ability to communicate with potential clients in the firm breakup context.

50. This category includes MODEL RULES, supra note 35, Rule 1.7 (Conflict of Interest: General Rule), Rule 1.9 (Conflict of Interest: Prohibited Transactions), Rule 1.10 (Imputed Disqualification: General Rule), Rule 1.11 (Successive Government and Private Employment). The Model Code counterparts are MODEL CODE, supra note 34, DR 5-101 (Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment), DR 5-105 (Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer), DR 4-101 (Preservation of Confidences and Secrets of a Client), DR 9-101 (Avoiding Even the Appearance of Impropriety). See infra notes 225-38 and accompanying text.

51. This category includes MODEL RULES, supra note 35, Rule 1.6 (Confidentiality of Information). The Model Code counterpart is MODEL CODE, supra note 34, DR 4-101 (Preservation of Confidences and Secrets of a Client). See infra notes 239-44 and accompanying text.

52. This category includes MODEL RULES, supra note 35, Rule 1.15 (Safekeeping Property). The Model Code counterpart is MODEL CODE, supra note 34, DR 9-102 (Preserving Identity of Funds and Property of a Client). See infra notes 245-57 and accompanying text.

53. The Model Code states, in pertinent part:

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

MODEL CODE, supra note 34, DR 6-101. The Model Code does not define competence.

54. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the rep-
During a breakup, a lawyer could violate these continuing obligations ethics regulations by neglecting a client the lawyer has been actively representing. In *Grievance Committee v. Lempesis,* a disciplined lawyer failed to execute and record a mortgage, and attributed his oversight to the confusion surrounding his dissolved law practice and his personal situation.

A more difficult issue is raised, however, if a lawyer's partner neglects a client the partner has been actively representing. The obligation contained in the Rules to be competent, diligent, and to communicate is owed to "a client." Yet the ethics regulations never define the term "client." The Rules, like the Code, are silent on the issue of whether a lawyer's client should also be viewed as the partner's client, imposing on the partner the ethical obligations of competence, diligence, and communication.

One could turn to partnership, contract, or tort law to define the word "client," which is used in the ethics regulations. Under these bodies of law, when a client comes to a law partnership, the general understanding is that the client is a client of the partnership, not just a client of the particular lawyer consulted.

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59. Id. at 48-51, 148 S.E.2d at 870-71.

60. See supra notes 54-56.

61. See supra notes 54-56. See also 1 G. HAZARD & W. HODES, supra note 37, at 53-54, which states that an essential first step in applying the law of lawyering is to determine whether a person with whom a lawyer is engaged is a client or a nonclient. However, neither the Model Rules of Professional Conduct nor the law at large explicitly defines the identity of the client in any transaction or situation. Indeed, legal rules could not make such an *a priori* identification, for the client-lawyer relationship is fundamentally a contractual relationship, the existence of which will depend upon specific circumstances.

62. See Model Code, supra note 34, DR 6-101; supra note 53 for the text of DR 6-101.

63. See supra note 61 for authority stating that the Model Rules do not explicitly define the identity of a "client."

64. See, e.g., Blackmon v. Hale, 1 Cal. 3d 548, 558-59, 463 P.2d 418, 423-24, 83 Cal. Rptr. 194, 200 (1970) (although partners regarded plaintiff as client of only one partner, court treated plaintiff as client of partnership since firm held itself out as partnership and since no one informed plaintiff that partner was not representing him as member of firm); Corti v. Fleisher, 93 Ill. App. 3d 517, 521, 417 N.E.2d 764, 768 (1981) ("It is fundamental that the employment of one member of a law firm is the employment of all whether all are specially consulted or not, except where there is a special understanding to the contrary.").
Each member of the partnership owes an obligation to the client to perform the contract. Each lawyer is responsible for any breach of a duty to the client. Furthermore, a lawyer is not relieved of these responsibilities immediately upon the breakup of a firm. The majority rule is that when a partnership breaks up, it goes through a dissolution period before the partnership is finally terminated. During this dissolution period, the partnership and each partner have an obligation to complete the partnership work. For a lawyer to be relieved of these obligations, the old partnership must be discharged and new counsel substituted.

Using this understanding of the word "client," both the lawyer personally serving the client and that lawyer's partner would have to comply with the continuing obligations ethics regulations. Smith v. Daub comports with this interpretation. In Smith, two partners brought an accounting action against the third. One issue was the proper allocation of money collected in contingency cases that were ongoing matters when the firm dissolved. The issue facing the court was whether the lawyer handling these cases after the breakup was entitled to extra compensation, beyond his partnership share, for the work he did. In

65. See, e.g., Redman v. Walters, 88 Cal. App. 3d 448, 453, 152 Cal. Rptr. 42, 45 (1979) ("And as such a partner Walters would, of course, be responsible also for the negligent act of the partnership or one or more of his partners"); Smith v. Daub, 219 Neb. 698, 704, 365 N.W.2d 816, 820 (1985) ("Both under the provisions of the Uniform Partnership Act and the Code of Professional Responsibility, the partnership ... was obligated to complete the work for the clients or afford the clients an opportunity to seek other counsel."); see also cases cited infra note 127.

66. See cases cited supra in note 65.

67. C. WOLFRAM, supra note 29, § 16.2, at 887; see also cases cited infra note 126.


69. See, e.g., Redman v. Walters, 88 Cal. App. 3d 448, 453, 152 Cal. Rptr. 42, 45 (1979) (partner could be responsible for malpractice that occurred after his withdrawal from firm since he never withdrew from representation and the "dissolution of the partnership does not of itself discharge the existing liability of any partner"); Blackmon v. Hale, 1 Cal. 3d 548, 559 n.3, 463 P.2d 418, 424 n.3, 83 Cal. Rptr. 194, 200 n.3 (1979) ("It is immaterial in this case that the actual misappropriation occurred after the partnership of Adams and Hale was dissolved. Until plaintiff had notice of the dissolution and consented to a discharge of the partnership, Hale remained liable for obligations assumed before dissolution."); Ellerby v. Spiezer, 138 Ill. App. 3d 77, 81, 485 N.E.2d 413, 416 (1985) ("law partnership's dissolution did not terminate its contractual relations with its clients"); Smith v. Daub, 219 Neb. 698, 704, 365 N.W.2d 816, 820 (1985) ("Both under the provisions of the Uniform Partnership Act and the Code of Professional Responsibility, the partnership ... was obligated to complete the work for the clients or afford the clients an opportunity to seek other counsel."); But see Gibson v. Talley, 156 Ga. App. 593, 593-94, 275 S.E.2d 154, 156 (1980) (attorney not liable for malpractice because partnership dissolved before alleged malpractice; case was accepted during partnership and no discussion of whether client knew of dissolution).

70. 219 Neb. 698, 365 N.W.2d 816 (1985).

71. Id. at 699-701, 365 N.W.2d at 817-18.

72. Id.
concluding he was not, the court relied in part on the following reasoning: "Both under the provisions of the Uniform Partnership Act and the Code of Professional Responsibility, the partnership of Daub, Stehlik, and Smith was obligated to complete the work for the clients or afford the clients an opportunity to seek other counsel." Although this language was cited in a civil case between lawyers rather than a disciplinary proceeding, it suggests that each member of a partnership has an obligation to comply with the continuing obligations ethics provisions. It is arguable that Smith v. Daub implicitly defined the word "client" as a client of the partnership and imposed on all partners the ethical obligations to competently represent that client.

This interpretation is troubling, however, because it is at odds with other provisions in the Rules and the law upon which they are based. Ordinarily, a lawyer is not responsible for ethical violations committed by another lawyer, even one's partner. One is only responsible, ethically, for one's own conduct, even though contract and tort law may impose vicarious liability. Of course, a partner has a personal responsibility to "make reasonable efforts to ensure that the firm has measures that give reasonable assurances that all lawyers in the firm

73. Id. at 704, 365 N.W.2d at 820 (emphasis added).
74. The relevant provisions are Rules 5.1 and 5.2:

RULE 5.1 Responsibilities of a Partner or Supervisory Lawyer
(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
   (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
   (2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

MODEL RULES, supra note 35, Rule 5.1.

RULE 5.2 Responsibilities of a Subordinate Lawyer
(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Id. Rule 5.2.

The Model Code does not contain any provisions addressing the issue of the relationship of the individual partners to a client of the partnership. The courts construing the Model Code, however, generally refused to impose vicarious ethical responsibility. See cases cited in ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 280-83 (1984) (law upon which Model Rule 5.1 was based).

75. See supra note 74.
76. Compare text of Model Rule 5.1, supra note 74 with cases cited in supra notes 64-69.
conform to the rules of professional conduct." 77 Furthermore, a lawyer can become personally responsible for another lawyer's violation if the lawyer orders the violation, ratifies it with knowledge of the conduct, or learns of the conduct at a time when the consequences can be avoided or mitigated and fails to take such steps. 78 Absent those circumstances, however, one lawyer is not responsible for another lawyer's ethical violations. These provisions, then, appear inconsistent with a definition of "client" that would include all partnership clients.

It is submitted that in defining the "client" to whom ethical obligations are owed, the better interpretation is that "client" refers to clients personally served by the lawyer. This interpretation has the advantage of being consistent with the other Rules' provisions and the law upon which they are based. 79 Furthermore, there are few, if any, policy reasons to hold a lawyer vicariously responsible for another's ethical violations. Vicarious ethical responsibility is not necessary to make the client whole; partnership and tort law can accomplish that. 80 Furthermore, such vicarious responsibility probably would not increase significantly the level of ethical compliance. A partner or supervisory lawyer already has a personal ethical responsibility to institutionalize measures for compliance and is personally responsible for ethical violations the supervisory lawyer ordered, ratified, or failed to correct, if correction was possible. 81

Until this issue is clearly resolved, however, the conservative approach is for lawyers to recognize that they have potential ethical exposure, as well as contract and tort exposure, with respect to clients served by their partners. Lawyers should notify all partnership clients of their departure from the firm. Unless the partnership agreement specifically provides that a lawyer's withdrawal does not dissolve the partnership, 82 the lawyer would be well advised to have the original partnership withdraw from representation and new counsel substituted. 83 Furthermore, even if the vicarious responsibility approach is re-

77. MODEL RULES, supra note 35, Rule 5.1(b); supra note 74 for text of Rule 5.1.
78. MODEL RULES, supra note 35, Rule 5.1(c); supra note 74 for text of Rule 5.1.
79. See supra note 74; accord Hazard, Ethical Issues In Withdrawal, Expulsion And Retirement, in ABA, WITHDRAWAL, RETIREMENT & DISPUTES 35-36 (1986) ("In the absence of any indications to the contrary, an exiting lawyer can assume the need to be concerned only for 'his' or 'her' clients, that is, assume that the remaining lawyers will take care of the clients they served.").
80. See supra notes 64-69.
81. See MODEL RULES, supra note 35, Rule 5.1; supra note 74 for text of Rule 5.1.
82. See UNIF. PARTNERSHIP ACT § 29, 6 U.L.A. 364 (1914) (dissolution "is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on . . . of the business"); id. § 18, 6 U.L.A. 213 (1914) (stating partnership rights and duties, but permitting them to be modified by agreement). See generally Champion v. Superior Court, 201 Cal. App. 3d 777, 247 Cal. Rptr. 624 (1988). In Champion, the court refused to enforce an agreement limiting a departing partner to the partnership percentage of fees collected after dissolution, reasoning that such a contract would "create a de facto dissolution. It would impose on the lawyer the burden of performing his share of the work in winding up unfinished cases." Id. The court found that the firm was protected because it could elect to dissolve the partnership. Id.
83. See supra notes 68-69. If the lawyer or old firm withdraws, they should comply with the relevant withdrawal provisions. Model Rule 1.16 provides:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
jected, under the Model Rules a partner has a personal responsibility to ensure that the firm has in place measures giving reasonable assurance of conformance to the ethical rules. Thus, during a breakup, each partner should make an effort to institutionalize procedures that will ensure that all firm clients are represented adequately.

2. Restrictive Covenants

Both the Model Code and the Model Rules prohibit a lawyer's use of restrictive covenants. The Model Code's Disciplinary Rule ("DR") 2-108, for example, states:

(A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

(B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to

\[\begin{align*}
(1) & \text{ the representation will result in violation of the rules of professional conduct or other law; } \\
(2) & \text{ the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or } \\
(3) & \text{ the lawyer is discharged. }
\end{align*}\]

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client, if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

\[\begin{align*}
(1) & \text{ the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; } \\
(2) & \text{ the client has used the lawyer's services to perpetrate a crime or fraud; } \\
(3) & \text{ a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent; } \\
(4) & \text{ the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; } \\
(5) & \text{ the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or } \\
(6) & \text{ other good cause for withdrawal exists. }
\end{align*}\]

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon 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, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.


84. See MODEL RULES, supra note 35, Rule 5.1; supra note 74 for text of Rule 5.1.

85. Cf. 1 G. HAZARD & W. HODES, supra note 37, at 456-57 (1985) (Rule 5.1 would be violated if partner made no efforts to ensure that firm lawyers study recently adopted Model Rules). This provision could be used to ensure that all firm lawyers took steps to ensure that there were no unwanted clients whose legal matters were ignored. Accord Hazard, supra note 79, at 35-36 (if there are unwanted clients after breakup, firm must comply with withdrawal provisions).
practice law. 86

Model Rule 5.6 is substantially similar to DR 2-108. 87 The comment to Rule 5.6 explains the rationale for these provisions. Restrictive covenants are undesirable because they limit the lawyer's professional autonomy and the client's freedom to choose a lawyer. 88

Although these ethics provisions have been criticized, 89 the courts, disciplinary authorities, and ethics committees interpret these provisions strictly. 90 In-

86. MODEL CODE, supra note 34, DR 2-108.

87. Model Rule 5.6 provides:
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; or
(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

MODEL RULES, supra note 35, Rule 5.6. The Pennsylvania version of the Model Rule is identical to the ABA version. PA. R. PROF. CONDUCT 5.6.

88. MODEL RULES, supra note 35, Rule 5.6 comment. Accord 1 G. HAZARD & W. HODES, supra note 37, at 486 (1985) ('Covenants not to compete once were attacked as being 'unseemly,' 'unprofessional,' or even 'ungentlemanly.' Those arguments no longer carry legal weight. A better rationale—amply supporting the rule—is that such covenants impinge upon the right of future clients to free choice of counsel.').

89. See, e.g., Corti v. Fleisher, 93 Ill. App. 3d 517, 522-24, 417 N.E.2d 764, 769 (1981) (court did not cite DR 2-108, but, relying on Dwyer v. Jung, found unenforceable agreement that Corti "owned" certain files); Attorney Grievance Comm'n v. Hyatt, 302 Md. 683, 685-88, 490 A.2d 1224, 1225-26 (1985) (disciplinary proceedings brought against Hyatt Legal Clinic attorneys for, among other things, entering into employment agreement prohibiting employee attorneys from later setting up legal clinic or "similar" legal services organization; court dismissed these charges without prejudice, but with leave to refile if necessary, in view of the parties' agreement to rewrite agreement and fact that Hyatt Legal Services never sought to enforce it); Karlin v. Weinberg, 77 N.J. 408, 418-19, 390 A.2d 1161, 1166-67 (1978) (in case upholding restrictive covenant against physician, court distinguished and approved Dwyer v. Jung because covenant there involved lawyers; court also noted Dwyer v. Jung involved absolute prohibition whereas covenant at issue was geographic prohibition); Dwyer v. Jung, 133 N.J. Super. 343, 346-49, 336 A.2d 498, 499-501 (Ch.) (court relied on DR 2-108, ethics opinions, and principles underlying lawyer-client relationship to hold unenforceable, as void against public policy, partnership agreement provision stating that one partner couldn't represent certain designated clients within five years), remanded, 68 N.J. 177, 343 A.2d 464, aff'd per curiam, 137 N.J. Super. 135, 348 A.2d 208 (App. Div. 1975); Cohen v. Graham, 44 Wash. App. 712, 717, 722 P.2d 1388, 1391 (1986) (purchase and sale agreement following dissolution whereby attorney agreed not to represent certain clients violated DR 2-108 and was unenforceable; covenant not to contact certain clients held enforceable), review denied, 107 Wash. 2d 1033 (1987); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1417 (1978) (relying on DR 2-108 and former opinions, Committee opined that certain partnership agreement was unethical; agreement would prohibit departing partner from hiring firm associates for certain number of years); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1171 (1978) (relying on ABA Formal Op. 300 and DR 2-108, Committee opined that partnership agreement was unethical; proposal stated that
deed, research has not revealed any cases decided *after* the adoption of the Model Code or the Model Rules that have upheld a restrictive covenant between

departing attorney would perform no legal services for firm clients for two years); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1072 (1968) (relying on ABA Formal Op. 300 and overruling dicta in ABA Informal Op. 521, Committee opined that restrictive covenant in proposed partnership agreement would be unethical; agreement would prevent withdrawing partner from practicing within county for period of perhaps five years); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 521 (1962) (relying on ABA Formal Op. 300 and Canons 7 and 27, Committee opined that it would be unethical to have an agreement restricting lawyer-employee from handling matter for firm client or firm practicing within locality for certain period of time; in dicta, Committee noted that restrictive agreement in partnership agreement as opposed to employment agreement would not involve any question of ethics since parties are dealing on equal footing); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 300 (1961) (relying on Canons 7, 27 and general principles, Committee opined that it was unethical to have covenant restricting employed lawyer from practicing in community for stated period); District of Columbia Bar Legal Ethics Comm., Op. 181 (Committee opined that confidentiality agreement which, among other things, stated that employee “agrees and covenants 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 relationships with its clients, agents, representatives/vendors or otherwise” violated DR 2-108); District of Columbia Bar Legal Ethics Comm., Op. 122 (1983) (relying on DR 2-108, Committee opined that proposed covenant in partnership agreement was unethical; covenant would, among other things, prohibit departing partner from performing services for clients of firm for 18 months); Idaho State Bar Comm. on Ethics and Professional Responsibility, Formal Op. 108 (1981) (relying on DR 2-108, Committee opined that shareholder agreement may not restrict geographic areas or clients lawyer serves upon termination); New Jersey Advisory Comm. on Professional Ethics, Op. 147 (1969) (relying on Canons of Ethics and proposed draft of Model Code, Committee opined that covenant in partnership agreement was unethical; covenant prohibited withdrawing partner from practicing within county for five years); State Bar of Texas Professional Ethics Comm., Op. 422 (1984) (relying on DR 2-108, Committee opined that proposed partnership agreement and employment agreement between law firms and associates was unethical; among other things, agreements restricted associates for “reasonable time” from “practicing law in competition” with firm in its geographical area and from soliciting firm’s current clients for two years, and restricted withdrawing partners from continued representation of firm clients); O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS No. 10126, at 493 (Supp. 1975) (Virginia, Informal Op. 200) (employment agreement which would preclude attorney from practicing in same geographical area as firm for specified time after attorney leaves firm would be improper); id. No. 9527, at 412 (North Carolina, Op. 776 (1971)) (attorneys may not, when forming association, enter into agreements restricting their practice after end of association); id. No. 9212, at 367 (New York County, Op. 621 (1974)) (it is improper for attorney to enter into agreement which would restrict his acceptance of professional employment from any person who was client of partnership at time he ceased being member); id. No. 8453, at 212 (Indiana, Op. 5-1974 (1974)) (attorneys may not enter into restrictive covenants which limit geographical area where associate may practice after ending association with firm). Accord C. WOLFRAM, *supra* note 29, § 16.2, at 885 (“One limitation is that the [partnership] agreement may not contain a restrictive covenant limiting the right of any partner to practice law after termination of the partnership except as a condition to payment of retirement benefits.”); Galante, supra note 2, at 28 (attorney from Fulop & Hardee “has caused a stir” by suggesting receiver should enforce provision of shareholder agreement that members of firm must remit 50% of fees collected from ex-Fulop & Hardee clients). See also Ladas & Perry v. Abelman, N.Y.L.J., Sept. 3, 1980, at 1, col. 2 (court denied plaintiff law firm’s request for preliminary injunction prohibiting departing attorneys from soliciting or accepting business from firm clients; court reasoned that such injunction would be tantamount to restrictive covenant and can only be used if needed to protect clients from such duress as would tend to interfere with their informed and reliable decision-making).
lawyers. Furthermore, there are only a handful of cases decided before the Model Code was in existence that have upheld a restrictive covenant.\textsuperscript{91}

The ethics committees, with the exception of that of Illinois,\textsuperscript{92} similarly condemn restrictive covenants. The closest these committees have come to permitting restrictive covenants is to opine that certain agreements are \textit{not} restrictive covenants.\textsuperscript{93} For example, the District of Columbia Legal Ethics Committee concluded that an employment agreement limiting the \textit{manner} in which an associate may solicit firm clients is not a restrictive covenant.\textsuperscript{94} The agreement prohibited the associate from contacting the clients by telephone or in

91. \textit{Hicklin} v. \textit{O'Brien}, 11 Ill. App. 2d 541, 138 N.E.2d 47 (1957), appears to be the most recent case upholding a restrictive covenant.

