

5-1-1985

## The Sale of a Law Practice: The Model Rules of Professional Conduct Point in a New Direction

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### Recommended Citation

Stephen E. Kalish, *The Sale of a Law Practice: The Model Rules of Professional Conduct Point in a New Direction*, 39 U. Miami L. Rev. 471 (1985)

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# The Sale of a Law Practice: The Model Rules of Professional Conduct Point in a New Direction

STEPHEN E. KALISH\*

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## I. INTRODUCTION

Although there is no prohibition against a solo practitioner selling the physical assets of her law practice, such as the books, typewriters, or lease, commentators agree that she cannot sell her practice as a going concern.<sup>1</sup> The solo practitioner cannot profit

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1. See H.S. DRINKER, *LEGAL ETHICS* 161 (1953); Cantor, *The Value of a Lawyer's Interest in His Practice*, 43 N.Y.S. B.J. 47 (1971); Katten, *Sale of a Law Practice—Federal Tax and Ethical Aspects*, 54 ILL. B.J. 686 (1966); McCarthy, *Termination of a Law Practice*, 54 WIS. B. BULL. 51 (1981); Minkus, *The Sale of a Law Practice: Toward a Professionally Responsible Approach*, 12 GOLDEN GATE U.L. REV. 353, 356 (1982); Sterrett, *The Sale of a Law Practice*, 121 U. PA. L. REV. 306 (1972); Thurm, *Disposal of an Attorney's Practice*, 59 A.B.A.J. 68 (1973); Note, *The Death of a Lawyer*, 56 COLUM. L. REV. 606, 611, 614 (1956).

This article will not address the problems associated with the sale of a law practice by a solo practitioner's estate. These problems are to some extent different from the problems associated with the sale of a law practice by a retiring lawyer. See Minkus, *supra* note 1, at 369-73; Note, *supra* note 1.

Moreover, the Model Code of Professional Responsibility and the Model Rules of Professional Conduct provide that:

- (a) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:
  - (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer . . . .

from the likelihood that her clients will continue to patronize a lawyer she recommends them.<sup>2</sup> She cannot capitalize on the goodwill of her business.<sup>3</sup> This distinguishes her from other businesspersons, other professionals, such as doctors,<sup>4</sup> English solicitors,<sup>5</sup> and, most unfairly, from partners in American law firms.<sup>6</sup> The sub-

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MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(a) (1983); accord MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102(A) (1979); see *infra* notes 19-20. Most goodwill purchases involve some form of shared fee dependent on factors other than services rendered. Therefore, to permit a purchase of a deceased lawyer's practice would probably involve an amendment to either the Model Code or the Model Rules. The point of this article is that the Model Rules, without further amendment, permit the sale of a law practice by a solo practitioner.

2. One commentator has suggested that solo practitioners should enter into a "mutual cooperative association" to solve this problem. Dimitrous, *A Solo Practitioner's Partnership Agreements*, 56 WIS. B. BULL. 16 (1983).

3. There is no single definition of goodwill. In a sense, it is the not otherwise identifiable advantages related to a going concern. In 1810, Lord Eldon stated: "The good-will, which has been the subject of sale, is nothing more than the probability, that the old customers will resort to the old place." *Crutwell v. Lye*, 34 Eng. Rep. 129, 134 (Ch. 1810). In 1926, Justice Cardozo, in *In re Brown*, 242 N.Y. 1, 150 N.E. 581 (1926), wrote: "Men will pay for any privilege that gives a reasonable expectancy of preference in the race of competition. Such expectancy may come from succession in place or name or otherwise to a business that has won the favor of its customers. It is then known as good will." *Id.* at 6, 150 N.E. at 582 (citation omitted).