\textit{Hicklin} enforced a restrictive covenant against a lawyer who had received payments pursuant to the \textquotedblleft Contract of Sale\textquotedblright{} of his law practice. \textit{Id.} at 545-47, 138 N.E.2d at 49-50. In doing so, it used a \textquotedblleft reasonableness\textquotedblright{} test. \textit{Id.} at 547-50, 138 N.E.2d at 50-52. The defendant had argued that the contract was illegal, unethical, and against public policy. \textit{Id.} at 546-47, 138 N.E.2d at 50. The court found no illegality and said, without further explanation, that it need not consider the Canons of Ethics. \textit{Id.} at 550, 138 N.E.2d at 52.

Other opinions enforcing a restrictive covenant are extremely old. See \textit{Heinz} v. \textit{Roberts}, 135 Iowa 748, 110 N.W. 1034 (1907) (court granted injunction to enforce contract containing restrictive covenant against attorney); \textit{Thorn} v. \textit{Dimsmoon}, 104 Kan. 275, 178 P. 445 (1919) (court upheld contract between law student and attorney for sale of law practice which included restrictive covenant).

One explanation for these cases might be that before the \textit{Model Code of Professional Responsibility} was adopted, the extent to which the Canons of Ethics prohibited restrictive covenants was unclear. See, e.g., \textit{ABA, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY} 115 (1979) (\textquotedblleft The old Canons had no explicit provision dealing with restrictive covenants between lawyers.\textquotedblright{}). \textit{Compare ABA Comm. on Professional Ethics, Formal Op. 300 (1961) (unethical for employment contract to prohibit employee-lawyer from practicing within region for specific time after his employment) with ABA Comm. on Professional Ethics, Informal Op. 521 (1962) (restrictive covenant in partnership agreement would not be unethical because parties are on equal footing). \textit{Opinion} 521 was overruled in ABA Comm. on Professional Ethics, Informal Op. 1072 (1968).}

92. When it adopted the \textit{Model Code of Professional Responsibility}, the Illinois Supreme Court declined to adopt DR 2-108, stating that \textquotedblleft the common law relating to restrictive covenants is sufficient to handle the problem, and that lawyers should not be subject to disciplinary action for entering into such agreements.\textquotedblright{} \textit{ILL. CODE PROF. RESPONSIBILITY} DR 2-107 Commentary. The court may have been thinking of \textit{Hicklin} v. \textit{O'Brien}, 11 Ill. App. 2d 541, 138 N.E.2d 47 (1957), when it made this statement. See \textit{supra} note 91 for a discussion of \textit{Hicklin}.

This explains the unusual position of the Illinois Ethics Committee. See, e.g., Illinois State Bar Ass'n, Comm. on Professional Ethics, Op. 86-16 (1987). Among other things, the Committee declined to express an opinion regarding the validity of an employment agreement whereby the associate agreed to surrender all future business referred by firm clients, since such restrictive covenants were not covered by ethical regulation, but were a matter of common law. See \textit{id. \ Compare id. with opinions cited \textit{supra} note 91 and \textit{infra} notes 105-06.}


93. See, e.g., District of Columbia Bar, Legal Ethics Comm., Op. 97 (employment agreement that prohibits solicitation of firm clients but not mailed announcements is not improper restrictive covenant); District of Columbia Bar, Legal Ethics Comm. Op. 77 (same).

A more difficult issue is raised if an agreement imposes a financial penalty for competing, but does not absolutely forbid such competition. Two different types of financial penalties can be imposed. One type requires the departing lawyer to forfeit certain monies if the lawyer competes with the firm. This person, permissible in the District of Columbia, but did not prohibit mailed announcements to firm clients.95

Given the clarity of the ethical regulations and the adherence to that language by courts and ethics committees, what is perhaps surprising is that lawyers continually propose such restrictive covenants, that restrictive covenants actually exist in lawyer agreements, and that lawyers even try to enforce them.96 Such agreements are not limited to any particular type of practice. They have been used in two-person firms,97 mid-size firms,98 and even legal clinics.99

Dwyer v. Jung100 demonstrates the current standard reaction to a restrictive covenant in a partnership agreement.101 After practicing together approximately one and a half years, Jung dissolved his three-lawyer partnership.102 Jung’s former partners then brought an accounting action against him.103 Jung counterclaimed, alleging that his former partners had violated the restrictive covenant contained in the partnership agreement.104 That provision stated:

Should the partnership terminate, all clients listed in exhibit “A” shall be designated to certain individual partners. Upon termination, and by virtue of this Agreement, all partners shall be restricted from doing business with a client designated as that of another partner for a period of 5 (five) years.105

After noting the scarcity of reported opinions, the court reviewed DR 2-108, the legal principles underlying that provision, and various ethics committee opinions.106 The court then held that the restrictive covenant in the partnership agreement was void as against public policy.107 Dwyer v. Jung thus illustrates the unforgiving approach to an absolute prohibition on competition.108

A more difficult issue is raised if an agreement imposes a financial penalty for competing, but does not absolutely forbid such competition. Two different types of financial penalties can be imposed. One type requires the departing lawyer to forfeit certain monies if the lawyer competes with the firm.109 This

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95. Id.
96. See supra note 90; infra notes 109-10.
101. See supra note 90 for a discussion of the reluctance of courts and ethics committees to enforce such restrictive covenants.
102. 133 N.J. Super. at 345, 336 A.2d at 499.
103. Id. at 345-46, 336 A.2d at 499.
104. Id. at 345-46, 336 A.2d at 499.
105. Id. at 345, 336 A.2d at 499.
106. Id. at 346-49, 336 A.2d at 499-501.
107. Id. at 346-49, 336 A.2d at 499-501.
108. Accord cases cited supra note 90.
109. See, e.g., Hagen v. O’Connell, Goyak & Ball, 68 Or. App. 700, 703-04, 683 P.2d 563, 564-65 (1984) (court refused to enforce buy-sell agreement that reduced shareholder’s payments by 40% if shareholder failed to enter into binding noncompetition agreement, finding penalty violated DR 2-
type of penalty is not tied to a particular client. A second type of financial penalty is tied to a particular client. The agreement gives the firm some or all of the fees attributable to work done for certain clients after the lawyer's departure.  

The approach taken by the majority of courts and committees consider-

108); Gray v. Martin, 63 Or. App. 173, 181-82, 663 P.2d 1285, 1290 (court refused to enforce partnership agreement that deducted one-half of one year's profits if partner competed upon withdrawal), petition for appeal denied, 295 Or. 541, 668 P.2d 384 (1983); District of Columbia Bar Legal Ethics Comm., Op. 181 ("Confidentiality Agreement," which required employee-attorney to covenant, inter alia, not to disrupt firm business in any way after departure and which provided for liquidated damages of $150,000 plus attorneys' fees and costs upon violation, violated DR 2-108); District of Columbia Bar Legal Ethics Comm., Op. 77 (employment contract which provided penalty of $4,000 per year of employment for solicitation of firm clients was not unethical because mailed announcements were permitted; committee assumed financial penalty could constitute restrictive covenant); Kentucky Bar Ass'n Ethics Comm., Op. E-326 (1987) (committee opines that partnership agreement that ties partner's right to certain payments to covenant not to compete within geographic area violates DR 2-108); Virginia State Bar Standing Comm. on Legal Ethics, Op. 880 (1987) (relying on DR 2-106, Virginia's version of Model Code DR 2-108, committee opined that proposed deferred compensation plan for professional corporation was unethical insofar as it would deny compensation, comparable to death benefits, for withdrawing attorneys who practiced within certain geographical radius and insofar as money for such benefits initially was contributed to plan by attorney-employee, rather than firm-employer); Virginia State Bar Standing Comm. on Legal Ethics, Op. 428 (1981) (committee found unethical partnership agreement provision linking termination compensation to agreement not to practice for five years in certain communities, specifically finding termination benefits did not constitute "retirement benefits" contemplated in DR 2-108). But see Cohen v. Lord, Day & Lord, No. 34,599 (N.Y. App. Div. Nov. 15, 1988) (1988 N.Y. App. Div. LEXIS 11226) (reversing lower court, court enforced partnership agreement which required partner who competed in certain geographic area to forfeit share of partnership profits collected in three years following his withdrawal to which he otherwise was entitled; rejecting Gray v. Martin, court concluded that financial disincentive does not "restrict" lawyer and that DR 2-108(A) was intended to protect the rights of the public to select counsel of choice, not to safeguard attorney's right to departure compensation); M. ALTMAN & R. WEIL, supra note 7, § 8.03, at 8-5, app. 63 (observing that "some partnership agreements specifically deny payments to a former partner in competition" and presenting sample agreement with differing benefits).

110. See, e.g., In re Silverberg, 75 A.D.2d 817, 819, 427 N.Y.S.2d 480, 482 (1980) (court found agreement that required departing partner to remit 80% of net billings from certain clients violated DR 2-108 and was not enforceable in arbitration). See also Corti v. Fleisher, 93 Ill. App. 3d 517, 522-23, 417 N.E.2d 764, 769 (1981) (court did not cite DR 2-108, but relied on Dwyer v. Jung to find unenforceable employment agreement provision stating that "the owner of each file . . . shall be entitled to all fees received subsequent to the date of termination of this agreement"); Dallas Bar Ass'n Legal Ethics Comm., Op. 86-1 (1986) (agreement giving firm 10% of all fees collected on new business of ex-firm clients handled by departing attorney violated DR 2-107, fee division provision; committee relied in part on District of Columbia Bar, Op. 65, infra, and State Bar of Texas, Op. 422, supra note 90); District of Columbia Bar Legal Ethics Comm., Op. 122 (partnership agreement that required attorney to give firm 20% of gross billings from certain client for five years after departure violated DR 2-108; committee drew no distinction between fees for new matters and fees for ongoing matters); District of Columbia Bar Legal Ethics Comm., Op. 65 (employment agreement that required attorney to give firm 40% of net billings for firm clients for two years after departure violated DR 2-108 because it created restriction on right to practice; committee drew no distinction between fees for new matters and fees for ongoing matters); State Bar of Michigan Comm. on Professional & Judicial Ethics, Op. C-1145 (1986) (committee found that employment contract which said that lawyer who represented firm client within two years after departure had to purchase goodwill associated with client, as measured by value of billable time spent servicing client in past 12 months, violated DR 2-108; committee drew no distinction between fees for new matters and fees for ongoing
ing the issue is that such agreements are indeed restrictive covenants.111

Gray v. Martin112 is perhaps the leading example of a case finding that a financial penalty was an improper restrictive covenant.113 In Gray, a law firm brought an accounting action against Martin, a departing partner.114 Martin counterclaimed, seeking money provided for in the “benefits paragraph” of the partnership agreement.115 The trial court dismissed Martin’s counterclaim.116 The court found these benefits were excluded by the “withdrawal paragraph” of the partnership agreement.117 The withdrawal paragraph said that a partner who withdrew and then practiced law within a three-county area forfeited certain benefits, amounting to one-half of one year’s profits.118 The Oregon Court of Appeals reversed the trial court’s dismissal of Martin’s counterclaim. The court found the withdrawal paragraph void as against public policy because it violated DR 2-108.119

Although the withdrawal paragraph imposed a financial penalty, rather than an outright prohibition, the court reasoned that it was a restrictive covenant because it affected Martin’s right to practice in three counties. If Martin did practice, he would lose benefits which otherwise would be his.120 The court also rejected the law firm’s argument that the withdrawal provision was merely a condition of retirement benefits, thus falling within DR 2-108’s exception.121

matters). But see Levy v. Kreindler, N.Y.L.J., Sept. 3, 1987, at 11, col. 2 (N.Y. Sup. Ct.) (court rejected argument that agreements which allowed senior partner to determine percentage of fees departing partner would receive for cases in which he was substituted did not have chilling effect on clients’ right to select counsel and did not violate DR 2-108, given senior partner’s duty to act in good faith). Cf. cases cited infra note 145, where there was no agreement but the courts ruled departing lawyers must share fees in ongoing cases with their partners.

111. See supra notes 109-10.


113. 63 Or. App. at 181-82, 663 P.2d 1290-91.

114. Id. at 176, 663 P.2d at 1286.

115. Id. at 181, 663 P.2d at 1290. The paragraph in question, paragraph 11, will be referred to as the “benefits paragraph” for convenience.

116. Id. at 176, 663 P.2d at 1287.

117. Id. at 177, 663 P.2d at 1287. The paragraph in question, paragraph 25, will be referred to as the “withdrawal paragraph” for convenience.

118. Id. at 181, 663 P.2d at 1290.

119. Id. at 181-82, 663 P.2d at 1290-91.

120. Id., 663 P.2d at 1290.

121. 63 Or. App. at 181-82, 663 P.2d at 1290. Gray v. Martin’s rejection of the “retirement benefits exception” is consistent with the commentary. See, e.g., ABA, ANNOTATED RULES OF PROFESSIONAL CONDUCT 297 (1984) (citing Dwyer v. Jung and Gray v. Martin with approval), which states,

As described above, an agreement between lawyers purporting to restrict the right to practice after dissolution is void as against public policy and is in violation of a lawyer’s ethical obligation if the restriction is unrelated to benefits upon retirement . . . . Similarly, a partner’s right to payment upon withdrawal from the firm may not be made contingent on the partner’s covenant not to compete within the geographical area.

Id. See 1 G. HAZARD & W. HODES, supra note 37, at 486 (1985) (observing that “purpose and meaning of the last clause of Rule 5.6(a) is not crystal clear;” the context suggests these authors view this clause as applying to true “retirement” situation rather than “withdrawal” situation).
The court said that if withdrawal has the same meaning as “retirement” in DR 2-108, then the disciplinary rule has no meaning.\(^{122}\) The court concluded by noting that it was appropriate to find the withdrawal paragraph unenforceable because of the violation of the disciplinary rule.\(^{123}\) Thus, \textit{Gray v. Martin} exemplifies the authority holding that a financial penalty, as well as an outright prohibition, can constitute a restrictive covenant.\(^{124}\)

As discussed above, the majority of courts and ethics committees have found unethical \textit{agreements} that absolutely forbid a departing lawyer from com-

\(^{122}\) 63 Or. App. at 182, 663 P.2d at 1290. Of course, one could argue the flip side: if retirement means true retirement from law practice, rather than withdrawal from a law firm, then DR 2-108(B)(2)'s exception is meaningless—pure surplusage—because one would not need a noncompetition clause in these circumstances.

\(^{123}\) 63 Or. App. at 182, 663 P.2d at 1290.

\(^{124}\) This reasoning—that a financial penalty is indeed a restriction and can be equivalent to a prohibition—appears sound. Nevertheless, this reasoning has been rejected in one financial penalty case. See \textit{Cohen v. Lord, Day & Lord}, No. 34,599 (N.Y. App. Div. Nov. 18, 1988) (1988 N.Y. App. Div. LEXIS 11226) (court upheld agreement requiring lawyer who competes to forfeit approximately one year's salary, which would have been paid out over three years had lawyer not competed; agreement imposed a "financial disincentive" but did not restrict lawyer's ability to practice law). \textit{Cf.} Rochester Corp. v. Rochester, 450 F.2d 118, 122-23 (4th Cir. 1974) ("[F]orfeiture [of retirement benefits], unlike the restraint included in the employment contract, is not a prohibition on the employee's engaging in competitive work but is merely a denial of the right to participate in the retirement plan if he does so engage.").

Contrary to \textit{Cohen, supra}, the author believes that a financial penalty can affect both the lawyer's autonomy and the client's right to select counsel of choice. Indeed, both DR 2-108 and Rule 5.6 prohibit \textit{restrictions} on the right to practice law, not just outright prohibitions. See \textit{supra} notes 86-88 and accompanying text for the prohibitions in DR 2-108 and Rule 5.6 against restrictive covenants on the right to practice law. Even the \textit{Cohen} court might consider a 99% financial penalty to be a restriction, although it did not consider an alleged penalty of $285,000, approximately one year's salary, to be a restriction. Rather than have each court determine an arbitrary threshold that must be exceeded before a financial penalty is considered a restrictive covenant, the better approach is to treat all agreements that impose financial penalties for competition as restrictive covenants. \textit{See generally} \textit{Sherbert v. Verner}, 374 U.S. 398, 403-10 (1963) (state may not deny unemployment benefits to person who refuses to work on Saturday for religious reasons); \textit{Speiser v. Randall}, 357 U.S. 513, 518-19 (1958) (government may not act indirectly to produce result that it could not command directly).

On the other hand, the type of financial penalty found in \textit{Gray v. Martin} is arguably less egregious than the client-based penalty because it will not have as great an impact on clients although it may have either a greater or lesser impact on lawyers. See \textit{supra} notes 109-10. To illustrate, it seems impossible to predict which type of financial penalty will have the greatest impact on the lawyer's professional autonomy because that undoubtedly will depend on the circumstances. (The relevant circumstances include the size of the nonclient-based penalty and, for the client-based penalty, the lawyer's need to have a particular client's business in order to afford to leave the firm.) On the other hand, a client-based penalty probably will have the most direct impact on the client's freedom to choose a lawyer. If an attorney gets only 20¢ for every dollar billed for certain clients, as in \textit{In re Silverberg}, 75 A.D.2d 817, 427 N.Y.S.2d 480 (1980), the attorney probably will not represent the client for long. That client probably will be deprived of its first-choice lawyer (or pay high fees). On the other hand, a penalty that is not tied to a particular client will not deprive a \textit{particular} client of its first-choice lawyer. The lawyer has no financial incentive to decline representation of a particular client. What could happen is that clients will have a smaller number of \textit{firms} to choose from and perhaps a different type of firm or practice will be available because the lawyer will be discouraged from leaving the firm.
peting with the firm or that impose a financial penalty on such competition. However, even where there are no restrictive covenant agreements, there are two situations in which the parties might resort to arguments based on DR 2-108 or Rule 5.6. These are situations in which there are no restrictive covenant agreements, but the parties contend that a proposed rule of law should not be applied because it is equivalent to a restrictive covenant agreement. The argument is that if an agreement that imposes a restrictive covenant is improper, a proposed rule of law that accomplishes the same thing also should be improper and rejected.

The first situation in which this “indirect” restrictive covenant argument could be used is where there is a dispute among partners over the allocation of fees and profits after a breakup. To understand this issue, a review of partnership law is needed. Absent a contrary agreement, a partnership is dissolved when the relationships change by any partner ceasing to be associated with the carrying on of the business, that is, when the firm breaks up.125 The firm then goes through a winding-up period before the partnership is finally terminated.126 During the dissolution period before termination, each partner has an independent obligation to complete the partnership work.127 In the absence of an agreement to the contrary, no partner is entitled to extra compensation for this “wind-up work,” even if it lasts for years.128 This “no-compensation” rule of


128. Fox v. Abrams, 163 Cal. App. 3d 610, 616-17, 210 Cal. Rptr. 260, 265-66 (1985) (“no compensation” rule applied to professional corporation as well as partnership, and because agreement was silent, fees in ongoing cases should be divided on basis of Jewel v. Boxer); Jewel v. Boxer, 156 Cal. App. 3d 171, 178-79, 203 Cal. Rptr. 13, 18 (1984) (in absence of agreement, fees in cases ongoing at time of dissolution to be shared according to attorneys’ rights to fees in former partnership); Rosenfeld, Meyer & Susman v. Cohen, 146 Cal. App. 3d 200, 216-20, 194 Cal. Rptr. 180, 189-92 (1983) (because attorney breached fiduciary duty by failing to complete ongoing antitrust case for partnership, fees belonged to partnership); Sheradsky v. Moore, 389 So. 2d 1206, 1207 (Fla. App. 1980) (law partner in dissolution owes duty to partners to conclude firm business without extra compensation, including overhead, petition for appeal denied, 399 So. 2d 1145 (Fla. 1981)); Frates v. Nichols, 167 So. 2d 77, 81 (Fla. App. 1964) (adopting rule that retention of law firm obligates every member to fulfill contract and that upon dissolution, each partner is obligated to complete that obligation without extra compensation); Ellerby v. Spiezer, 138 Ill. App. 3d 77, 82-83, 485 N.E.2d 413, 417 (1985) (court adopted “no compensation rule” for contingency fee cases completed after firm dissolution); Berkson v. Berryman, 62 Md. App. 79, 93-94, 488 A.2d 504, 511-12 (in absence of
partnership law could be challenged by relying on the “indirect” restrictive covenant argument. The argument is that if an agreement that imposes a financial penalty on lawyers for continuing to represent “firm” clients is improper, a rule of law that accomplishes the same thing also should be improper. Although this “no compensation” partnership principle theoretically could be challenged on the ground that it is tantamount to a restrictive covenant, the courts generally have not been troubled by this point. One reason may be that the “no compensation” principle is evenly balanced, requiring all partners to share, after a breakup, fees from ongoing matters, whereas a restrictive covenant is more likely to cover fees for future matters or to impose a burden only on the departing party.

contract, partners were not entitled to extra compensation for work done during “winding up” of partnership), cert. denied, 303 Md. 295, 493 A.2d 349 (1985); Resnick v. Kaplan, 49 Md. App. 499, 507, 434 A.2d 582, 587 (1981) (court adopted “no compensation” rule, finding attorneys had duty to share fees according to usual percentages); Smith v. Daub, 219 Neb. 698, 704, 365 N.W.2d 816, 820 (1985) (applying Uniform Partnership Act, held that partner was not entitled to additional compensation for work performed on contingency cases following dissolution); Platt v. Henderson, 227 Or. 212, 233-39, 361 P.2d 73, 83-85 (1961) (partner was not entitled to any special compensation for “winding up” work). But see Cofer v. Hearne, 459 S.W.2d 877, 880 (Tex. 1970) (departing partner is entitled to keep compensation for work done after his departure on cases that originally were firm cases; majority rule rejected as unconscionable and inequitable). See also Dinkes, Mandel, Dinkes & Morelli v. Ioannou, N.Y.L.J., July 22, 1987, at 11, col. 3 (N.Y. Sup. Ct.) (court referred case to referee to determine if firm and associate had agreement; if not then plaintiff firm should receive reasonable value for legal services for work done prior to time defendant-associate took over certain cases); McLean v. Michaelowsky, 117 Misc. 2d 699, 701, 458 N.Y.S.2d 1005, 1007 (Sup. Ct. 1983) (after associate departed and took over certain cases, firm was entitled to quantum meruit recovery).


131. Compare the “no compensation” cases cited supra note 128 with the cases and ethics opinion cited supra note 110, which find client-based financial penalty agreements to be improper restrictive covenants. The agreements in the cases cited supra note 110 found to be restrictive covenants
The second situation in which an "indirect" restrictive covenant argument could be offered is where a law firm seeks a preliminary injunction against the departing lawyers to prevent them from contacting or representing clients of the old firm. In an attempt to defeat the injunction, lawyers have argued that an injunction is improper because it is equivalent to a restrictive covenant.\textsuperscript{132} This argument has met with limited success.\textsuperscript{133}

In sum, it is clear that some lawyers still are using employment, shareholder, or partnership agreements that absolutely forbid competition or that impose a financial penalty for doing so. It is also clear that some lawyers, at least, will try to enforce such restrictive covenants during a law firm breakup. These actions are inadvisable. With very few exceptions, such agreements consistently have been found unethical and probably are unenforceable.

It is also clear that during breakup disputes some lawyers have cited DR 2-108 and Rule 5.6 in situations where there is no agreement. They rely on these ethical principles to support their position on other issues such as fee allocation and injunctions against client contact. It is beyond the scope of this article to discuss how ethics principles and other legal principles will be reconciled in particular situations if they conflict.\textsuperscript{134} It should be noted, though, that these situations probably will only increase, and that it is difficult to predict how these issues will be resolved in the courts.\textsuperscript{135}

appear to penalize only the departing lawyer or to impose a client-based financial penalty on the lawyers with respect to new matters, rather than ongoing matters, that the lawyers are handling for former "firm" clients.

In the future, the courts might not only reject this "indirect" restrictive covenant argument, discussed \textit{supra} notes 125-30 and accompanying text, but also might conclude that a client-based financial penalty is not a restrictive covenant if it applies equally to both sides of the dispute and is limited to fees for ongoing cases. The rationale would be that parties should be able to enter into an agreement that is equivalent to the rule of law the court will impose in the absence of an agreement.

132. \textit{See}, e.g., \textit{Ladas \& Parry v. Abelman}, N.Y.L.J., Sept. 3, 1980, at 13, col. 4 (N.Y. Sup. Ct.) (court denied injunction that sought to enjoin defendants from soliciting or accepting business from firm clients, relying on DR 2-108 and principle that no restriction may be placed upon lawyer's right to practice law and that injunction should only be used to protect clients from such duress as would interfere with their decision-making).


134. \textit{See supra} note 38.

135. The unpredictability of the courts is demonstrated by \textit{Champion v. Superior Court}, 201 Cal. App. 3d 777, 247 Cal. Rptr. 624 (1988). Because of its effect on a client's choice of counsel, the court found unenforceable a contract which said that

all clients and client files remain the property of the Partnership and any fees realized in any such case shall remain the property and asset of the Partnership. The withdrawing partner shall be entitled to that percentage of the fees equal to his percentage in the Partnership at the time of departure.

\textit{Id. at} 782, 247 Cal. Rptr. at 626. The court interpreted the contract to mean that fees from an ongoing case the departing attorney took with him had to be shared, but not fees from all ongoing cases since the partnership did not dissolve. \textit{Id.} Because the policy concerns are similar to those used to challenge the "no compensation" principle, and had been previously rejected, one might have expected this California court to enforce the contract. Instead, however, this court invalidated the contract provision and permitted the attorney to retain fees from these cases.
3. Fees

Both the Code and the Rules regulate the maximum fees that a lawyer may charge the client. Assuming that lawyers do not change their fee agreement with the client and that the agreement was proper to begin with, these provisions should not prove particularly troublesome when law firms break up. However, both the Model Code and Model Rules have limitations on fee splitting that could present a problem during a breakup. Unfortunately, whether these provisions apply during a breakup presents difficult statutory construction issues.

Neither the Code nor the Rules regulates the manner in which lawyers within a firm divide a fee provided the amount of the total fee is reasonable.

136. See Model Rules, supra note 35, Rule 1.5 (lawyer's fee must be "reasonable"); Model Code, supra note 34, DR 2-106 (lawyer prohibited from charging "illegal" or "clearly excessive" fee). The Pennsylvania version of the Model Rule is different in that it prohibits an "illegal" or "clearly excessive" fee, but defines such a fee using the factors the Model Rules use to define a "reasonable fee." See Pa. R. Prof. Conduct 1.5.

In addition to these regulations regarding maximum fees, various bar associations have, during the past, issued guidelines regarding minimum fees. The Supreme Court held that these minimum fee schedules violate the antitrust laws. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (mandatory minimum fee schedule published by county bar association and enforced by state bar violated Sherman Antitrust Act).

137. DR 2-107 Division of Fees Among Lawyers provides:

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

(B) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

Model Code, supra note 34, DR 2-107. Subsection (e) of Rule 1.5 provides:

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

Model Rules, supra note 35, Rule 1.5(e). The Pennsylvania version of the Model Rule is significantly different in that subsection (e) is a complete new version of the ABA subsection (e). The Pennsylvania version of subsection (e) deletes the requirement that the fee division be in proportion to the services performed or that the attorney has agreed in writing to assume joint responsibility for the case:

(e) A lawyer shall not divide a fee for legal services with another lawyer who is not in the same firm unless:

(1) the client is advised of and does not object to the participation of all the lawyers involved, and

(2) the total fee of the lawyers is not illegal or clearly excessive for all legal services they rendered the client.

Pa. R. Prof. Conduct 1.5(e).
However, both the Code and the Rules regulate the manner in which lawyers from different firms may split a fee. Both the Code and the Rules permit interfirm fee division, but only if the client is advised, the total fee is not excessive, and other conditions are met. Disciplinary Rule 2-107 of the Model Code requires the division to be made in proportion to the services performed and the responsibility assumed by each lawyer. The Model Rules require, at a minimum, that all lawyers dividing the fee assume joint responsibility for the representation. Thus, when a firm and its departing lawyers divide fees for legal work performed after the breakup, the threshold issue from an ethics perspective is whether such division should be regarded as a regulated interfirm division or an unregulated intrafirm division.

Under the Model Code, even if a division of fees is between different law firms, the attorney may not have to comply with the requirements of the disciplinary rule: “This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.” Thus, assuming there was an interfirm fee division under the Code, the second issue will be whether the fee division was made pursuant to a “separation agreement.”

The Model Rules’ fee splitting provision, Rule 1.5(e), does not contain a comparable exception for separation or retirement agreements. The comment to Rule 1.5 does not explain this omission. Furthermore, this issue never arose during the debates before the ABA House of Delegates. Hence, it is difficult to tell if this was an inadvertent oversight by the drafters or a deliberate omission. Furthermore, even if it were a deliberate omission, it is unclear whether this provision was omitted because the drafters considered such agreements to

138. See supra note 137.
139. See id. There has been some disagreement regarding what DR 2-107(A)(2) means in requiring attorneys to divide a fee “in proportion to the services performed and responsibility assumed by each.” Model Code, supra note 34, DR 2-107(A)(2). See generally ABA, Annotated Model Rules of Professional Conduct 58 (1984) (and cases cited therein); American Bar Foundation, Annotated Code of Professional Responsibility 111-13 (1979) (ethics opinions regarding DR 2-107); G. Hazard & W. Hodes, supra note 37, at 86 (Supp. 1987) (different interpretations of DR 2-107); C. Wolfgram, supra note 29, § 9.2, at 512 (same).
140. See supra note 137. Unlike the Model Code, then, the Model Rules permit “referral fees” provided the referring attorney assumes in writing joint responsibility for the representation and complies with the other requirements. The Model Code was concerned about “brokering,” Vogelhut v. Kandel, 308 Md. 183, 190, 517 A.2d 1092, 1096 (1986), but the Model Rules permit a referral fee because it “facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well.” Model Rules, supra note 35, Rule 1.5 comment.
141. Model Code, supra note 35, DR 2-107(B); see supra note 137 for the text of DR 2-107(B).
142. See Model Rules, supra note 35, Rule 1.5(e); supra note 137 for the text of Rule 1.5(e).
143. Legislative History of the Model Rules, supra note 29, at 39-47.
144. Cf. 1 G. Hazard & W. Hodes, supra note 37, at 84-86.1 (1985 & Supp. 1987) (no reference made in treatise to omission of “separation agreement” exception from Rule 1.5(e)). The drafters may have intentionally omitted the exception because they thought such agreements were “intrafirm” agreements, and no exception was needed to an interfirm fee splitting rule. Alternatively, the omission may have been inadvertent. It may be that the drafters would have included such an exception if aware of its omission. A third possibility is that the drafters considered such agreements to be interfirm divisions, but felt an exception was inappropriate and deliberately omitted
be unregulated intrafirm agreements or because they wished to delete the interfirm separation agreement exception. Thus, under the Model Rules, assuming there was an interfirm division, additional issues are whether a separation agreement exception should be read into the Rule and, if so, whether the agreement in question satisfies that exception.

The cases do not provide a clear answer to these statutory construction issues. To begin with, research has not revealed any disciplinary cases which raise the issue of whether lawyers violate Disciplinary Rule 2-107 or Rule 1.5(e) by splitting fees following a breakup. The issue of fee splitting has been raised in some, but not all, of the civil cases among lawyers regarding proper allocation of fees following a breakup. These fee allocation cases suggest different ways to

One definition of an “interfirm” fee division is a division between lawyers who, as a practical matter, are in different firms at the time the division is made. This is the likely definition implicitly used in In re Silverberg.\textsuperscript{146} In Silverberg, the agreement said that if the departing lawyer thereafter represented clients of his former partner, he had to give his former partner eighty percent of the net billings for a period of eighteen months.\textsuperscript{147} The court found this agreement violated DR 2-107 and was unenforceable.\textsuperscript{148} To find a violation of DR 2-107, the court must have concluded that the agreement involved an interfirm division. The court could have reached this conclusion if it implicitly used the first definition; the division of fees in this case was between lawyers who, as a practical matter, were practicing in different firms at the time the division was made.

A second definition of interfirm fee division would again be based on the time a division of fees is made, but would define “law firm” in a theoretical, rather than a practical sense. Under this definition, a division of fees for ongoing matters would not involve an interfirm division since a partnership is not terminated until all partnership business is wound up. Thus, theoretically, if not practically, the division involves the same partnership or firm, not different firms.

This second definition appears to be the one used in two Illinois cases, Saltzberg v. Fishman\textsuperscript{149} and Ellerby v. Spiezer.\textsuperscript{150} These courts concluded that it would not be illegal\textsuperscript{151} or improper under DR 2-107\textsuperscript{152} for lawyers who for-
merly practiced together in a firm to thereafter divide fees from cases ongoing at the time of dissolution. The Ellerby court said,

[The fee division] does not result in improper fee splitting as suggested by Spiezer, since as we already noted the partnership continues until the winding up of the partnership affairs has been completed and it is perfectly proper for law partners to split fees among themselves.153

The Saltzberg court concluded the fee division was not illegal because “[i]t was simply perpetuating defendant’s employment with the firm for the limited purpose of disposing of cases on the group B list.”154 This second definition also may be the one contemplated by those courts adopting the “no compensation” rule referred to earlier;155 under this definition, the fee divisions among former partners for ongoing cases would be unregulated intrafirm divisions.

Because the Model Code and the Model Rules prohibit interfirm fee divisions, rather than interfirm fee division agreements,156 the first and second definitions examine the lawyers’ relationship at the time the fee division occurs. These two definitions differ, however, in the way they analyze the lawyers’ relationship. The approach used in the first two definitions is not the only possibility, however. Notwithstanding the statutory language, one might argue that the Model Code and the Model Rules necessarily prohibit interfirm fee division agreements. Then, one could analyze the lawyers’ relationship as of the time the agreement is made, rather than the time the division is made.

In most instances, this third definition should produce the same results as the second. Like the second definition, this third definition would not regulate a prebreakup agreement by partners to divide fees for work performed after the breakup, for cases ongoing at the time of the breakup. This third definition, like definition two, also could explain the “no compensation” cases.157 Definition three would not prohibit the courts from dividing fees among ex-partners pursuant to the Uniform Partnership Act because there is no fee division agreement among the parties in this situation.

This third definition could produce a different result in at least two situations. If the fee division agreement is reached after the lawyers have formed new firms, the fee division would not be permissible under this definition or definition one, but would be permissible under the second definition. Additionally, unlike the first two definitions, this third definition would permit an agreement that divides fees not only for matters that were ongoing at the time of the breakup, but also for new matters handled for certain clients.158

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153. 138 Ill. App. 3d at 81, 485 N.E.2d at 416.
154. 123 Ill. App. 3d at 454-55, 462 N.E.2d at 907.
155. See cases cited supra note 145.
156. See supra note 137.
157. See cases cited supra note 145.
158. Under this third definition, the agreement in In re Silverberg, 75 A.D.2d 817, 427 N.Y.S.2d 480 (1980) would be proper. See supra notes 146-48 and accompanying text for a discussion of this agreement, which purported to divide fees for new matters, as well as ongoing matters. Cf. ethics opinions cited infra note 182 (opining that fee division agreements concerning new matters are improper).
A fourth definition of "interfirm" fee division is suggested by Vogelhut v. Kandel. This definition does not require a choice between a practical or a theoretical definition of "law firm;" nor does it require a choice between the time of division or an agreement to evaluate whether different firms are involved. Instead, the Vogelhut court concluded that DR 2-107 is limited to those situations involving concurrent representation of a client by two lawyers. Thus, this definition would not apply to a division of fees between the firm that initially represented a client and the lawyers who represented the client after the breakup.

In Vogelhut a discharged lawyer sued his successor for breach of contract for twenty-five percent of the fee. The successor argued that the agreement violated DR 2-107 and thus was unenforceable. The court held that DR 2-107 did not apply because "DR 2-107 contemplates concurrent representation of a client by more than one attorney." None of these four definitions is ideal. The second, third and fourth definitions have the advantage of being simple to apply in the breakup situations—they would exempt from regulation postbreakup fee divisions for ongoing cases. Furthermore, because they exempt from regulation most postbreakup fee divisions, one need not ever resolve the difficult issues of the meaning of the separation agreement exception in the Code or whether such an exception should be read into the Rules.

Although simplicity often is desirable, it should not be paramount. This author submits that the preferable interpretation is the first because, for several reasons, it comports most closely with the plain meaning of the statutes, and it satisfies the policy concerns behind these principles. First, it is likely that most people would interpret the statutory language in a practical, rather than a theoretical, manner. The firm does not have an ongoing interest in the fees, but has been limited to quantum meruit recovery. These cases are consistent with the second definition because, in the absence of a partnership, there is not even, theoretically, the same firm dividing fees. See, e.g., Dinkes, Mandel, Dinkes & Morelli v. Ioannou, cited in N.Y.L.J., July 22, 1987, at 11, col. 3 (N.Y. Sup. Ct.) (directing referee to determine if there was agreement between firm and associate and, if not, to award fees based on the "reasonable value of legal services rendered" by firm in cases now handled by associate); McLean v. Michaelowsky, 117 Misc. 2d 699, 704, 458 N.Y.S.2d 1005, 1007 (Sup. Ct. 1983) (same).

164. The second definition states that an interfirm division is one between lawyers who, as a practical matter, are not still practicing together in the same firm. The third definition states that an interfirm division is one between lawyers who were not practicing together at the time of the fee division agreement. The fourth definition states that an interfirm fee division is one between lawyers who concurrently are representing a client. See supra notes 149-53, 158-59 and accompanying text.

165. The second definition also has the advantage of being consistent with the law firm-associate fee allocation cases. In those cases, the firm does not have an ongoing interest in the fees, but has been limited to quantum meruit recovery. See supra notes 146-48 and accompanying text.

166. The first definition describes a regulated interfirm fee division as a division between lawyers who, as a practical matter, are in different firms at the time the division is made. See infra notes 168-77 and accompanying text.

160. Id. at 190, 517 A.2d at 1096.
161. Id. at 186, 517 A.2d at 1094.
162. Id. at 188, 517 A.2d at 1095.
163. Id. at 189, 517 A.2d at 1096.
164. The second definition states that an interfirm division is one between lawyers who, as a theoretical matter, are not still practicing together in the same firm. The third definition states that an interfirm division is one between lawyers who were not practicing together at the time of the fee division agreement. The fourth definition states that an interfirm fee division is one between lawyers who concurrently are representing a client. See supra notes 149-53, 158-59 and accompanying text.
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166. The first definition describes a regulated interfirm fee division as a division between lawyers who, as a practical matter, are in different firms at the time the division is made. See supra notes 146-48 and accompanying text.
167. See infra notes 168-77 and accompanying text.
theoretical, sense. For example, assume that three years after a bitter breakup, lawyers in the old firm and the new firm are splitting fees from a case that was accepted one week before the breakup. This division would probably be considered to involve different firms. Even partnership law recognizes that, once there has been a dissolution, the relationship has changed, even though the partnership is not yet terminated and the partners have a duty to wind up partnership business.\textsuperscript{168} Second, by speaking of an improper division rather than an improper agreement, the statutory language suggests that “different firms” should be measured as of the time of the division, rather than the time of any agreement.\textsuperscript{169} Finally, there is no reference in the language to the concurrent representation requirement imposed by \textit{Vogelhut}.\textsuperscript{170}

Policy concerns also support this first definition. Disciplinary Rule 2-107 was formulated to prohibit brokering of clients, to protect a client from clandestine payment and employment, and to prevent aggrandizement of fees.\textsuperscript{168} While Rule 1.5 now permits referral fees, i.e., “brokering,” provided the referring attorney retains responsibility, the rule still requires a client to be advised of any fee division and requires the total fee to be reasonable.\textsuperscript{171} Thus, it appears that the Rules still intend to regulate fee division to protect a client from clandestine payment and employment and to prevent aggrandizement of fees. In a breakup situation, the old and the new firms probably will not have the type of relationship that creates a large risk of clandestine employment. There is a risk, however, of aggrandizement of fees. A lawyer in the situation of Silverberg, who received twenty cents for every one dollar of net billings, might be tempted to pad his bill.\textsuperscript{172} This was the concern of the California appellate court in \textit{Champion v. Superior Court},\textsuperscript{173} which found that the fee would be unconscionable if the departing attorney handling the case received less than three percent of the fees generated by his work.\textsuperscript{174} In this kind of situation, clients will be better protected if they are advised of the division of fees between the old and the new

\begin{itemize}
\item \textsuperscript{168} See \textit{supra} notes 125-26 and accompanying text.
\item \textsuperscript{169} See \textit{supra} note 137.
\item \textsuperscript{170} Compare \textit{supra} note 137 with \textit{Vogelhut}, 308 Md. 183, 189, 517 A.2d 1092, 1096 (1986). One could argue that a “concurrent representation” requirement is implicit in DR 2-107 and Rule 1.5(e). The rationale would be that in requiring attorneys to assume joint responsibility for a case or to divide fees in proportion to services and responsibility, these ethical regulations contemplate concurrent representation. Furthermore, when the comment explains the purpose of the rule by saying it “facilitates association of more than one lawyer in a matter,” \textit{Model Rules}, \textit{supra} note 35, Rule 1.5 comment, it is contemplating concurrent representation. The “concurrent representation” interpretation, however, ignores the fact that both the Code and the Rules require disclosure and consent, that some of the purposes of fee splitting regulations are to prohibit clandestine payment and aggrandizement of fees, \textit{Vogelhut} v. \textit{Kandel}, 308 Md. at 189, 517 A.2d at 1096, and that these evils can occur when there is successive representation as well as concurrent representation.
\item \textsuperscript{172} See \textit{supra} note 137.
\item \textsuperscript{173} See \textit{In re} Silverberg, 75 A.D.2d 817, 818, 417 N.Y.S.2d 480, 482 (1980).
\item \textsuperscript{174} 201 Cal. App. 3d 777, 247 Cal. Rptr. 624 (1988).
\item \textsuperscript{175} Id.
\end{itemize}
firms so that they can evaluate the risks of such representation and scrutinize carefully their bills and representation.