4. See *Dugan v. Dugan*, 92 N.J. 423, 457 A.2d 1 (1983); *Tessmar v. Grosner*, 23 N.J. 193, 128 A.2d 467 (1957).

5. See *Cantor*, *supra* note 1, at 47-48 (examining buying and selling practices in England); see also *Bunn v. Guy*, 102 Eng. Rep. 803 (KB 1803) (upholding attorney's sale of his practice where attorney received consideration in return for his recommending clients to two other attorneys); *Candler v. Candler*, 37 Eng. Rep. 834 (Ch. 1821) (upholding attorney's payment of profits from his practice to non-attorney); G. GRAHAM-GREENE, *CORDERY'S LAW RELATING TO SOLICITORS* 311 (7th ed. 1981) (discussing solicitors ability to capitalize on the goodwill of their practice).

6. Prior to 1971, there was some ambiguity with respect to whether a firm could share subsequently-earned fees with a retired partner. Canon 34 of the prior Model Code provided: "No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility." In 1971, the Committee on Ethics and Professional Responsibility (hereinafter the Committee) held in Formal Op. 327 (1971) that Canon 34 permitted payment to a retired partner out of the firm's future earnings. The Committee allowed compensation in spite of the fact that this constituted a fee-splitting arrangement. The Committee resolved past ambiguities by stating that it was "permissible to make payments to a retired partner . . . in accordance with a pre-existing retirement plan, the amount of those payments being measured by subsequent earnings of the firm." *Id.* This holding is equivalent to permitting the retired partner to be paid for his interest in the firm's goodwill. The Model Code incorporates the Committee's opinion and provides: "This Disciplinary Rule [related to fee-splitting] does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107(B) (1969). There is no similar provision in the Model Rules. Apparently, the drafters believed that a retired partner was by definition a firm member. Rule 5.4(a)(1) of the Model Rules, which is substantially identical to DR 3-102(A)(1) makes this clear, and provides:

(A) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

stantive law and the canons of ethics permit partners to sell their businesses as going concerns, thereby realizing some value for their goodwill.

For example, Lawyer S, a solo practitioner, has a thriving practice. She wishes to retire. As a means of assisting her clients with this change, as well as a means of making a profit for herself, she arranges to sell her practice to Lawyer B. She believes B to be capable and competent. S agrees with B to write her clients, advising them that she is retiring, and that she recommends that they continue their business with B. S also agrees to discontinue her local law practice and not to compete with B in the future. B agrees to pay S a percentage of his gross revenues during the next five years. The arrangement could be advantageous for all. Nevertheless, commentators conclude that such an arrangement is impermissible.<sup>7</sup>

Yet, on the other hand, the consequences may be wholly different where S and B are partners practicing as "S & B," and at S's retirement, S agrees to discontinue her law practice and not to compete with B in the future. As in the prior hypothetical, S and B may write S's clients, recommending that they continue their relationship with B. The practice may continue under the name of "S & B." B may agree to pay S a percentage of his future revenues over the next few years. Because this retirement benefit is related to future revenues, it is a way of paying S for her share of the business as a going concern. Unlike the prior hypothetical, commentators approve of this arrangement allowing S to capitalize on her goodwill.<sup>8</sup>

Understandably, commentators have disagreed on the desirability of this distinction between solo practitioners and partners.

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(1) an agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(a)(1) (1983) (footnotes omitted). If there could be such payments to the partner's estate, *a fortiori*, there could be such payment to the retired partner.

In his article, Sterrett critiques the ABA Committee on Ethics and Professional Responsibility, Formal Op. 327 (1971). Sterrett, *supra* note 1, at 322-23. This Opinion is the root of the comparison problem because it allows the retired partner to capitalize on her goodwill. This article accepts the Opinion and argues that the Committee should treat solo practitioners similar to retiring partners.

7. Other commentators give different and more complex examples. See Minkus, *supra* note 1, at 353-54; Thurm, *supra* note 1, at 48. The principle, however, is the same.