In sum, both the statutory language and the policies of these ethical regulations probably are satisfied by a definition of interfirm fee division that includes successive representation, that defines law firms in a practical rather than a theoretical sense, and that determines firm affiliation as of the time of the fee division itself, rather than the time of any fee division agreement.

If this definition of interfirm fee division is accepted, a fee division following a breakup would trigger the requirements of Disciplinary Rule 2-107 and Rule 1.5(c). Because there is no exception to Rule 1.5(c), under the Rules, resolution of the fee splitting issue becomes simple.\textsuperscript{176} Attorneys who divide fees after a breakup will be required to notify the client of the division, ensure that the total fee is reasonable, and assume joint responsibility for the representation.\textsuperscript{177} The client is placed on notice of the division and can act accordingly.

Under the Code, however, resolution of the issue is not quite so simple. Disciplinary Rule 2-107(B) exempts payments made “to a former partner or associate pursuant to a separation or retirement agreement.”\textsuperscript{178} Thus, under the Code, fee divisions for ongoing matters could be permitted either because they are not viewed, in the first instance, as covered by DR 2-107(A), or because they will be treated as falling within DR 2-107(B)’s separation agreement exception. Although the vast majority of courts\textsuperscript{179} considering the issue have concluded that fee divisions for cases that were ongoing at the time of the breakup are not prohibited by DR 2-107, they generally do not explain their reasoning and do not define the separation agreement exception.\textsuperscript{180}

The reasoning of the ethics committees also has been sketchy and inconsistent, although they generally concur that fees for ongoing cases may be divided without violating DR 2-107.\textsuperscript{181} Generally, they also agree that if a fee division

\textsuperscript{176} See supra notes 137, 142-44 and accompanying text, which explain that there is no “separation agreement” exception in the Rules. The author submits that such an exception should not be “read into” the Rules. One can justify the conclusion on statutory construction grounds. See, e.g., 2A C. SANS, SUTHERLAND STATUTORY CONSTRUCTION § 47.23, at 194 (rev. 4th ed. 1984) (“expressio unius est exclusio alterius” rule of statutory construction creates inference that “all omissions should be understood as exclusions”). Furthermore, the omission of an exception is consistent with appropriate policies of the fee division provisions. See supra notes 172-75 and accompanying text.

\textsuperscript{177} See supra note 137.

\textsuperscript{178} Id.

\textsuperscript{179} Compare cases cited supra in note 145 with Corti v. Fleisher, 93 Ill. App. 3d 517, 519, 417 N.E.2d 764, 767 (1981) (employment agreement stating that “owner of each file... shall be entitled to all fees received subsequent to the date of termination of this agreement” found invalid under DR 2-107); In re Silverberg, 75 A.D.2d 817, 427 N.Y.S.2d 480 (1980) (agreement giving each partner 80% of net billings from other partner’s “clients” violated DR 2-107 as well as DR 2-108).

\textsuperscript{180} See cases cited supra note 145.

\textsuperscript{181} See Dallas Bar Ass’n Legal Ethics Comm., Op. 86-1 (1986) (Committee condemned agreement regarding new matters, it expressed no opinion regarding ethical implications of fee division between firm and former associate with respect to client matters which do not constitute new business); Florida Bar Ethics Comm., Op. 84-1 (1984) (Committee advised associate that issue of proper fee split between associate and firm in event client hires associate is not ethics issue but matter of contract); Illinois State Bar Ass’n Comm. on Professional Responsibility, Op. 610 (1978) (partner-
concerns new matters, it is a regulated interfirm agreement that does not fall
within the separation agreement exception.\textsuperscript{182} For those cases and ethics opin-

\textit{Id.}

firm to enter into "referral fee agreement" with associate which gave firm fees for new business
generated by former clients of firm who retain associate; such agreement did not constitute “referral
fee or forwarding fee” permitted by Texas nor is it permissible “separation agreement” under DR 2-
107(B) because it is concerned exclusively with new business); District of Columbia Bar Legal Ethics
partner to pay firm for five years 20% of fees earned from representation of specific client violated
DR 2-107; Committee did not rely on distinction between fees for new matters or ongoing matters or
limit its opinion accordingly); District of Columbia Bar Legal Ethics Comm., Op. 65 (1979) (agree-
ment requiring associate to pay firm 40\% of net billings if he “performs any legal work for a client of
the firm during a two-year period” violated DR 2-107 and did not fall within DR 2-107(B)'s excep-
tion); Illinois State Bar Ass'n Comm. on Professional Ethics, Op. 86-16 (1987) (Committee opined
that it would violate DR 2-107 if firm attempts to collect fees from client or associate, after associ-
ate's departure, where all legal work was done by departing associate and involved matters associate
did not work on with firm); Illinois State Bar Ass'n Comm. on Professional Responsibility, Op. 84-
15 (1985) (employment agreement requiring attorneys departing from professional corporation to
remit, for two years, 25\% of all fees collected from entity that was client of corporation at time of
ions that rely on DR 2-107(B), there has been no significant effort to justify an interpretation of the term “separation agreement” that exempts fees for ongoing cases, but not fees for new matters; that is, to explain why the language and policies of DR 2-107(B) exempt not only fees for work completed before the breakup, but also fees for some, but not all, legal work done after the breakup.183 Because of the conflicting approaches taken by the courts and ethics committees, their failure to examine and explain the statutory language, and

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withdrawal violated DR 2-107; committee did not rely on distinction between fees for new matters and ongoing matters); New York County Lawyers' Ass'n Comm. on Professional Ethics, Op. 596 (1971) (associate cannot divide fees with firm for services rendered after associate leaves, even with respect to clients brought to firm by associate; such division violates DR 2-107); Virginia State Bar Standing Comm. on Legal Ethics, Op. 794 (1986) (Committee stated that “to the extent your predecessor firm's agreement requires conduct not consistent with [Virginia's version of DR 2-107], then it violates that DR”; partnership agreement required partner “who leaves the firm to continue to work on matters for clients he served prior to the time he left the firm, but to submit all bills for processing and payment through the predecessor law firm” and give firm one-third of fees).

183. See, e.g., Corti v. Fleisher, 93 Ill. App. 3d 517, 531, 417 N.E.2d 764, 775 (1981) (DR 2-107(B) did not apply where payments are not tied to particular files and clients are not affected by relationship because DR 2-107(B) "sanctions payment to a former partner or associate of a law firm for legal services which contributed to the firm's overall profit"); Nishman v. DeMarco, 62 N.Y.2d 926, 929-30, 468 N.E.2d 23, 24, 479 N.Y.S.2d 185, 186 (1984) (court cited DR 2-107(B) as support for its conclusion that fee division for ongoing matters was proper; no explanation of exception); Levy v. Kreindler, N.Y.L.J., Sept. 3, 1987, at 11, col. 1 (court cited DR 2-107(B) in support of conclusion that fee division agreement giving senior partner discretion to allocate fees in ongoing cases was proper; no explanation of exception); Baron v. Mullinax, Wells, Mauzy & Baab, Inc., 623 S.W.2d 457, 462 (Tex. Ct. App. 1981) (fee division agreement between firm and associate was permitted under DR 2-107(B) because it was “during the overall process of his separation from the firm” and payments in ongoing cases “would ripen into a payment to a former associate pursuant to the agreement reached on his separation”); Association of the Bar of the City of New York Comm. on Professional Ethics, Op. 80-2 (1982) (agreement to divide fees in ongoing cases was “separation agreement” under DR 2-107(B); committee analogizes agreement to retirement agreement and does not address issue of whether fees could be based on new matters); Dallas Bar Ass'n Legal Ethics Comm., Op. 86-1 (1986) (agreement giving firm 10% of fees on new matters handled by ex-associate for former firm clients was not “separation agreement”; defining separation agreement as agreement “between a law firm and its former associate [or partner] concerning litigation which the . . . attorney and [the] law firm were working on when they were associated”); District of Columbia Bar Legal Ethics Comm., Op. 65 (1979) (agreement requiring payment of 40% of fees attributable to former firm client was not “separation agreement”). The District of Columbia Legal Ethics Committee stated that a separation agreement is limited to situations in which an attorney withdraws from a firm with certain amounts due him or her with respect to work previously preformed or other accrued rights. . . . It was not the intent of DR 2-107(B) to exempt from the restrictions of DR 2-107(A) circumstances involving post-separation payments flowing from the withdrawing attorney to the former firm, relating to work performed by the withdrawing attorney after the date of withdrawal.

District of Columbia Bar, Legal Ethics Committee, Op. 65 (1979); Illinois State Bar Ass'n Comm. on Professional Ethics, Op. 610 (1978) (partnership provision was valid “separation agreement” under DR 2-108(B) “insofar as it provides for division of fees on matters commenced before the withdrawal date”; committee said it was practical provision for sharing fees and would result in firm getting more than billed on some cases and less than billed on others). See also Garfield v. Greenbaum, Wolff & Ernst, 103 A.D.2d 709, 711, 477 N.Y.S.2d 983, 985 (1984) (Asch, J., dissenting) (agreement to pay retired partner fees on sliding scale according to client billings “does not seem to satisfy the requirements of a genuine retirement agreement” and should be void as against public policy).
the absence of legislative history explaining the policy concerns behind DR 2-107(B)'s exception, the fee splitting issue will probably remain difficult and unpredictable in Code jurisdictions.

When deciding how to divide fees after a breakup lawyers should know that the scope of the fee-splitting provisions is still unresolved. The better and more conservative approach is for lawyers to treat these fee divisions as regulated, notify the client of the division, ensure that the total fee is reasonable, and recognize their joint responsibility for the case. Lawyers should also recognize that even with client consent, the ethics committees may treat fee divisions for new matters, as opposed to ongoing cases, as unethical. Furthermore, some courts might rely on these provisions in a civil fee allocation case to invalidate the parties' contract.\textsuperscript{1} In short, the fee division statutes raise some of the most difficult statutory construction issues that can arise during a breakup. Attorneys should be prepared for uncertainty, inconsistency, and inelegant solutions.

4. Publicity

While the fee division regulations may be the most troublesome from a theoretical perspective, the most troublesome provisions from a practical perspective probably are those regulating the type of contact a lawyer may have with clients and others.\textsuperscript{184} These "publicity" regulations can be divided into essentially two subgroups. First, some provisions specify that a lawyer may not make false or misleading communications.\textsuperscript{185} Other provisions regulate when truthful

\textsuperscript{184} As discussed \textit{supra} notes 88-145 and accompanying text, the courts generally refuse to enforce contracts containing unethical restrictive covenants. On the other hand, several courts are willing to enforce contracts containing illegal fee divisions. \textit{See}, e.g., Phillips v. Joyce, 169 Ill. App. 3d 520, 523 N.E.2d 933, 940 (1988) (contract between two firms jointly handling case did not violate DR 2-107 because clients consented and there was joint representation; in dicta court observes that it may be inappropriate for attorney to attempt to use disciplinary rule and illegal contract argument to avoid his contractual obligation); Watson v. Pietrantoni, 364 S.E.2d 812, 815 (W. Va. 1987) (fee splitting agreement violated DR 2-107, but firm could not raise that violation as bar to payment); \textit{see also} Foote v. Shapiro, 6 Pa. D. & C.3d 574, 577-81 (1978) (court upheld contract between lawyers that violated DR 2-107, reasoning that DR 2-107 was not legislative enactment or statement of positive law) (citing also ABA Comm. on Professional Ethics, Informal Op. 870 (1965)) (attorney should not set up unethical conduct as defense)). The reason for this difference may be that restrictive covenants are viewed as more harmful to the client, especially if such contract suits are brought before representation is underway rather than after it is conducted. In any event, with respect to the fee division cases, it arguably is more desirable to reject a DR 2-107 defense in a contract case on the ground that the lawyers should not be able to avoid their obligations by relying on the illegality rather than on the ground that there is no DR 2-107 violation. The latter reasoning leaves the client without protection whereas the former reasoning only leaves the lawyer without protection.

\textsuperscript{185} \textit{See infra} notes 186-224 and accompanying text for a discussion of publicity regulations.

\textsuperscript{186} \textit{See} \textit{MODEL CODE, supra} note 34, DR 2-101(A), DR 2-102(B)-(C); \textit{MODEL RULES, supra} note 35, Rules 7.1, 7.5. Disciplinary Rule 2-101(A) provides:

\begin{itemize}
  \item \textbf{Publicity.}
  \begin{itemize}
    \item \textit{A lawyer shall not, on behalf of himself, his partners, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.}
  \end{itemize}
\end{itemize}

\textit{MODEL CODE, supra} note 34, DR 2-101. Model Rule 7.1 provides:
Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

MODEL RULES, supra note 35, Rule 7.1.

Both the Code and the Rules also require that a firm must be truthful with respect to firm names. Rule 7.5, for example, provides:

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Id. Rule 7.5.

Model Code DR 2-102 provides:

(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm.

(C) A lawyer shall not hold himself out as having a partnership with one or more other lawyers or professional corporations unless they are in fact partners.

MODEL CODE, supra note 34, DR 2-102(B)-(C).

The Pennsylvania version of Rule 7.1 of the Model Rule is identical to the ABA version. See PA. R. PROF. CONDUCT 7.1. However, the Pennsylvania version of Rule 7.5 varies slightly from the ABA version in adding the following to Rule 7.5(a): "If otherwise lawful a firm may use as, or continue to include in, its name, the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession." Id. Rule 7.5(a). Another difference is that the Pennsylvania version of subsection (d) of Rule 7.5 is stated in the negative rather than the positive. Id. Rule 7.5(d).

187. See, e.g., MODEL CODE, supra note 34, DR 2-101, DR 2-102, DR 2-103. Because these Model Code provisions are very lengthy, and many aspects of them have been found unconstitutional, see infra note 207, they are not reprinted here.

In addition to Model Rule 7.1, see supra note 186 for text, the relevant Model Rules provisions are Rules 7.2 and 7.3:

RULE 7.2 Advertising

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical,
The first subgroup is the easier one. Both the Model Code and the Model Rules prohibit a lawyer from making false or misleading communications about the lawyer or the lawyer's services. Although these provisions should be easy to comply with, some lawyers have alleged violations of these provisions during law firm breakups. In Koeppel v. Schroder, for example, a law firm sued to enjoin the departing lawyers from soliciting clients represented by the former

outdoor, radio or television, or through written communication not involving solicitation

as defined in Rule 7.3.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(d) Any communication made pursuant to this Rule shall include the name of at least one lawyer responsible for its content.

MODEL RULES, supra note 35, Rule 7.2.

RULE 7.3 Direct Contact with Prospective Clients

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 addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

Id. Rule 7.3.

The "targeted directed mail" prohibition in Rule 7.3 has been found unconstitutional. Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916 (1988). See infra notes 208-12 and accompanying text for a discussion of Shapero. The Pennsylvania version of Rule 7.2(a) is slightly different. It reads:

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through written communications not within the purview of Rule 7.3.

PA. R. PROF. CONDUCT 7.2.

The Pennsylvania version of Rule 7.3 is completely re-written:

(a) A lawyer shall not solicit in-person or by intermediary professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant move for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person or by telephone, but, subject to the requirements of Rule 7.1 and Rule 7.3(b), does not include written communications, which may include targeted, direct mail advertisements.

(b) A lawyer shall not contact, 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 that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;

(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.

PA. R. PROF. CONDUCT 7.3.

188. See MODEL CODE, supra note 34, DR 2-101; MODEL RULES, supra note 35, Rule 7.1. See also PA. R. PROF. CONDUCT 7.1 (identical to Model Rule 7.1). See supra note 187 for the relevant text of these provisions.

One of the bases the firm cited for the injunction was that the departing lawyers had “falsely represented that the Koeppel firm had split up and implied that it was no longer in a position to service and protect its clients’ interests.” Conversely, in Preiser v. Druckman, it was the departing lawyer who alleged in his complaint that the old firm misled the public by continuing to use his name. And in Paul L. Pratt, P.C. v. Blunt, a departing associate allegedly induced a client to sign a contingent fee contract by representing that he was associated with his former firm. Thus, even when it is permissible and appropriate for a lawyer to make statements to clients of the old firm, the lawyer must be careful that such statements are neither false nor misleading.

Although there have been charges that certain communications during a breakup were false or misleading, the more recurrent issue has been determining what statements by lawyers involved in a breakup, if any, the ethics regulations permit. The issue most frequently raised is what contact the departing lawyer may have with clients of the firm. There are over two dozen ethics opinions on this issue. Furthermore, the issue also arises indirectly in breakup cases, such

190. Id. at 780, 505 N.Y.S.2d at 667-68.
191. Fox, 4 Lawyers Who Left L.L. Firm Barred from Seeking Its Clients, supra note 1, at 1, col. 3 (citing portions of complaint and trial court opinion).
196. Id. at 515, 488 N.E.2d at 1065.
197. See infra notes 198-224 and accompanying text for a discussion of when truthful communications are permitted.
198. See infra notes 199-200 and accompanying text for a discussion of permissible and impermissible communications with former clients.
199. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1466 (1981) (prior Committee advice in Informal Op. 1457 would be same if lawyer were associate rather than partner, distinguishing Adler, Barish); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1457 (1980) (mailing letter to persons with whom attorney had active lawyer-client relationship would be proper under Model Code); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 910 (1966) (withdrawing partner may send announcement to firm clients with whom he had personal contact advising them without elaboration of change and thereafter represent such clients); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 787 (1964) (act of withdrawing lawyer telling clients he would be practicing elsewhere and would like to continue
as in the context of an injunction hearing or a tort action for interference with contract.\textsuperscript{200}

doing work for them would violate Canons of Professional Ethics); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 681 (1963) (lawyer may send announcements of his withdrawal only to his clients, not to firm clients); Alabama State Bar General Counsel, Op. 82-689 (1982) (withdrawing lawyer may send letter to clients personally served, provided that part of letter offering to serve clients was deleted); State Bar of California Standing Comm. on Professional Responsibility & Conduct, Formal Op. 1985-86 (upon withdrawal from firm or dissolution, attorneys must maintain balance between proper notice under Rule 2-111 and proscription against client solicitation contained in Rule 2-101; it is best for firm and departing attorneys to send joint notice, if possible); Chicago Bar Ass'n Comm. on Professional Responsibility, Op. 83-2 (in view of In re R.J.M., 445 U.S. 191 (1982), DR 2-102 and DR 2-103 should be interpreted to permit withdrawing attorney to send written communication to present and former clients of law firm); District of Columbia Bar Legal Ethics Comm., Op. 181 (harmonized District of Columbia Bar opinions 97, 77, and 65, finding no restrictive covenant is created by limitation on lawyer's right to solicit clients provided lawyer can send written announcements); District of Columbia Bar Legal Ethics Comm., Op. 97 (ethical to restrict associate's right to directly solicit clients provided firm preserves associate's right to mail announcement); District of Columbia Bar Legal Ethics Comm., Op. 77 (employment agreement limiting associate's right to solicit clients upon withdrawal was ethical because associate could send printed announcement); Florida Bar Professional Ethics Comm., Op. 84-1 (1984) (associate may inform client that he is no longer member of firm, but may not solicit response from client regarding disposition of client's files); Idaho State Bar Comm. on Ethics, Formal Op. 108 (1981) (associate may notify clients of departure); Illinois State Bar Ass'n Comm. on Professional Responsibility, Op. 86-16 (1987) (associate, as well as firm, may contact clients whom associate personally represented regarding departure and clients' right to select representation); Illinois State Bar Ass'n Comm. on Professional Responsibility, Op. 84-13 (1985) (same); Iowa State Bar Comm. on Professional Ethics and Conduct, Op. 80-40 (1980) (upon dissolution clients can be notified by mail and given choice of attorney); Kansas Bar Ass'n Professional Ethics Comm., Op. 82-18 (1982) (withdrawing attorney may send announcements only to those clients personally handled or that had asked for him); Kentucky Bar Ass'n Ethics Comm., Op. 317 (1987) (attorney can announce withdrawal by telephone or mail to those clients personally represented and advise them of right to select attorney); Maryland State Bar Ass'n Comm. on Ethics, Op. 83-59 (1983) (attorney may contact only clients personally represented, not firm clients generally); State Bar of Michigan Comm. on Professional and Judicial Ethics, Op. 681 (1981) (attorney can notify clients of his withdrawal but cannot express his willingness to represent them); State Bar of Michigan Comm. on Professional and Judicial Ethics, Op. C1 662 (1981) (lawyer may solicit only those clients he handled unless there was a particularly close relationship between lawyer and client); State Bar of Michigan Comm. on Professional and Judicial Ethics, Op. 517 (1980) (only those clients with whom sufficient personal relationship has been established may receive announcement from withdrawing lawyer); Association of the Bar of the City of New York Comm. on Professional Ethics, Op. 80-65 (partner may communicate in person or telephone clients of partnership with whom he had professional relationship to inform them of his withdrawal and may advise clients that they have right to choose their new counsel); Philadelphia Bar Ass'n Professional Guidance Op. 80-94 (notwithstanding firm's objection, lawyer may notify clients that he is leaving firm; lawyer had no interest in continuing representation of clients); State Bar of Texas Professional Ethics Comm., Op. 422 (1984) (associate has duty to his clients and can therefore notify them of his withdrawal from firm); Virginia State Bar Standing Comm. on Legal Ethics, Op. 381 (1980) (attorney may notify clients of departure and offer to continue serving them or recommend another lawyer).

The answers given to what types of contact are permissible have differed dramatically. Some authorities have said that a lawyer may not contact a client unless the lawyer had a personal relationship with that client.²⁰¹ Others permit contact with all firm clients.²⁰² Some state that the contact must be in writing.²⁰³ Others say that telephone contact is permissible.²⁰⁴ Some would not permit the lawyer to advise the client that the client has the right to choose the group of lawyers the client prefers.²⁰⁵ Others permit such notification.²⁰⁶

The range of these views undoubtedly reflects the evolution in the Supreme Court cases involving first amendment protection of a lawyer's commercial speech.²⁰⁷ The most recent case in this line is *Shapero v. Kentucky Bar Associa-


This issue also has been discussed in several articles. See, e.g., *Bonner*, supra note 27 (effect during dissolution of California provision against solicitation and Uniform Partnership Act); *Bufford & Hubbell*, supra note 28 (California Rules of Professional Conduct provision against solicitation); *Robinson*, supra note 27 (discussing *Paul L. Pratt*, P.C. v. *Blunt, Adler, Barish*, Code provisions against solicitation, and first amendment cases); Comment, *Adler, Barish, supra note 27* (discussing *Adler, Barish, Code of Responsibility proscriptions against solicitation, and constitutional limitations on Code*); Comment, *Recent Developments, supra note 28* (same).


207. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647-49 (1985) (Ohio's ban on truthful and nondeceptive drawings in advertisements unconstitutional); *In re R.M.J.*, 455 U.S. 191, 206-07 (1982) (Missouri’s rule prohibiting lawyer from sending announcements to nonclients and limiting advertisements to certain listed information unconstitutional); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 467 (1978) (upheld rule against in-person solicitation for pecuniary gain, as applied to lawyer who solicited clients in person, in their hospital rooms, and elsewhere); *In re Primus*, 436 U.S. 412, 437 (1978) (disciplinary action against ACLU attorney who solicited by mail potential client, offering free legal services to challenge state regulation that required steriliza-
In view of *Shapero*, it seems clear that a state cannot prohibit, on ethical grounds, written contact between clients and the lawyers involved in a breakup, provided such contact is not false or misleading.\(^{210}\) One would assume that since the advice is truthful, a state must also allow lawyers to advise their clients that they have the right to counsel of their choice.\(^{211}\) However, even post-*Shapero*, the state may have the right to prohibit in-person communication between the lawyer and client and perhaps even telephone communication.\(^{212}\) Thus, whether such action would be ethical depends on the particular state rule involved; they vary widely.\(^{213}\)

Of course, determining what contact is ethically permissible does not answer the question of whether a lawyer is free to engage in such contact. The courts have resorted to other bodies of law, such as interference with contract, in evaluating such contact.\(^{214}\) The parameters of this tort cause of action are be-

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\(^{209}\) *Id.* at 1920.

\(^{209.}\) *Id.* at 1923. The Kentucky Rule was identical to Model Rule 7.3. *Id.* at 1920.

\(^{210}\) In *Shapero*, the Supreme Court had to decide whether to treat targeted direct mail like in-person communication, against which the State may issue a prophylactic, categorical ban, see *Ohralik* v. Ohio State Bar Ass'n, 436 U.S. 447, 467 (1978), or like targeted advertisements, which may not be categorically banned, see *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647-49 (1985). See *Id.* at 1921-22. The Supreme Court held that a prophylactic ban for targeted direct mail was unconstitutional, distinguishing *Ohralik*. *Id.* at 1922-25. In characterizing and distinguishing *Ohralik, Shapero* repeatedly referred to the mode of communication involved in *Ohralik* and its unique characteristics: See, e.g., *Id.* at 1922 (“The relevant inquiry is... whether the mode of communication poses a serious danger that lawyers will exploit any such [clients'] susceptibility.”). *Shapero* found that the two characteristics of this mode of communication which justified a prophylactic ban (possibilities for overreaching and “unique... difficulties” of state regulation) were not present with respect to targeted direct mail. *Id.* at 1922-24. In view of this holding, it is difficult to imagine how the State could categorically ban truthful written contact between clients and lawyers involved in a breakup.

\(^{211}\) The reason for this is because such communication is indeed truthful. See *supra* notes 41-42 and accompanying text.

\(^{212}\) See *supra* note 210 with respect to in-person contact. The issue of telephone contact is more difficult. Like in-person contact, it presents regulatory difficulties because it is “not visible or otherwise open to public scrutiny,” *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1923 (1988) (quoting *Ohralik* v. Ohio State Bar Ass’n, 436 U.S. 447, 466 (1978)). On the other hand, it may present less possibilities for “overreaching, invasion of privacy, the exercise of undue influence, and outright fraud,” *Id.* at 1922 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641 (1985)), than does in-person contact.

\(^{213}\) See, e.g., regulations cited in Am. B. Foundation Code of Professional Responsibility by State (looseleaf 1980).

\(^{214}\) See, e.g., Paul L. Pratt, P.C. v. Blunt, 140 Ill. App. 3d 512, 488 N.E.2d 1062 (1986) (court affirmed preliminary injunction requiring departing associates to obtain court approval before soliciting partner's clients as partner may be able to prove tortious interference with contract); Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1176 (1978) (associates who, *inter alia*, solicited firm clients during and after their employment by firm and used firm files and clients as collateral for bank loan were liable for tortious interference with contract and could be enjoined), *cert. denied*, 442 U.S. 907 (1979); cf. Koeppel v. Schroder, 122 A.D.2d 780, 782-83, 505
Beyond the scope of this article. It should be noted, however, that as ethically permissible speech expands, the tort action may contract because tort actions have been premised on the idea—now incorrect—that a departing lawyer has no ethical right to contact the firm’s clients.215

A review of Adler, Barish, Daniels, Levin & Creskoff v. Epstein216 demonstrates this principle. Adler, Barish is the leading case finding interference with contract in a breakup situation. The Pennsylvania Supreme Court reinstated a permanent injunction which prohibited the departing associates from communicating with former firm clients, other than in a manner permitted by DR 2-102, the “mailed announcements” provision of the Code of Professional Responsibility. Among other things, the departing associates had used Adler, Barish files to obtain a line of credit from a bank and one associate had phoned and met with firm clients he represented and had sent clients a form letter which could be used to discharge the firm.217 Some of these actions were taken while the associates were still salaried employees or using Adler, Barish premises.218 The basis for the injunction was the court’s finding that the associates’ conduct was improper and, therefore, constituted an intentional interference with contract.219 A major reason why the court found the lawyers’ conduct improper was because it was “solicitation” prohibited by DR 2-103.220 However, the Supreme Court’s subsequent cases reveal that Adler, Barish was incorrect when it concluded that DR


Some authorities have viewed the relevant action as one for breach of fiduciary duty, rather than tortious interference with contract. See, e.g., In re Silverberg, 81 A.D.2d 640, 641, 438 N.Y.S.2d 143, 144 (1981) (citing Adler, Barish and other cases, court said “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 duty owed to each other and the partnership and a breach of the partnership agreement in general”); C. WOLFRAM, supra note 29, § 16.2, at 888 n.74 (“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”).

215. See infra notes 216-24 and accompanying text for a discussion of the premises of the tortious interference court decisions and why those premises are incorrect.


217. 482 Pa. at 420-21, 393 A.2d at 1177-78.

218. Id.

219. Id. at 432-36, 393 A.2d at 1183-85.

220. Id. at 434, 393 A.2d at 1184 (citing MODEL CODE, supra note 34, DR 2-103). In finding defendants’ conduct improper, the court relied on the fact there was “nothing in the ‘rules of the game’ which society has adopted” which sanctions [defendants’] conduct.” Id. (quoting Glenn v. Point Park College, 441 Pa. 474, 482, 272 A.2d 895, 899 (1971) (quoting F. HARPER & F. JAMES, THE LAW OF TORTS § 6.11 (1956))). The court stated it found the violation of DR 2-103 “significant in evaluating the nature of [defendants’] conduct.” Id. The court also said that it found the reasons underlying the disciplinary rule relevant here, especially the concern that defendants easily could overreach and unduly influence the clients. Id. The court further noted that in addition to having an impact on the informed and reliable decision-making of the client, defendants’ conduct also adversely affected the firm, denying it a source of anticipated revenue. Id. at 434, 393 A.2d at 1184-85. The court said that defendants had taken advantage of confidential information regarding the status and details of cases to which they were assigned and that no public interest was served by permitting such use because clients may too easily suffer in the end. Id. at 435-36, 393 A.2d at 1185.
2-103 was constitutional. Therefore, even if the decision were correct when decided, it may no longer be good law since a major basis for the decision (i.e., that the lawyers' contact was ethically impermissible solicitation and thus improper conduct and tortious interference) is undercut.

Thus, while the primary basis for the decision was the violation of the disciplinary rule, it cannot be said to be the only basis.


222. Adler, Barish may have been correct when decided because all the court ultimately did was enjoin defendants from soliciting clients other than as permitted by the Code of Professional Responsibility. The court did not order defendants to pay damages and did not prevent defendants from representing former firm clients. 482 Pa. at 422-23, 393 A.2d at 1178. Although the court mispredicted the Supreme Court's first amendment cases, the relief awarded is quite defensible. Furthermore, to the extent Adler, Barish based this injunction on the finding of a tortious interference with contract, that finding, or a similar one based on breach of fiduciary duty, may also be correct given the evidence of defendants' predeparture conduct. Among other actions, defendants furnished bank officials with a list of 88 cases and their anticipated legal fees in order to secure a line of credit. Id. at 420, 393 A.2d at 1177. At least one defendant apparently contacted firm clients while still using firm premises in an effort to induce them to fire the firm. Id. at 421, 393 A.2d at 1177-78.

Although both the fact of relief and the nature of that relief may be correct, much of the language in the opinion does not appear correct. When the Adler, Barish court says that departing associates should not compete with their firms on the basis of information learned while in the firm's employ and that such competition can be prohibited through a tort action, the court has come very close to creating, by rule of law, a restrictive covenant. This, however, is against the strong weight of authority. See supra notes 86-135. Insofar as Adler, Barish recognizes a claim for predeparture solicitation upon the basis of a predeparture act it should be followed, and insofar as it would enjoin solicitation in violation of the Code or the Rules it should be followed, but it should not be used to prohibit otherwise permissible postdeparture solicitation and representation by former firm attorneys. See 1 G. HAZARD & W. HODES, supra note 37, at 487 (1985), which states:

Equally questionable was the Pennsylvania Supreme Court's opinion in the celebrated case of Adler, Barish. . . . Under Rule 7.3, such conduct would not be a prohibited solicitation. Indeed, it could be said that such "solicitations" must be allowed, for otherwise the old firm will have a de facto covenant not to compete, which is prohibited under Rule 5.6(a).

Id. See also PRINCIPLES OF LEGAL ETHICS, "EVERYTHING A LAWYER NEEDS TO KNOW AND SHOULD NOT BE AFRAID TO ASK" 246-47 (1988) (suggesting that after separation from a firm, lawyers may communicate with clients, but not before).

223. Several courts have refused to follow Adler, Barish's lead. See, e.g., Bray v. Squires, 702 S.W.2d 266, 271 (Tex. Ct. App. 1985) (court found credible evidence that former associates did not contact firm clients until after their departure and that they did not accept employment until client terminated firm, thus jury findings of no breach of fiduciary duty were upheld); Koeppel v. Schroder, 122 A.D.2d 780, 780, 505 N.Y.S.2d 666, 667-68 (1986) (injunction reversed because, inter alia, lawyers had right to solicit former clients); Ladas & Parry v. Abelman, N.Y.L.J., Sept. 3, 1980, at 13, col. 4 (N.Y. Sup. Ct.) (court denied preliminary injunction, finding that even if defendants discussed new firm with corporate clients prior to departure, such contact may have been necessary if lawyers were not to be derelict to their clients). But see Paul L. Pratt, P.C. v. Blunt, 140 Ill. App. 3d 512, 488 N.E.2d 1062 (1986). Pratt demonstrates a reflexive, unthinking approach. Although the case was decided eight years and two significant Supreme Court cases after Adler, Barish, the Pratt court found the injunction constitutionally permissible, uncritically accepting Adler, Barish's reasoning that:

the defendant's conduct here of attempting to induce clients of the plaintiff to change firms
In sum, statements a lawyer may make during a breakup will be governed, in the first instance, by the relevant ethical provisions, as limited by the Supreme Court's first amendment cases. Under these first amendment cases, a lawyer has a right to contact firm clients or anyone else in writing. Furthermore, because it is truthful, lawyers should be able to advise clients of their right to discharge one lawyer and substitute another. At least currently, a particular state may prohibit in-person or telephone communication with a client, especially a client with whom the lawyer has no prior personal relationship. Whatever contact is permitted, a lawyer must be careful not to engage in false or misleading communication. Finally, in addition to the malpractice and ethical concerns, lawyers must be sensitive to the tort law implications of their actions. Tort law is beyond the scope of this article but it should be noted that tort remedies probably should contract as a lawyer’s first amendment rights expand; as the states expand the type of communication by a lawyer that is ethically permissible, the definition of what conduct is improper, and may be the basis for a tort remedy, should contract.224

5. Client Conflicts

Another issue lawyers face in law firm breakups is future conflicts of interest. Lawyers must take the necessary steps during the breakup to ensure that they do not have an impermissible conflict in the future.

The Model Rules contain specific provisions advising lawyers on how to deal with conflicts with former clients. Rule 1.9, in essence, states that absent a former client's consent, a lawyer may not represent a different client if that representation would be materially adverse to the former client, and if the representation involves the same or a substantially related matter.225 Under Model Rule 1.10, the imputed disqualification rule, this disqualification applies not only to former clients a lawyer personally represented, but to all former clients of the

in the middle of their active cases may, to the extent that it is prohibited by the disciplinary rules, be enjoined without violating the defendant's constitutional rights of free speech. We adopt the reasoning of the Adler court . . .

Id. at 520, 488 N.E.2d at 1068. The Pratt court never considered whether Adler, Barish correctly predicted the direction of Supreme Court cases and the fact that the conduct cannot, constitutionally, be prohibited by a disciplinary rule. See supra note 221.

224. See supra notes 220-23.
225. MODEL RULES, supra note 35, Rule 1.9, which provides:
Conflict of Interest: Former Client
A lawyer who has formerly represented a client in a matter shall not thereafter:
(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

The Pennsylvania version of Rule 1.9 is slightly different from the ABA version, in that it requires “a full disclosure of the circumstances” along with a consultation prior to consent of the client, PA. R. PROF. CONDUCT 1.9.
In certain circumstances, however, the Model Rules would permit both the remaining firm and the departing lawyers and their new firm to avoid the harshness of this rule. If a departing lawyer did not acquire material information protected by the confidentiality rules, then neither the departing lawyer nor the new firm is disqualified from representation adverse to a former firm client, even in a substantially related matter. Similarly, the remaining lawyers and their firm may represent a client whose interests are materially adverse to the interests of a former client, even in a substantially related matter, provided no one remaining in the firm has any material information protected by the confidentiality rules.

In contrast to the Model Rules, the Model Code does not contain any provision directly addressing the issue of conflicts of interest involving former clients. Most courts confronted with the issue have concluded that despite this

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226. Model Rules, supra note 35, Rule 1.10, which provides:

Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

The Pennsylvania version of Rule 1.10(a) is identical to the ABA version. See PA. R. PROF. CONDUCT 1.10(a).

227. The imputed disqualification exception governing the departing attorney and the lawyer's new firm is found in Rule 1.10(b):

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

Model Rules, supra note 35, Rule 1.10(b). The Pennsylvania version of Rule 1.10(b) is significantly different from the ABA version in that it provides for an exception to subsection (b). This exception is stated in parts (1) and (2) of subsection (b) and reads:

(b) . . . material to the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate client to enable it to ascertain compliance with the provision of the Rule.

PA. R. PROF. CONDUCT 1.10(b).

228. The imputed disqualification exception governing the remaining firm is found in Rule 1.10(c):

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

Model Rules, supra note 35, Rule 1.10(c). The Pennsylvania version of Rule 1.10(c) is identical to the ABA version. See PA. R. PROF. CONDUCT 1.10(c).

229. See Model Code, supra note 34, DR 5-105 (addresses conflicts only among current clients).
omission, the Code does regulate conflicts of interest involving former clients.\textsuperscript{230} The courts have diverged, however, when determining how the Model Code should treat vicarious disqualification where there is a conflict with former clients. Some courts have banned a firm from representation whenever a lawyer within the firm would be barred from representation.\textsuperscript{231} Other courts have used a balancing approach or have permitted screening devices to be used in such situations.\textsuperscript{232}

There is no question that at least some lawyers are oblivious to the vicarious disqualification rules for conflicts of interest. Perhaps surprisingly, such oversight can occur when small firms break up, as well as when large firms break up. For example, in 1982, a lawyer filed a petition for alimony modification on behalf of a husband.\textsuperscript{233} The lawyer's former partner had represented the wife in connection with the divorce.\textsuperscript{234} When the wife questioned the propriety of opposing counsel's representation, her lawyer sought the advice of the Alabama State Bar General Counsel & Disciplinary Commission\textsuperscript{235} and asked whether he had a conflict, stating that he saw no conflict in view of the fact he had never talked with the wife or his partner about the case. The opinion concluded that the representation of the husband was unethical in view of Alabama's version of DR 5-105(C), which specifically applied to former clients,\textsuperscript{236} and the absolute vicarious disqualification rule in DR 5-105(D).\textsuperscript{237}

In short, some lawyers are not as familiar with the vicarious disqualification conflicts rules as they should be. To adequately comply with their ethical obligations after a breakup, lawyers should compile and exchange a complete and accurate list of all clients and matters handled by lawyers associated with the

\begin{itemize}
  \item \textsuperscript{230} E.g., Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980) (court adopted "substantial relationship" test for evaluating former client conflicts, finding such test "necessary to implement" Canons 1, 4-7, and 9); E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 393-94 (S.D. Tex. 1969) (Code prohibits conflicts of interest involving former clients; court drew comparison between Canon 6 of ABA Canons of Ethics and comments to DR 5-105(A) of Code); In re Evans, 113 Ariz. 458, 462, 556 P.2d 792, 796 (1976) (court used Canon 9, "Avoiding the Appearance of Impropriety," to find ethical violation based on obtaining confidential information from former client).
  \item \textsuperscript{231} See, e.g., Trone v. Smith, 621 F.2d 994, 1001 (9th Cir. 1980) (disqualified entire firm because of former client conflict with member of that firm); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1321 (7th Cir.) (applying disqualification rule to large firm, even though burden falls "more heavily" on such), cert. denied, 439 U.S. 955 (1978); American Dredging Co. v. City of Philadelphia, 480 Pa. 177, 184, 389 A.2d 568, 572 (1978) (where one attorney is disqualified because of conflicts, entire firm is disqualified).
  \item \textsuperscript{232} See, e.g., Silver Chrysler-Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 753-54 (2d Cir. 1975) (firm was not disqualified because of conflict problems raised when new associate from large firm joined firm).
  \item \textsuperscript{233} See Alabama State Bar General Counsel, Op. 82-691.
  \item \textsuperscript{234} Id.
  \item \textsuperscript{235} Id.
  \item \textsuperscript{236} Id.
  \item \textsuperscript{237} The Alabama provision was identical to the Model Code provision, which states:
    \begin{itemize}
      \item (D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.
    \end{itemize}
MODEL CODE, supra note 34, DR 5-105(D).
former firm.\textsuperscript{238} Without such an exchange, there is a very real risk of a future ethical violation. Especially with larger firms, departing lawyers could inadvertently oppose a former client of the old firm on a substantially related matter. Even under the Rules, it would be useful for lawyers to know the identity of former firm clients so that they can properly screen for conflicts and adequately document their compliance with the exceptions in Rule 1.10(b) or (c) in the event they decide to go forward with representation adverse to a former client. Furthermore, if lawyers involved in a breakup recognized that they should routinely exchange client lists to comply with their ethical obligations, and recognized that their partners ethically may solicit former clients in writing, this might reduce some of the fighting that occurs over clients and client solicitation.

6. Confidentiality

The confidentiality provisions of the Model Code and the Model Rules probably are among the most familiar ethical regulations to most lawyers.\textsuperscript{239}

\textsuperscript{238} Although such advice seems sensible and necessary, it is not always heeded. One lawyer who has represented partners going through a dissolution has advised the author that the opposing client refused to agree to such an exchange.

\textsuperscript{239} The Model Code and Model Rules differ in their approach to confidentiality. First, they differ in their definitions of what is confidential information. Second, the exceptions are different. Many state provisions, such as Pennsylvania's, differ from both of these. For example, DR 4-101 provides:

\textit{Preservation of Confidences and Secrets of a Client.}

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

\textit{MODEL CODE, supra} note 34, DR 4-101. Model Rule 1.6 provides:

\textit{Confidentiality of Information}

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy be-
These obligations continue even upon dissolution of the firm. Because of their familiarity, they should be among the easiest with which to comply. Nevertheless, it is in a lawyer's best interest to review these obligations during a law firm breakup. In Adler, Barish, for example, the departing lawyers secured a line of credit from the bank for their new firm by giving the bank a list of "their clients" and the clients' anticipated legal fees. If this disclosure occurred without client consent, they probably violated the confidentiality rules. Similarly, a departing lawyer could violate this rule by revealing client information to the new firm the lawyer intended to join. These provisions would be especially difficult for the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

**MODEL RULES, supra note 35, Rule 1.6.** The Pennsylvania version of Rule 1.6 provides:

Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

1. to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm or substantial injury to the financial interests or property of another;

2. to prevent or to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used; or

3. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(d) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

PA. R. PROF. CONDUcT 1.6.

240. MODEL CODE, supra note 34, EC 4-6 ("The obligation of a lawyer to preserve the confidences and secrets of his clients continues after the termination of his employment."); MODEL RULES, supra note 35, Rule 1.6 comment ("The duty of confidentiality continues after the client-lawyer relationship has terminated."); see Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980) (need for confidentiality important aspect of disqualification rule regarding former clients).

241. Cf. Corlett, Killian, Hardeman, McIntosh & Levi v. Merritt, 478 So. 2d 828, 835 (Fla. Dist. Ct. App.) (Hubbart, J., dissenting), review denied, 488 So. 2d 68 (Fla. 1985). The dissenting opinion raises the confidentiality concerns during a breakup in an interesting context. A professional corporation employee who was terminated sued to compel redemption of his shares. The majority denied recovery saying it would not rewrite the parties' contract for them. Id. at 835. The dissent concluded that the majority stockholders had an ethical duty enforceable by law to redeem the shares because to do otherwise would permit the terminated attorney to sit in on corporate meetings where confidential client matters were discussed and could create conflict of interest problems resulting in improper fee-splitting. Id. at 835-36 (Hubbart, J., dissenting).


243. Both departing attorneys and the potential new firm have an interest in exchanging information. Attorneys will want to convince the firm of their experience and the possibility they will
cally easy to violate in a state such as Pennsylvania which, until recently, specifically stated that even the identity of a client was confidential information which could not be revealed absent consent.244

7. Safekeeping Property

Both the Code and the Rules contain provisions detailing how a lawyer is to handle client property, including funds.245 These straightforward provisions prohibit a lawyer from commingling the lawyer's property with the client's

attract clients. The firm will want to know what it might expect in the way of business and what conflicts may occur if the attorneys join. Notwithstanding these interests, attorneys must be careful not to violate the confidentiality rules.

244. Compare Pa. Code Prof. Responsibility DR 4-101(B)(1) ("Except when permitted under DR 4-101(C), a lawyer shall not knowingly: (1) Reveal a confidence or secret of his client, including his identity.") with Pa. R. PROF. CONDUCT 1.6. See supra note 239 for the text of Pennsylvania Rule 1.6.

245. The pertinent provisions are as follows:

DR 9-102 Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

1. Funds reasonably sufficient to pay bank charges may be deposited therein.

2. Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

1. Promptly notify a client of the receipt of his funds, securities, or other properties.

2. Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

3. Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

4. Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

MODEL CODE, supra note 34, DR 9-102.

RULE 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third
They also require a lawyer to identify and safeguard the client’s property.  

Morales v. State Bar illustrates how these safekeeping provisions might be violated during a breakup. Morales’s law firm “dissolved under very acrimonious circumstances” and involved a “bitter breakup.” Morales received a private reprimand and a criminal misdemeanor conviction and ultimately was disbarred because of conduct which was “related either directly to the firm’s breakup or indirectly to the financial crisis that came in its wake.” Allegedly because of inexperienced bookkeepers, Morales failed to keep complete records of client trust funds, had insufficient funds in his trust account on one occasion, and failed to withhold or pay payroll taxes and unemployment insurance contributions. These actions were the bases for the private reprimand and misdemeanor conviction.

Morales’s disbarment was based on his withdrawal of one-half of the funds in the firm pension account and the endorsement and cashing of a check made out to the old firm. Morales responded to these two charges by stating that the bank urged him to withdraw the pension money to repay a loan and gave him a legal opinion as to the propriety of Morales’s withdrawal of this money and by arguing that the endorsement incident was “a simple mistake by some temporary employee in the course of winding up the complex affairs of the old law firm.”

Even if Morales’s version is incorrect, as the California Supreme Court found, the case suggests some of the pitfalls for lawyers as a result of a breakup. Lawyers must be extremely careful and exercise close supervision dur-
ing a breakup so that temporary employees, inexperienced bookkeepers, and general confusion do not contribute to any ethical violations by the lawyer.

Another issue that has arisen in this area is how to handle unclaimed client funds upon dissolution of the firm. This was a topic addressed by three different ethics committees. They concluded that it was not unethical for lawyers upon dissolution and liquidation to retain and divide unidentifiable funds placed in a dormant client trust account a number of years ago, provided reasonable notice is given to all affected parties, advising them of the existence of the funds and giving them an opportunity to establish a claim to the balance.

8. Summary

In sum, when law firms break up, there are numerous ethical regulations that can be triggered. Lawyers must ensure that they comply with the continuing obligations ethical regulations with respect to clients the lawyer personally represents. Additionally, if a lawyer wants to be completely protected, the lawyer should have the former firm withdraw from the representation and the new counsel substituted. This latter action will protect a lawyer whose former partner violates the continuing obligation provisions with respect to a client of the former firm.

Lawyers also should comply with the restrictive covenant provisions. At a minimum, this means lawyers should not be parties to, nor try to enforce, an agreement which prohibits a lawyer from representing certain clients after the breakup. Furthermore, lawyers should be aware that if the agreement provides a financial penalty, that probably will be viewed by the courts and the ethics committees as an improper restrictive covenant.

Third, lawyers should be aware that there is a difficult fee-splitting issue that could arise if they divide fees after the breakup. Because this issue is still unresolved, the more conservative approach (and the better approach, this author believes) is for lawyers dividing fees to satisfy the requirements of the fee division provisions. While the fee division provisions in the Model Code and the Model Rules differ, both require the client to be advised of the fee division, require all lawyers dividing the fees to assume joint responsibility, and require the total fee to be reasonable.

Lawyers also must comply with the publicity regulations. First and foremost, this means communications cannot be false or misleading. In addition to truthfully communicating with clients, lawyers should ensure that the “firm” accurately holds itself out to the public; this may affect, for example, the way telephones are answered. Furthermore, lawyers must ensure that the relevant state regulations permit truthful communications to be made in the manner contemplated. Finally, lawyers should be aware that some courts have imposed tort liability on lawyers because of their communication with clients. Thus, the most


257. See opinions cited supra note 256.
sensible course of action, in this area particularly, is for the lawyers involved in the breakup to come to an understanding regarding when and how clients and others will be notified of the breakup and how files will be handled. Ideally, the lawyers should draft a joint letter to be sent to all clients, advising clients of their right to select the lawyer they prefer and telling clients how the selection can be made.

The fifth area lawyers should be sensitive to is conflicts of interest. Lawyers need to obtain adequate information during the breakup to enable them to comply with their obligations. Lawyers should provide client data to all firm members. Indeed, a recognition of the obligation to comply with the conflicts provision, together with the United States Supreme Court’s recent first amendment cases, should lead to fewer “publicity” problems. The reason is that if lawyers obtain client lists and have a right to directly solicit those clients following departure from the firm, and to notify the clients of their right to select the counsel they prefer, then the lawyers may be less inclined to engage in all-out battles with each other regarding temporary disposition of client files.

Sixth, lawyers should remember that their confidentiality obligations do not end when the representation is concluded. Thus, during and after the breakup, lawyers should ensure that they do not inadvertently reveal confidential client information without consent.

Finally, lawyers should ensure that they comply with the safekeeping of property requirements. Among other things, this means that lawyers should take steps during the potential chaos of a breakup to make sure that all fiduciary regulations are honored, that accounts are not confused, and that files are disposed of properly.

In sum, lawyers must be conscious of their ethical obligations and act carefully to comply with them. It would be easy for a lawyer to inadvertently violate these provisions during a breakup.

III. MALPRACTICE CONSEQUENCES OF LAW FIRM BREAKUPS

A. Introduction

Unlike disciplinary proceedings against a lawyer for ethical violations, a legal malpractice action is a civil suit between a lawyer and an injured party. The plaintiff is usually a client, although the courts increasingly are permitting nonclients to sue. The purpose of a malpractice action is to make the injured


259. See id. §§ 71 to 82 (strict “privity of contract” rule has been relaxed by some courts). Nevertheless, the vast majority of legal malpractice claims against attorneys continue to be filed by clients rather than nonclients. See ABA Standing Comm. on Lawyers’ Professional Liability, Profile of Legal Malpractice: A Statistical Study of Determinative Characteristics of Claims Asserted Against Attorneys 46 (1986) (of 29,227 claims reported to ABA’s National Legal Malpractice Data Center from January 1983 through September 1985, 87% were filed by clients, 13% by nonclients).
plaintiff whole.260 The term “legal malpractice” actually is a catchall expression used to describe several different legal theories used against a lawyer.261 The theories that sometimes are discussed under this heading include negligence; breach of fiduciary duties; breach of an express or implied contract; fraud; and intentional tort.262 Although this article focuses on the negligence claims that might arise as a result of a breakup, much of the discussion would apply equally well to a claim alleging breach of fiduciary duties.263

The negligence theory is the most common form of legal malpractice action.264 The legal malpractice negligence claim has the same elements as an ordinary negligence claim: duty, breach of duty, proximate cause, and damage.265

To satisfy the duty element in a malpractice case, one must generally show that a lawyer-client relationship existed at the time of the alleged malpractice.266 Breach of duty is shown by proof that “the lawyer failed to exercise the skill, apply the knowledge, and exert the diligence that would be brought to bear in such a representation by a lawyer of ordinary competence and diligence.”267 A breach of duty usually is established by comparing the lawyer’s “performance with the parallel performance of other lawyers in similar situations.”268


261. See generally R. MALLEN & V. LEVIT, supra note 258; D. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE (1980); D. STERN & J. FELIX-REITZKE, A PRACTICAL GUIDE TO PREVENTING MALPRACTICE § 1.01 (1983) (“defining legal malpractice can be an exercise in frustration” because of intermingling of theories and language).

262. See, e.g., R. MALLEN & LEVIT, supra note 258, § 100, at 169-70; D. MEISELMAN, supra note 261, at 17-18.

263. Several commentators have said that whichever theory is used, the proof is essentially the same. See, e.g., R. MALLEN & V. LEVIT, supra note 258, § 100, at 169-70; D. MEISELMAN, supra note 261, § 2.3, at 17-18; see also D. STERN & J. FELIX-REITZKE, supra note 261, §§ 1.02 to 1.07, at 3-19 (study and analyses of malpractice incidents by factors such as years in practice, type of firm, type of malpractice).

264. R. MALLEN & V. LEVIT, supra note 258, § 111, at 204.


266. C. WOLFRAM, supra note 29, § 5.6.2, at 209-10; R. MALLEN & V. LEVIT, supra note 258, § 101, at 171 (duty arises from attorney-client relationship). Occasionally, a duty can be owed to nonclients. See, e.g., Collins v. Binkley, 750 S.W.2d 737, 739 (Tenn. 1988) (nonclient purchasers permitted to sue attorney for improperly drafting deeds); Guy v. Liedebach, 501 Pa. 47, 459 A.2d 744, (1983) (will legatee permitted to sue attorney in assumpit for breach of contract in improperly drafting the will); see also R. MALLEN & V. LEVIT, supra note 258, §§ 71 to 82, at 142-68 (discussion of liability of attorney to nonclient); C. WOLFRAM, supra note 29, § 5.6.4, at 223-27.


268. C. WOLFRAM, supra note 29, § 5.6.2, at 212; see also Lipscomb v. Krause, 87 Cal. App. 3d
testimony is often used to establish the standard of care.\textsuperscript{269} Occasionally, however, courts may dispense with expert testimony or may decide that reasonable persons could reach only one conclusion regarding malpractice.\textsuperscript{270} While proof of causation in a legal malpractice case may differ from proof in other negligence cases, the basic concepts are the same as used in the ordinary negligence case.\textsuperscript{271}

B. Malpractice Actions Based on Neglect

Negligence is always a risk during a breakup because a lawyer's full attention may be diverted from the client’s matters and concentrated on the lawyer’s own problems. \textit{Vollgraff v. Block}\textsuperscript{272} is an example of a case where a breakup apparently led to a malpractice claim. The plaintiffs had been in a car accident and hired the defendant law partnership to prosecute their claim against two defendants.\textsuperscript{273} Approximately six months after accepting the case, the partnership was dissolved.\textsuperscript{274} The plaintiffs apparently were not notified of the dissolution.\textsuperscript{275} No further action was taken on the plaintiffs’ case, and the statute of limitations period expired.\textsuperscript{276}

When the plaintiff clients filed a malpractice claim, one partner asked for relief on the ground that the partnership was dissolved before the accrual of the malpractice action.\textsuperscript{277} The court denied the motion, reasoning that “partnership dissolution does not discharge a partner from obligations existing prior to dissolution.”\textsuperscript{278}

\begin{itemize}
  \item 270. See, e.g., Wagenmann v. Adams, 829 F.2d 196, 218 (1st Cir. 1987) (expert testimony unnecessary for gross legal malpractice; cases in accord listed); Dixon v. Perlman, 528 So. 2d 637, 642 (La. Ct. App. 1988) (“In other cases where the trial court is familiar with the standards of practice in its community or the attorney's conduct obviously falls below any reasonable standard of care, the assistance of expert testimony may be unnecessary.”); R. \textit{MALLEN} & V. \textit{LEVITT}, \textit{supra} note 258, § 665, at 837, 839-41.
  \item 271. See, e.g., R. \textit{MALLEN} & V. \textit{LEVITT}, \textit{supra} note 258, § 102, at 177-79; Helmbrecht v. St. Paul Ins. Co., 122 Wis. 2d 94, 103, 362 N.W.2d 118, 124 (1985) (in proving proximate cause in legal malpractice case, plaintiff usually must show that “but for the negligence of the attorney, the client would have been successful in the prosecution or defense of the action”) (quoting Lewandowski v. Continental Casualty Co., 88 Wis. 2d 271, 277, 276 N.W.2d 284, 287 (1979)).
  \item 272. 117 Misc. 2d 489, 458 N.Y.S.2d 437 (Sup. Ct. 1982).
  \item 273. \textit{Id.} at 490, 458 N.Y.S.2d at 438.
  \item 274. \textit{Id.}
  \item 275. \textit{Id.} at 493, 458 N.Y.S.2d at 440.
  \item 276. \textit{Id.} at 490, 458 N.Y.S.2d at 438.
  \item 277. \textit{Id.}
  \item 278. \textit{Id.} at 492, 458 N.Y.S.2d at 440.
\end{itemize}
One commentator noted that situations where neither side in a breakup wants a particular client also could lead to neglect, with the entire firm facing the resulting malpractice claim. Thus, as the courts and commentators have observed, unless a lawyer is especially careful during the breakup, it is easy to get absorbed in the dispute and lose sight of the client.

C. The Role of Ethical Regulations in a Malpractice Action

Simple neglect, however, is not the only type of malpractice exposure a lawyer faces during a breakup. It is quite possible for a lawyer to be liable for malpractice based, in whole or in part, on a violation of the ethical regulations described in part II, above.

At first glance, it might appear that the ethical regulations have no place in a malpractice action. After all, an action for legal malpractice and a disciplinary proceeding for violation of the ethical regulations have “different purposes, parties and procedures.” More and more, however, the Model Code and the Model Rules are being used in some fashion in legal malpractice actions. For

279. Hazard, supra note 79, at 35. Indeed, conversations with a colleague who has represented attorneys going through a dissolution reveal that each side hoped certain clients would elect the other lawyer, but felt compelled to continue representation when selected by the client. See supra notes 68-69.


282. See, e.g., Miami Int’l Realty Co. v. Paynter, 841 F.2d 348, 352-53 (10th Cir. 1988) (court refused to set aside malpractice judgment for plaintiff-client on ground that expert referred to Code violations because expert did not testify, nor did court instruct jury, that violations constituted negligence per se); Nolan v. Foreman, 665 F.2d 738, 741 (5th Cir. 1982) (in action to recover partial legal fees, court reversed judgment for attorney to permit jury to consider DR 2-106 and DR 2-110 in establishing whether attorney breached fiduciary duty); Woodruff v. Tomlin, 616 F.2d 924, 936 (6th Cir.) (en banc) (Code of Professional Responsibility establishes some evidence of legal standards), cert. denied, 449 U.S. 888 (1980); Day v. Rosenthal, 170 Cal. App. 3d 1125, 1147, 217 Cal. Rptr. 89, 102 (1985) (court found Doris Day’s attorney liable for malpractice; no expert testimony needed because conduct was clearly contrary to established standards and because expert’s testimony could not override Rules of Professional Conduct), cert. denied, 475 U.S. 1048 (1986); Lysick v. Walcom, 258 Cal. App. 2d 136, 146, 65 Cal. Rptr. 406, 413 (1968) (appellate court set aside jury verdict for defendant-attorney; relying on violations of conflict of interest requirements, court found defendant breached duty to plaintiff and remanded for trial on causation); Cooper v. Public Fin. Corp., 146 Ga. App. 250, 256-57, 246 S.E.2d 684, 689-90 (1978) (unsuccessful defendant filed suit against opposing attorney based on violation of DR 7-102’s prohibition against frivolous suits; court assumes such an action is valid and finds no violation); Beattie v. Firmschild, 152 Mich. App. 785, 791, 394 N.W.2d 107, 109 (1986) (court rejects argument that Code violation is negligence per se, finding instead “there is a rebuttable presumption that violations of the Code of Professional Responsibility constitute actionable malpractice”; thus plaintiff’s claim was properly dismissed for lack of expert testimony); Sawabini v. Desenberg, 143 Mich. App. 373, 385, 372 N.W.2d 559, 566 (1985) (Code violations create rebuttable presumption of malpractice, but plaintiff did not allege sufficient acts to show a breach of confidentiality); see also Kinnamon v. Staitman & Snyder, 66 Cal. App. 3d 893,
example, in Woodruff v. Tomlin,\textsuperscript{283} the court reversed a judgment for an attorney and concluded that Code violations could be used as evidence of the standards required of lawyers; the court remanded to allow the jury to consider malpractice based on violation of the conflict of interest provisions.\textsuperscript{284}

Proper use of these ethical regulations in a civil action against a lawyer is a controversial topic.\textsuperscript{285} The range of arguments concerning proper use vary: ethical regulations should be used to create an independent cause of action;\textsuperscript{286} ethical violations should be used to create a \textit{presumption} of a breach of the malpractice standard of care;\textsuperscript{287} ethical violations should be used as \textit{evidence} of a

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  \item \textsuperscript{283} According to one commentator, the courts steadfastly have refused to use the Code to create an independent cause of action, although some courts have hinted it might be appropriate. Note, \textit{The Rules of Professional Conduct}, supra note 285, at 803-04 ("To afford non-clients the protection that the drafters intended, courts should use the appropriate provisions as the basis for private causes of action."); contra Dalquist, supra note 285, at 30 (argues that Code should not be used to create independent cause of action, although appropriate to establish existing cause of action). See also R. MALLEN & V. LEVIT, supra note 258, § 256, at 340 ("Unfortunately, there has been little consideration of whether ethical standards provide an independent basis for liability, define the standard of care or merely suggest proper conduct."); Wolfram, supra note 285, at 340-30 (argues that Code should not be used to create independent cause of action, although appropriate to establish existing cause of action). See also R. MALLEN & V. LEVIT, supra note 258, § 256, at 340 ("Unfortunately, there has been little consideration of whether ethical standards provide an independent basis for liability, define the standard of care or merely suggest proper conduct."); Wolfram, supra note 285, at 340-30 (argues that Code should not be used to create independent cause of action, although appropriate to establish existing cause of action).

  \item \textsuperscript{284} \paragraph{Proper use of these ethical regulations in a civil action against a lawyer is a controversial topic. The range of arguments concerning proper use vary: ethical regulations should be used to create an independent cause of action; ethical violations should be used to create a \textit{presumption} of a breach of the malpractice standard of care; ethical violations should be used as \textit{evidence} of a}

  \item \textsuperscript{285} Id. at 936-38.

  \item \textsuperscript{286} See, e.g., Note, \textit{The Rules of Professional Conduct}, supra note 285, at 803-04 ("To afford non-clients the protection that the drafters intended, courts should use the appropriate provisions as the basis for private causes of action."); contra Dalquist, supra note 285, at 30 (argues that Code should not be used to create independent cause of action, although appropriate to establish existing cause of action). See also R. MALLEN & V. LEVIT, supra note 258, § 256, at 340 ("Unfortunately, there has been little consideration of whether ethical standards provide an independent basis for liability, define the standard of care or merely suggest proper conduct."); Wolfram, supra note 285, at 340-30 (argues that Code should not be used to create independent cause of action, although appropriate to establish existing cause of action). See also R. MALLEN & V. LEVIT, supra note 258, § 256, at 340 ("Unfortunately, there has been little consideration of whether ethical standards provide an independent basis for liability, define the standard of care or merely suggest proper conduct."); Wolfram, supra note 285, at 340-30 (argues that Code should not be used to create independent cause of action, although appropriate to establish existing cause of action).

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  \item \textsuperscript{288} 109 Cal. Rptr. 2d 287, 289, 458 N.Y.S.2d 735, 736 (1983) (in finding plaintiff’s suit against his attorney governed by three year malpractice statute of limitations, rather than six year contract statute, court rejected plaintiff’s argument that breach of conflict of interest section gives rise to breach of contract and stated that violation does not in itself generate cause of action).

  \item \textsuperscript{289} See, e.g., Note, Lipton v. Boesky, supra note 285, at 135 (endorsing use of code violations}

\end{itemize}
breach of the standard of care; and, finally, ethical violations should not be permitted at all in a malpractice action.

The parameters of this debate were set by Professor Charles Wolfram in his article, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*. In this article, Professor Wolfram discussed all three possible ways of using the Model Code—to constitute evidence of malpractice, to create a presumption of malpractice, for example, as negligence per se, or to support an independent cause of action. Without distinguishing particularly among these uses, Professor Wolfram offered three reasons in favor of greater use of the Model Code in civil actions against lawyers. He then offered several reasons why such use would help achieve an acceptable level of attorney compliance.

88. See, e.g., Dalquist, supra note 285, at 11 (agreeing that it is “proper to allow the Code to be considered in legal malpractice actions as an indicator of the standards’”); see also Ishmael v. Millington, 241 Cal. App. 2d 520, 528, 50 Cal. Rptr. 592, 597 (1966) (court reversed summary judgment for defendant-attorney, finding that in view of violation of conflict of interest provisions, “fact trier might reasonably find him negligent”) and cases cited supra note 282; cf. Hoover, supra note 281, at 595-616 (advocating increased use of Model Rules in malpractice actions, although he is somewhat vague about precise use).


291. See id. at 304-05 (endorsing use of conflicts provision of Code by clients against attorney to create presumption of negligence); id. at 308 (suggesting courts may hold that violation of confidentiality provision “creates a right of action in the client”); id. at 314 (recommending use of Code provision against frivolous litigation as guidance for determining what constitutes lack of probable cause in malicious prosecution case).

292. Id. at 286-95. The first argument offered by Professor Wolfram is that ethical provisions are analogous to criminal or administrative regulations. Thus, they should be treated like other codified law and violations of applicable provisions should serve as evidence of negligence or to establish negligence per se. Id. at 286-87. Accord Dalquist, supra note 285, at 14; Note, *The Rules of Professional Conduct*, supra note 285, at 780-83; Comment, supra note 285, at 699-700 (violation of Code in professional negligence action similar to violation of statute establishing negligence per se); Note, *Lipton v. Boesky*, supra note 285, at 143-44 (code violations analogous to statute violations which create rebuttable presumption of negligence). See also Schneyer, supra note 285, at 946-47 (critiques Model Rules’ disclaimer, not to “undertake to define standards for civil liability”).

The second justification offered is that the current enforcement mechanism for ethical violations is insufficient. Wolfram, supra note 285, at 288. Use of the Code or Rules in malpractice actions would help achieve an acceptable level of attorney compliance. Id. at 289-93. Accord Dalquist, supra note 285, at 14; Hoover, supra note 285, at 616 (application of ethical standards in Code
eral counterarguments to such use, and explained why he thought the counter-
arguments were not persuasive.\textsuperscript{293}

Since that article, there has been more written on the topic.\textsuperscript{294} The debate,
however, basically remains as framed by Professor Wolfram. The commentators
generally focus on one particular method of using the Model Code or Model
Rules—as an independent cause of action, as negligence per se, or as evidence of
during malpractice proceedings may increase deterrence of unethical conduct); Note, \textit{Lipton v. Bo-
Comment, \textit{supra} note 285, at 699 (Code drafted to set minimum standards of conduct; active use of
Code would complement Code's "deterrent aims").

A third argument is that these provisions can help establish the standards of conduct below
which an attorney will be civilly liable. Wolfram, \textit{supra} note 285, at 293. In other words, they add
specificity to the notions of "fiduciary obligations" and "reasonable care" that currently are used in
malpractice litigation. \textit{Id.} at 293-95. \textit{Accord} Dalquist, \textit{supra} note 281, at 15-16; Hoover, \textit{supra} note
281, at 615; cf. Comment, \textit{supra} note 285, at 698 (Code has generally withstood constitutional att-
tacks for vagueness).

293. The arguments against use of the Code or the Rules in a malpractice action often begin
with the language of these regulations. The Code states that it "does not undertake to define stan-
dards for civil liability." \textit{Model Code}, \textit{supra} note 34, Preliminary Statement 1c. The Rules con-
tain a lengthier statement, advising in part: "Violation of a Rule should not give rise to a cause of
action nor should it create any presumption that a legal duty has been breached." \textit{Model Rules},
\textit{supra} note 35, Scope 12. Professor Wolfram and others have responded to this argument by observ-
ning that the courts have ignored this language and by suggesting this language expresses neutrality,
not hostility, to the possibility of using ethics provisions in a malpractice action. See Wolfram, \textit{supra}
note 285, at 287; Note, \textit{The Rules of Professional Conduct}, \textit{supra} note 285, at 788; Comment, \textit{supra}
note 285, at 695 (Code should be read as neutral; Code does not proscribe use in legal malpractice
actions). \textit{See also} 1 G. HAZARD & W. HODES, \textit{supra} note 37, at 12.1 (Supp. 1987), which states:
The Scope Note's follow-up proposition that a violation of the Rules "[should not] create
any presumption that a legal duty has been breached," is also quite sound, so far as it
goes.

Passing automatic imposition of liability at the suit of every client and third person,
however, it should be evident that rules of professional conduct are relevant to malpractice
cases at some level, no matter what the Rules themselves try to say.

\textit{Id.}

The second argument offered against use of the Code or the Rules in a malpractice action is a
"floodgates" argument. Wolfram, \textit{supra} note 285, at 295. As Professor Wolfram stated it, "permit-
ing every allegation of an attorney violation of the Code to survive a motion to dismiss in a subse-
quent damage action against that attorney would result in unneeded litigation against attorneys." \textit{Id.} \textit{Accord} Dalquist, \textit{supra} note 285, at 16; Comment, \textit{supra} note 285, at 700; Note, \textit{Lipton v. Boesky},
\textit{supra} note 285, at 147 (dispels "floodgates" argument).

A third objection raised is that the Code and the Rules are too protective of attorney interests
and thus may be inadequate to protect the interests of nonlawyers participating in civil litigation
\textit{supra} note 285, at 145; Comment, \textit{supra} note 285, at 700-01. For example, in Kirsch v. Duryea, 21 Cal. 3d 303, 305, 578 P.2d 935, 940, 146 Cal. Rptr. 218, 223 (1978), the court
reversed the judgment entered against the defendant-attorney, in part because he had complied with
the relevant Rules of Professional Conduct.

Some additional objections that are offered are that the Code or the Rules are too vague to be of
much use in litigation, and that allowing their use might create difficult issues of whether discipline
should be given collateral estoppel (i.e., issue preclusion) effect in civil suits. See Wolfram, \textit{supra}

294. \textit{See supra} note 285 for a list of commentaries.
malpractice—and then attack or defend that method, relying primarily on variations of Professor Wolfram’s original arguments or counterarguments, although occasionally offering additional points.

The commentators disagree on exactly how the ethics provisions should be used in a malpractice case. All these commentators recognize, however, that, slowly but surely, courts have permitted ethics violations to be used as evidence of malpractice. Furthermore, none of these commentators objects to use of ethics violations as evidence of malpractice. Thus, as breakups occur in the future, lawyers probably should not expect the dispute to be whether the courts will use ethics violations in a malpractice action, but how these violations will be used.

295. See, e.g., Dalquist, supra note 285, at 3 (endorsing use of Code violations as evidence of malpractice, but concluding “general arguments advanced for a more expanded use of the Code are not persuasive”); Hoover, supra note 281, at 614-15 (observing that Model Rules are likely to become influential in civil litigation and endorsing greater use without predicting exactly how they will be used); Schneyer, supra note 285, at 945-46 (stating that comments to Rules express “unwarranted animus against Model Rule enforcement in malpractice and disqualification cases” and recommending that courts be allowed to consider such uses); Note, Lipton v. Boesky, supra note 285, at 137 (endorsing use of Code violations to create rebuttable evidence of malpractice); Note, The Rules of Professional Conduct, supra note 285, at 804 (arguing, inter alia, that to “afford non-clients the protection that the drafters intended, courts should use the appropriate provisions as the basis for private causes of action”); Comment, supra note 285, at 692 (addressing viability of using Code violations as negligence per se).

296. See supra notes 292-93 for citations to the responses by subsequent commentators to the original arguments or counterarguments.

297. One additional objection that has been offered is founded on the difference between the purposes of the Code and the Rules on the one hand, and the purpose of legal malpractice actions on the other. The argument is that there traditionally has been and properly should be a fundamental difference between the standard of conduct applied in a disciplinary case and the standard of conduct applied in civil damages actions. See, e.g., Dalquist, supra note 285, at 18.

Another additional argument that has been offered is that use of ethics provisions would, in effect, be an abandonment of the privity doctrine since these provisions might permit nonclients to sue. Dalquist, supra note 285, at 19. One commentator argues that the debate must recognize that fact and address the merits of the proposals on those terms, as well as others. Id. at 19-20. Accord Note, The Rules of Professional Conduct, supra note 285, at 791-95.

298. See, e.g., Dalquist, supra note 285 (observing that “. . . courts often use the Code as a type of persuasive precedent in such malpractice litigation and violations of the Code are frequently treated as evidence of negligence or negligence per se); Hoover, supra note 281, at 616 (“drafters have all but assured that these provisions will become an alternative resource in civil malpractice litigation”); Note, Lipton v. Boesky, supra note 285, at 151 (in Michigan, Code violations will be used as rebuttable evidence of malpractice); Note, The Rules of Professional Conduct, supra note 285, at 779 (“[m]any courts are not adverse to applying the Code in ‘client v. attorney’ negligence actions to determine whether the attorney breached a duty owed to the client”); Comment, supra note 285, at 694 (“The Code of Professional Responsibility plays an integral part in the establishment of the duty element and the conduct which evidences the breach of that duty.”).

299. See supra note 298.


In Estate of Younger, 314 Pa. Super. 480, 461 A.2d 259 (1983), the superior court relied on the Code of Professional Responsibility to find a presumption of undue influence against an attorney who drafted a will awarding himself a gift. Id. at 494-95, 461 A.2d at 265-66. The court used the
D. Ethical Violations During a Breakup That Might Form the Basis of a Malpractice Action

A review of the ethical provisions discussed earlier reveals several provisions that conceivably could be used in a malpractice action. Creative lawyers may rely on violations of these provisions as evidence of negligence, to establish negligence per se, or perhaps even as the basis for an independent cause of action.\(^{301}\) Thus, lawyers going through a breakup should be sensitive to their ethical obligations not only because it is proper and because they might later be subject to discipline, but also because such violations could be the basis for a malpractice action brought by a client who was injured or merely unhappy.\(^{302}\)

The most difficult hurdle for a client who brings a malpractice action based on the ethical regulations probably will be to show causation and damages due to the ethical violations. In malpractice cases, if clients can satisfy these elements, they probably will be able to use the client-lawyer relationship to estab-

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301. See supra notes 282-300 and accompanying text. Indeed, one commentator has argued that it would be legal malpractice if a lawyer failed to rely on a Code or Rule violations in a legal malpractice case. See, Note, Lipon v. Boesky, supra note 285, at 150.

302. See Woody v. Mudd, 258 Md. 234, 265 A.2d 458, 466 (1970) (court suggests client filed malpractice suit because of disappointment in result and need to blame someone rather than because attorney did anything wrong). Accord C. Wolfram, supra note 29, § 5.6.2, at 209 n.46. Although nonclients have been permitted to sue attorneys for malpractice, see supra note 259 and accompanying text, the focus in this article is on suits by clients against attorneys. The reason for this focus is because the author is primarily concerned about harm to clients during a breakup and because the least controversial method of using ethics violations in a malpractice suit is as evidence of malpractice in a suit brought by a client. See supra notes 282-89.
lish the duty element and use ethical violations as evidence of the breach element.\textsuperscript{303}

1. “Continuing Obligation” Regulations

Because the “continuing obligations” ethical regulations require competence, diligence, and communication,\textsuperscript{304} it is easy to envision their use in a malpractice action. These provisions essentially impose an ethical duty to do that which is required under contract and tort law.\textsuperscript{305} For example, in \textit{Lipton v. Boesky},\textsuperscript{306} the plaintiffs brought a suit based on breach of the common law duty of care and on violations of Code provisions including those prohibiting incompetence, misrepresentation, and commingling.\textsuperscript{307} Among other actions, the defendant-lawyer allegedly failed to file a lawsuit, misrepresented the consequences of plaintiffs’ executing an assumption agreement, and failed to oppose a summary judgment.\textsuperscript{308} This case suggests how a lawyer’s violation of the ethical duties of diligence or communication during a breakup might be used as evidence of malpractice.

2. “Restrictive Covenant” Regulations

Violations of the restrictive covenant provisions will present a different and more difficult case for the client because the type of breach and the nature of the injury are different than in an ordinary malpractice case. Clients might allege that they were injured not because their lawyers did an inadequate job, but because the defendant-lawyers’ use of a restrictive covenant deprived the client of the hotshot lawyers who would have done \textit{more} than an adequate job; they would have done a \textit{winning} job. Such a client could easily find authority stating that the prohibitions on restrictive covenants are designed to promote client choice.\textsuperscript{309} Because the statutes are designed to protect clients,\textsuperscript{310} clients could argue that they should be able to sue for any injury caused by the lawyer’s breach of the duty required by the statute. While injury would be difficult to prove, such clients might be able to survive a motion to dismiss directed against such a claim.

\textit{In re Silverberg}\textsuperscript{311} demonstrates how such a suit could arise. That agreement required each partner to pay the other eighty percent of the fees charged, even with respect to new matters, for certain designated clients. The client may

\begin{itemize}
\item \textsuperscript{303} See supra notes 282-89.
\item \textsuperscript{304} See supra notes 54-56.
\item \textsuperscript{305} \textit{Compare supra} notes 53-59 and accompanying text (ethical duty) \textit{with supra} notes 272-80 and accompanying text (malpractice). Although a lawyer can face malpractice liability for a single instance of neglect, the courts have been less certain whether a lawyer can be disciplined for a single instance of neglect. \textit{See} 1 G. \textit{Hazard} \& W. \textit{Hodes, supra} note 37, at 5-8 (Supp. 1987).
\item \textsuperscript{306} 110 Mich. App. 589, 313 N.W.2d 163 (1981).
\item \textsuperscript{307} \textit{Id}. at 593-94, 313 N.W.2d at 164-65.
\item \textsuperscript{308} \textit{Id}.
\item \textsuperscript{309} \textit{See supra} note 88.
\item \textsuperscript{310} \textit{Id}.
\item \textsuperscript{311} 75 A.D.2d 817, 427 N.Y.S.2d 480 (1980).
\end{itemize}
be placed in an awkward position if the partnership splits, as it did, and the
client wants the “wrong” partner to handle its case. The “wrong” partner either
has to challenge the agreement or risk a substantial financial penalty for the
representation. The partner might simply decline to represent the client, or
charge higher than standard fees. If the client were unhappy with the final re-
sult, it might claim that its injury was due to its failure to receive counsel of
choice.

3. “Fee-Splitting” Regulations

A client arguing that a fee-splitting provision was violated might similarly
claim that the fee division prevented the client from using counsel of choice, that
the client was harmed by this deprivation, and that the client should be able to
sue for the injury caused by the attorney’s ethical violation.\(^{312}\)

Alternatively, clients might allege injury based on having to pay higher fees
than the clients would have had to pay without the fee division.\(^{313}\) Professor
Wolfram envisioned this latter type of injury and recommended that an action
based on this violation be permitted.\(^{314}\) Whenever there is a fee division fol-
lowing a breakup, it would be understandable if clients thought they were paying
more than they would have to pay without the division and were tempted to sue.\(^{315}\)

4. “Conflict-of-Interest” Regulations

Conflict of interest violations have been used frequently as evidence of mal-
practice.\(^{316}\) In *Ishmael v. Millington*,\(^ {317}\) for example, a California court permi-

\(^{312}\) See *supra* note 311 and accompanying text.

\(^{313}\) The client could argue that one of the purposes of these ethics provisions was to guard
against such injury. See *supra* notes 171-75 and accompanying text.

\(^{314}\) See Wolfram, *supra* note 285, at 318.

\(^{315}\) In Rosenfeld, Meyer & Susman v. Cohen, 146 Cal. App. 3d 200, 211, 194 Cal. Rptr. 180,
186 (1983), the departing attorneys initially offered to represent the client for approximately 26% of
the fees charged by their firm. The court ultimately required the departing attorneys to share these
fees with their partners. Presumably, the departing attorneys would have negotiated a higher fee if
they knew they would have to share fees and thus the case illustrates how a client could be hurt by a
fee splitting agreement. It demonstrates that different configurations of lawyers may be able to
charge quite lower fees in the absence of any fee splitting requirement. *Accord* Champion v. Superior
Court, 20 Cal. App. 3d 777, 247 Cal. Rptr. 624 (1968) (court refused to enforce fee splitting provi-
sion as between lawyers, finding it would lead to unconscionably high fees).

\(^{316}\) The second largest legal malpractice settlement believed to be awarded was $27 million
arising out of the failure of Maryland Savings-Share Insurance Corporation (MSSIC). The basis for
the complaint was the law firm’s conflict of interest in simultaneously representing MSSIC and sev-
eral of the institutions it regulated. See [3 Current Reports] LAW. MAN. ON PROF. CONDUCT
(ABA/BNA) 176 (June 10, 1987). *Accord* Woodruff v. Tomlin, 616 F.2d 924, 935-37 (6th Cir.) (en
banc), cert. denied, 449 U.S. 888 (1980) (overturned summary judgment for attorney to allow jury to
consider malpractice claim based on breach of conflict of interest provision; Code can be used as
evidence of standards required of attorneys); Lysick v. Walcom, 258 Cal. App. 2d 136, 148, 65 Cal.
Rptr. 406, 414 (1968) (attorney violated legal and ethical duties towards his client, insured, in re-
jecting a settlement offer and acting solely on interests of his client, insurer); ABC Trans Nat’l
Transport, Inc. v. Aeronautics Forwarders, Inc., 90 Ill. App. 3d 817, 831-32, 413 N.E.2d 1299, 1311
(1980) (court verdict that attorney did not breach fiduciary duty was not against manifest weight of
ted a malpractice claim against a lawyer based on a client's claim that in connection with her divorce, the defendant-lawyer represented both her and her husband and negligently allowed her to be duped by her husband. The basis for her suit was the mere fact of improper dual representation, not improper advice actually given to her by the lawyer. In permitting this suit, the court relied on the provisions of the California Rules of Professional Conduct and the ABA Canons of Ethics, which require disclosure and consent before dual representation.318

One can easily imagine similar reasoning being used in a case involving former-client conflicts, as opposed to dual-client conflicts. If the improper representation were discovered early, a client might allege that the lawyer's breach of the ethical regulations is evidence of the breach of a duty, and that this breach caused the client damage by requiring the client to pay unnecessarily to educate a second set of lawyers about the case. If the conflict were not disclosed until the matter was complete and if the client were not completely satisfied, a claim could be made, as in Ishmael, that an unsatisfactory result was caused by the conflict and the lawyer's failure to give the client the proper allegiance. Indeed, this claim theoretically could be brought by either the current client or the former client.

5. "Confidentiality" Regulations

A malpractice cause of action based on the unauthorized disclosure of confidences or secrets is well-recognized.319 Imagine that as a result of the breakup, one group of lawyers loses a particular client and, in a fit of pique, reveals confidential information or makes disparaging but true remarks about the client.320

Evidence; claim, based on a conflict of interest provision, was not so clear as to be undisputed and thus expert testimony was necessary); Crest Inv. Trust, Inc. v. Comstock, 23 Md. App. 280, 302, 327 A.2d 891, 904 (1974) (clients' judgment against attorney upheld because dual representation without full disclosure incurs risk of civil liability to client caused by lack of disclosure).


318. Id.


320. Complaint, Welch v. Winston, No. 87-1475 (M.D. Pa.), illustrates some of the surprising ways in which such suits can arise. The complaint alleged that defendant-attorney represented plaintiff, who was charged with driving under the influence and manslaughter. Id. The client allegedly could not remember what happened before the accident, including who was driving. The eyewitness reports and physical evidence suggested the client was driving and was guilty. During the plea hearing, testimony revealed that the client was in fact innocent; he had been pulled from the passenger's side of the car, but because the car was upside down, there was some confusion, and he was reported as the driver. After this testimony, the client was permitted to withdraw the guilty plea that he had entered. His attorney later wrote a short story entitled Stranger Than True: Why I Defend Guilty Clients. Winston, Why I Defend Guilty Clients, HARPERs, Dec. 1986, at 70. This story was published and later republished (including in one law school legal ethics casebook), allegedly without client permission. The client sued his attorney for breach of fiduciary duty, among other things, claiming that there was sufficient detail in the stories so that he was identified by friends and suffered embarrassment and distress. Complaint, Welch v. Winston, supra. Because the attorney went bankrupt, the case was dropped without any resolution of these claims. Order, Welch v. Winston, No. 87-1475 (M.D. Pa. Mar. 9, 1988) (dismissing complaint without prejudice).
Or, perhaps more likely, imagine that in a fee dispute, one side files suit and includes in court papers confidential client information. 321

Rosenfeld, Meyer & Susman v. Cohen 322 suggests how such a suit might arise. In that case, two partners ("C&R") had handled a large antitrust case for their firm for over five years. 323 Approximately six months before the case was to go to trial, the partners demanded double their partnership percentage for the antitrust case. 324 When their partners refused this and other demands, C&R withdrew from the firm. 325 The antitrust client then discharged the firm and retained C&R. 326 This substitution and resulting fee agreement reduced the client's fees from a thirty-three percent contingency fee to a fee of $250,000 per year and an eight and three-quarters percent contingency fee. 327 With a settlement of thirty-three million dollars, the fees owed to C&R were approximately twenty-six percent of the fees the client had agreed to pay the firm. 328

After the settlement, the firm filed suit against C&R. Although the opinion does not indicate, one wonders whether the lawyers obtained the client's consent to the disclosure of confidential information such as the fee agreement and fee discussions. 329

If the court were willing to accept embarrassment or invasion of privacy as a type of damage, then a client might bring a malpractice action, alleging that the lawyer's breach of the confidentiality obligations caused that damage. 330 The lawyer could, of course, raise a first amendment defense to such an action, but most lawyers probably would prefer not to have to rely on such a defense. As these examples show, there are subtle ways a lawyer could violate the confidentiality rules during a breakup, and these violations possibly could lead to liability.

323. Id. at 209, 194 Cal. Rptr. at 184.
324. Id. at 209-10, 194 Cal. Rptr. at 185.
325. Id. at 210, 194 Cal. Rptr. at 185.
326. Id.
327. Id. at 210-11, 194 Cal. Rptr. at 186.
328. Id. at 211, 194 Cal. Rptr. at 186.
329. Disciplinary Rule 4-101(C)(3) permits disclosure of "confidences or secrets necessary to establish or collect [the lawyer's] fee." MODEL CODE, supra note 34, DR 4-101(C)(3). It is not obvious that this exception applies to suits between lawyers. Furthermore, California has not adopted this provision. Cf. CAL. BUS. & PROF. CODE § 6068(e) (Deering Supp. 1988) ("It is the duty of an attorney . . . [to maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his or her client."). Information regarding the fee agreement and fee discussions probably would be considered confidential under both the Code and the Rules. It is "information relating to representation of a client," triggering Rule 1.6. MODEL RULES, supra note 35, Rule 1.6. Under the Code it could be a "secret" because it might be considered "information gained in the professional relationship . . . the disclosure of which would be embarrassing or would be likely to be detrimental to the client." MODEL CODE, supra note 34, DR 4-101. See supra note 239 for the text of DR 4-101 and Rule 1.6.
330. Wagenmann v. Adams, 829 F.2d 196, 221 (1st Cir. 1987) (upholding jury awards for pain, suffering, humiliation, and mental anguish caused by legal malpractice); Salley v. Childs, 541 A.2d 1297, 1300 (Me. 1988) (in legal malpractice case, client entitled to damages for emotional distress).
6. “Safekeeping” and “Publicity” Regulations

The two remaining categories of ethical regulations concern safekeeping property and the publicity regulations. Not surprisingly, the courts will permit malpractice liability based on violations of these “safekeeping” ethical provisions. In Day v. Rosenthal,331 for example, the lawyer's breach of the ethical rule against commingling was one basis for the twenty-six million dollar malpractice judgment in favor of Doris Day and her family.332 Indeed, the court permitted the judgment to stand even though there had not been any expert testimony, concluding that the ethical rules “set the standard.”333 Similarly, in Blackmon v. Hale,334 the court overturned a judgment in favor of the defendant-lawyer, finding that the lawyer breached his fiduciary duties when he released to his ex-partner, upon dissolution of the firm, funds in the firm trust account.335 The ex-partner had opened a new trust account, from which he diverted the plaintiff’s money.336 Violation of these safekeeping provisions thus may be relied upon, especially in breach of fiduciary duty suits.

On the other hand, it is more difficult to imagine a malpractice claim based on a violation of the publicity provisions. If misrepresentations were involved, a client could, of course, allege reliance on those misrepresentations and injury. For example, in Paul L. Pratt, P.C. v. Blunt,337 the client arguably selected a certain lawyer because the client was told that the lawyer was still affiliated with his ex-firm.338 A client might possibly be able to claim injury caused by such a breach, although obviously the proof will be difficult. Absent such misrepresentation, however, it is difficult to see how the client could claim injury by receiving more information than permitted by the ethical regulations.339

In sum, if a lawyer violates ethical regulations during a breakup, one can imagine scenarios in which these ethical violations could lead to malpractice exposure. While such cases may still be rare, the underlying principles for this liability are in place and the factual situations that could give rise to such liability are occurring all too frequently. Thus, lawyers going through a breakup should ensure not only that they attend carefully to all their cases, but also that they comply carefully with the ethical regulations. A violation of these regulations not only might give rise to disciplinary action, but also might be the basis for, or be used in, a malpractice action.

332. Id. at 1149, 217 Cal. Rptr. at 104. The court was relying on former CAL. R. PROF. CONDUCT 9.
333. 170 Cal. App. 3d at 1149, 217 Cal. Rptr. at 104.
335. Id. at 559, 463 P.2d at 424-25, 83 Cal. Rptr. at 200-01.
336. Id. at 554-55, 463 P.2d at 421, 83 Cal. Rptr. at 197.
338. Id. at 517-18, 488 N.E.2d at 1066-67.
339. Cf. Tingle v. Arnold, Cate & Allen, 129 Ga. App. 134, 137, 199 S.E.2d 260, 263-64 (1973). In Tingle, a nonclient tried to rely on an alleged violation of the publicity provisions to create a private cause of action. Id. The court rejected this attempt, affirming a summary judgment in favor of defendant lawyers who, after successfully obtaining a jury verdict in a prior action, were sued by the loser of that prior action for soliciting defendant lawyers' client. Id.
IV. A REVIEW OF SOME PROPOSED SOLUTIONS FOR THE ETHICAL AND MALPRACTICE PROBLEMS INHERENT IN LAW FIRM BREAKUPS

If ethical pitfalls and malpractice consequences abound during a breakup, what is a lawyer to do? The standard advice given to lawyers is to have a written agreement to preempt some of these problems. While the agreement itself may become the subject of a dispute, having an agreement forces lawyers to think about the issues before the situations arise and before the lawyers are emotionally involved. It also provides a focus for action once the breakup occurs. Surprisingly, a recent survey showed about one-half of the law partnerships surveyed did not have written agreements.

The courts, like the commentators, stress the importance of a written agreement. The lack of a partnership agreement led one judge to compare lawyers to barefoot shoemakers, lacking that which they are in the business of producing. Still another court stated that the partners in the [firm] not only lacked an agreement about the allocation of fees from active cases upon a dissolution of the partnership but, contrary to the sound legal advice they undoubtedly always gave their partnership clients, they had no written partnership agreement. The absence of a written partnership agreement was an invitation to litigation upon a dissolution of the partnership.

Once a breakup occurs, the courts and the commentators suggest that a primary objective should be to solve the difficulties quietly, quickly, and privately. They agree that clients are hurt and courts are burdened by these

340. This section reviews briefly some of the advice given to lawyers going through a breakup and the programs that are available to assist lawyers. This article does not purport to analyze in depth how lawyers should respond or the nature of the Alternative Dispute Resolution programs. The author hopes to address those topics in a later article.

341. See, e.g., ALTMAN & WEIL, supra note 7, § 8.01, at 8-2; C. WOLFRAM, supra note 29, § 16.2, at 887 ("The breakup of a partnership should be provided for in the partnership agreement."); Feerick, Avoiding and Resolving Lawyer Disputes, in ABA, WITHDRAWAL, RETIREMENT AND DISPUTES 3, 7 (1986) ("A possible starting point in dispute avoidance is for lawyers to set forth their understandings in a written partnership agreement."); Galante, For Firms, Breaking Up Is Hard To Do, supra note 1, at 44, col. 3, 46, col. 4 ("Law firm consultants and lawyers who have been involved in such fee battles say the most important step in preventing problems is a partnership agreement that anticipates all aspects of a breakup."); McMenamin, Dissolution Of A Law Firm, supra note 27, at 3 (recommending written partnership); Wel, supra note 20, at 2, col. 3 (recommending written partnership agreement that covers withdrawal).


343. See, e.g., M. ALTMAN & R. WEIL, supra note 7 § 8.01, at 8-1 to 8-2 (about half of existing law partnerships do not have written agreements); accord, Galante, For Firms, Breaking Up Is Hard To Do, supra note 1, at 44 (citing 1985 Altman & Weil nationwide poll, in which less than half of firms surveyed had agreements). Cf. Ellerby v. Spiezer, 138 Ill. App. 3d 77, 79, 485 N.E.2d 413, 415 (1985) (partners fought about proper allocation of fees upon dissolution, under oral partnership agreement); Smith v. Daub, 219 Neb. 698, 699, 365 N.W.2d 816, 818 (1985) (court forced to construe disputed oral partnership agreement).


346. See, e.g., Feerick, supra note 341, at 7; Pollock, supra note 8, at 60 (describing two break-
disputes.\textsuperscript{347} Furthermore, such disputes do the lawyers no good; “the quality of life within a law firm and its image in the larger community can be diminished by perceptions that the firm has not been fair in its treatment of withdrawing partners,” or by a perception that the “lawyers are litigious, over-reaching, or difficult to deal with.”\textsuperscript{348} Commentators suggest that lawyers are retained for their judgment probably as much as their skills. Breakup disputes can dispel the image of a lawyer “as unflappable, a cool hand, always in control, and devoted to solving clients’ problems.”\textsuperscript{349}

In addition to a written partnership agreement, the commentators recommend several procedures to help lawyers resolve disputes quietly, quickly, and privately. The parting lawyers have been advised to enlist the assistance of particularly close, nonwithdrawing partners or a good friend of the law firm.\textsuperscript{350} Lawyers also may want to enlist independent counsel, although some recommend that counsel be involved only in a consulting role.\textsuperscript{351} Mediation is also one of the procedures advised,\textsuperscript{352} as is arbitration.\textsuperscript{353} Indeed, even when the parties do not voluntarily choose such procedures, they occasionally are compelled by the courts to submit to them.\textsuperscript{354}

ups that were accomplished with “tolerable unpleasantness,” those of Chicago’s Rooks, Pitts, Fullagar & Poust and N.Y.C.’s Kaye, Scholar, Fierman, Hays & Handler; Reuben, Saying Goodbye Gracefully, in ABA, WITHDRAWAL, RETIREMENT & DISPUTES 5 (1986).

347. See, e.g., Graham, Can Ugly Litigation Be Avoided, supra note 1, at 1 (effect of acrimonious litigation on court calendar). See also supra notes 22-23 and infra notes 353-55.

348. Feerick, supra note 341, at 7. Accord McMenamin, Dissolution Of A Law Firm, supra note 27, at 6 (“any name-calling, public dispute or downgrading of former lawyers will hurt every lawyer concerned”); McMenamin, Dismembering A Law Firm, supra note 27, at 18, col. 3 (“Any name-calling, public dispute or downgrading of former partners or associates will hurt every lawyer concerned. The public expects that lawyers are adult, educated and intelligent individuals who will act in a professional manner.”); Weil, supra note 20, at 2, col. 3 (management consultant with experience in breakups states, “If overly assaulted by the contenders, the best of clients and employees may simply seek alternatives. No client wants to be involved in the fratricidal struggles of lawyers, and many an employee prefers to avoid such an emotional cost, especially those who have job offers readily available.”).

349. See, e.g., Reuben, supra note 346, at 5.

350. See, e.g., Feerick, supra note 341, at 7.

351. Id. at 7-8; Graham, Can Ugly Litigation Be Avoided, supra note 1, at 23-24 (quoting those who think outside counsel can aggravate disputes and those who favor use of outside counsel, especially in consulting role).

352. See, e.g., Feerick, supra note 341, at 8; Galante, Jenkins & Perry Feud Almost Over, supra note 1, at 5 (dissolution “was a result of binding mediation hammered out over the past six months by former San Diego Superior Court Judge William A. Yale”).

353. See, e.g., Feerick, supra note 341, at 8; Weil, supra note 20, at 2 (experienced management consultant says private arbitration “is cheaper, quicker and far more private, and consequently does less damage to the parties involved. A binding arbitration clause should be considered in any partnership (or shareholders) agreement.”). See also, Greenberg v. Gitlin, N.Y.L.J., Oct. 17, 1985, at 3, col. 2 (N.Y. Sup. Ct.) (court said, “if the parties [in this dissolution] had proceeded to arbitration initially, this matter would be much closer to a final resolution”).

354. See, e.g., Greenberg v. Gitlin, N.Y.L.J., Oct. 17, 1985, at 1, col. 2 (N.Y. Sup. Ct.) (court ordered parties to submit their grievances to binding arbitration under American Arbitration Association rules, as required by partnership agreement); Glatzer v. Diamond, 19 Misc. 2d 77, 187 N.Y.S.2d 524 (Sup. Ct.) (parties submitted dispute about proper fee allocation upon dissolution to arbitration), aff’d, 9 A.D.2d 675, 192 N.Y.S.2d 487 (1959); Granelli, supra note 1 at 2, col. 4 (court
In response to the increased number of breakups and lawyers’ desires to resolve these disputes quietly and privately through alternative dispute resolution, several bar associations around the country have instituted alternative dispute resolution programs for lawyers facing a breakup of their firm.\textsuperscript{355} To date, five different bar associations have instituted such programs, and at least one other bar association is considering such a program.\textsuperscript{356} Four of the programs are sponsored by city bar associations; one is sponsored by a state bar association.\textsuperscript{357} The five programs are those of the Cleveland Bar Association, the Denver Bar Association, the Association of the Bar of the City of New York, the Pennsylvania Bar Association, and the Bar Association of San Francisco. All five programs provide arbitration. Only one program, Pennsylvania’s, provides mediation in addition to arbitration.\textsuperscript{358} These programs are designed to help the client, as well as the lawyer, protecting client confidences by use of nonpublic alternative dispute resolution and minimizing possible neglect by expediting res-

\textsuperscript{355} See, e.g., Denver Bar Ass'n Intraprofessional Disputes Committee, Plan For Screening Intraprofessional Disputes § 1 (as amended Apr. 21, 1982 and Jan. 19, 1984) [hereinafter Denver Plan] (“The purpose of the Plan is to investigate on a confidential basis and, where possible, resolve disputes between attorneys to the end that the public and the legal profession will be protected from the intraprofessional disputes which can hinder the orderly administration of justice and legal affairs.”); Association of the Bar of the City of New York Comm. on Arbitration and Alternative Dispute Resolution, Proposal For Association-Sponsored Arbitration Of Disputes Among Lawyers, 42 RECORD 877, 879, 882 (1987) [hereinafter NYC Comm., Proposal] (summarizing need for programs and stating: “In addition to the drain on the courts, such litigation [over breakups] has a distressing and potentially dangerous impact on clients, who have been likened to the children over whom custody battles are fought in divorce cases.”); Moss, supra note 17, at 9, 10 (need for alternative dispute resolution shown by lawyer’s plea for help with painful firm breakup, by survey of judges and county bars in urban areas, and by fee division fights involving small firms in more rural areas); Subcomm. on Arbitration of Law Firm Dissolutions and Fee Disputes Among Attorneys, Comm. on Arbitration of Fee Disputes, Bar Ass’n of San Francisco, Special Rules of Procedure § I(A) (June 19, 1987) [hereinafter San Francisco Rules] (“These Special Rules are designed to respond to many requests from attorneys that the Committee assist in resolving [dissolution and attorney fee] disputes.”).


There is no information clearinghouse that keeps track of these programs. These five programs were located through contacts with ABA officials, local bar officials and alternative dispute resolution experts. Anyone with information about additional programs is asked to contact the author.

\textsuperscript{357} See supra notes 355-56 for the sponsors of the programs. The Cleveland, Denver, New York City, and San Francisco programs are sponsored by city bar associations; the Pennsylvania program is sponsored by a state bar association. \textit{Id}. None of the five bar associations is integrated (\textit{i.e.}, bar membership is not a prerequisite to the practice of law).

\textsuperscript{358} See Pa. Rules, supra note 356.
olution of the dispute.\textsuperscript{359}

Thus, while the emotional toll of a breakup can be great and ethical pitfalls and malpractice consequences may abound, much more is being written on this difficult topic, advice is now offered by those with experience, and the organized bar is beginning to take steps to help lawyers going through a breakup.

V. CONCLUSION

This article summarized the ethical issues that can arise when law firms break up. The potential problems include lawyers who neglect their continuing obligations to clients; lawyers who attempt to use restrictive covenants, which include both outright prohibitions on competition and financial penalties for competition; fee divisions that may be improper, especially if the lawyers allocate fees for new matters which arise after the breakup; publicity issues, such as who a departing lawyer may contact and by what method, and whether any communications are false or misleading; issues of maintaining client confidentiality; taking the necessary steps to protect against client conflicts; and issues involving safeguarding client property.

In addition to ethical pitfalls, a lawyer could face malpractice consequences as a result of the law firm breakup. The malpractice claims could be garden-variety claims, based on the lawyer's neglect of the client's case when the lawyer was distracted by the breakup. On the other hand, malpractice claims may be based, in whole or in part, on a lawyer's violation of ethical regulations. Thus, a lawyer should comply with the ethical regulations not only because it is proper, not only because their violation can be the basis of disciplinary action, but also because their violation may be the basis for civil liability. Lawyers should carefully consider both before and during a breakup steps that can be taken to minimize such problems. Indeed, a lawyer may want to consider submitting any disputes to one of the alternative dispute resolution programs that have sprung up around the country. Furthermore, lawyers and bar associations may want to consider sponsoring their own alternative dispute resolution program for law firm breakups. It is prudent to get all the help one can with a problem that is here to stay. As the old song goes, "Breaking up is hard to do."\textsuperscript{360}

\textsuperscript{359} See \textit{supra} note 355.

\textsuperscript{360} See Neil Sedaka & Howard Greenfield, \textit{Breaking Up Is Hard to Do} (1962).