8. See *supra* note 6; Sterrett, *supra* note 1, at 306-08.

One commentator, however, has justified the distinction.<sup>9</sup> Mr. Sterrett argues that in a "true" partnership there would be little chance that S, one partner, would refer her clients to an incapable and incompetent partner. He believes that partners choose others as partners because of their legal talents and would not recommend other partners to clients for extraneous reasons, such as the amount of a retiring partner's promised benefits. Nevertheless, the author concedes that there is potential for abuse in the "quickie" partnership situation, in which S and B join together for the purpose of transferring S's business. He warns that courts and disciplinary authorities should be vigilant in preventing this abuse. The author, however, offers no way of distinguishing a "true" from a "quickie" partnership.<sup>10</sup> Another commentator advocates a more permissive approach to the sale of a solo practitioner's law practice.<sup>11</sup> Professor Minkus suggests an amendment to the Model Code of Professional Responsibility (Model Code) that would allow the sale of an individual practice if there is adequate disclosure to clients and the clients consent.<sup>12</sup>

Authorities draw support for their conclusion that a solo practitioner cannot sell the non-physical aspects of her law practice from an opinion of the New York County Lawyer's Association's Committee on Professional Ethics: "Clients are not merchandise. Lawyers are not tradesmen. They have nothing to sell but personal

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9. Sterrett, *supra* note 1.

10. *Id.* at 321-23.

11. Minkus, *supra* note 1.

12. *Id.*; see The Standing Committee on Professional Responsibility and Conduct of the State Bar of California, Report and Recommendations Concerning Proposed New Rule 2-112 (April 30, 1982). The proposed rule stated:

Rule 2.112. Sale or Purchase of a Law Practice

(A) A law practice of a member or a deceased member of the State Bar or a law firm, including consideration for good will, may be sold to or purchased by another member of the State Bar or law firm. The total fee charged to clients shall not be increased solely by reason of the payment of consideration for the good will or other tangible assets of the practice.

(B) If the sale will involve the transfer of responsibility for the work on behalf of the seller's clients, then notice pursuant to the provisions of this rule must be given. In all other sales and purchases, notice pursuant to the provisions of this rule may be given.

(C) The seller must notify clients in writing that an interest in the law practice is being sold to the purchaser and that the clients have the right to retain other counsel and to take possession of their files. This notification must comply with the provisions of rule 2-101(A)-(6), Rules of Professional Conduct, and the seller must disclose any conflict of interest.

(D) The purchaser shall take reasonable steps to assure that the seller has complied with subdivision (C) of this rule.

service. An attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status."<sup>13</sup> In a later Opinion, the American Bar Association Committee on Ethics and Professional Responsibility (Committee) concluded: "The practice of law is not a business which can be bought or sold."<sup>14</sup>

As a statement of fact, the suggestion that there is nothing of value to be bought and sold contradicts reality. Lawyers regularly speak of their clients as belonging to them, and when moving from firm to firm, they usually take their clients with them. Even the IRS has recognized that there can be goodwill associated with a solo law practice.<sup>15</sup> Recently, several cases have held that in the context of marital dissolution disputes, there is definitely something of value associated with a law practice as a going concern.<sup>16</sup> The probability of client loyalty establishes the value of the practice.<sup>17</sup> The simple fact that lawyers are willing to pay for this potential suggests that such value exists.

The Committee's statements lack logic. To state that the sale of a law practice is "inconsistent with the best concepts of our professional status" or that a law practice is "a business which can[not] be bought or sold," begs the question. Why is it inconsistent? Why is it a business that cannot be bought or sold? What interests or persons might be harmed if lawyers bought and sold solo law practices? Such statements reflect only the belief that sales of individual practices are undignified and overly commercial.

Prohibiting the sale of the intangible assets of a solo law practice, including goodwill, has unfortunate consequences. Frequently, there is valuable goodwill incident to a solo law practice. Thus, lawyers, through two common methods, will attempt to circumvent

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13. New York County Lawyer's Ass'n Comm. on Professional Ethics, Op. 109 (1943), quoted in ABA Comm. on Ethics and Professional Responsibility, Formal Op. 266 (1945). With the exception of the language quoted from Opinion 109, this article will only cite ABA Committee opinions. Not only are they more available than state ethics committee opinions, but they are also the products of a more authoritative body. See Finman & Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 U.C.L.A. L. REV. 67 (1981).

14. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 300 (1961).

15. See Comment, *Law Firms: Selected Partnership Tax Problems of Formation and Admission of New Partners*, 59 NEB. L. REV. 679 (1980).

16. See *Dugan v. Dugan*, 92 N.J. 423, 457 A.2d 1 (1983); *In re Freedman*, 35 Wash. App. 49, 665 P.2d 902 (1983).

17. The *Dugan* court made it clear that this value was different from a professional degree and future earning capacity.

the law prohibiting its transfer. First, the buyer may pretend to purchase only the seller's physical assets. The buyer pays an enhanced amount for those assets, because the transfer secretly includes the transfer of goodwill. Second, the buyer and seller may enter into a partnership. Several months later, the seller will retire. The buyer, or successor partner, is left with the business as a going concern. This is the "quickie" partnership method. The end result of both of these methods is that lawyers resort to misrepresentation and deception in order to realize the goodwill incident to a solo law practice.

Concerned with her financial security upon retirement, a solo practitioner may feel compelled to enter into a partnership agreement. There is no correlation, however, between a particular form of business organization and quality lawyer services. In some situations, a solo practitioner may provide better service than a partnership could provide. Thus, policies favoring a particular form of business organization over another are unwise and inefficient.

Clients tend to return business to a lawyer because she provides good service. The law ought to encourage and reward this kind of service. One effective way would be to permit the solo lawyer who provides it, and therefore achieves the promise of return business, the opportunity to gain as a result. Not to permit her to sell her practice may give her less incentive to provide the service in the first instance. Moreover, if the retiring lawyer is unable to sell the practice, she will have no economic incentive to guard her clients' interests on her retirement. She may leave them with little more than a good-bye notice.

The argument against allowing the sale of a law practice includes the charge that the seller may violate several duties that she owes her present clients as well as potential future clients.<sup>18</sup> First, the seller may breach her duty not to disclose her clients' confidences and secrets. Second, she may breach her duty to give an objective referral, untainted by a conflict of interest. Third, she may make herself unavailable for future service. She may improperly withdraw from her professional obligations, and as a result of a covenant not to compete, unduly restrict others from subsequently choosing her as their attorney.

Critics also have charged that the buyer may violate several duties. First, the buyer not only may be soliciting clients but he

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18. Of course, the seller and buyer act in concert. The analysis of the problem is easier to understand, however, if we focus on seller and buyer separately.

also may be paying the seller to refer these clients to him. Second, the buyer may be jeopardizing his loyalty to his new clients. He might be tempted to provide either a low-quality service or a too costly service to his clients in order to compensate for the price paid to the seller. Third, the buyer may mislead the client with respect to the nature of his law practice by the use of the seller's office, telephone number, or trade name.

The conclusion that a solo practitioner should not be able to sell her law practice as a going concern, however, does not withstand close scrutiny. This is especially true in light of the American Bar Association's Model Rules of Professional Conduct (Model Rules).<sup>19</sup> Subject to intense professional and public debate during the last few years, the Model Rules were designed to replace the Model Code of Professional Responsibility.<sup>20</sup> This article maintains that the Model Rules, more clearly than the Model Code, reflect a set of values that suggest that, under certain conditions, a solo practitioner should be able to sell her practice. The fact that the Model Rules reflect important developments in constitutional law supports this suggestion.

A retiring solo practitioner ought to be able to sell her law practice, including its goodwill, to a qualified lawyer. This will discourage deception, permit lawyers to use an appropriate form of business organization, and encourage lawyers to provide good service to their clients and to consider client interests on retirement. A reasonable sales agreement ought to be both enforceable and ethical.

The sales agreement should provide that: (1) the buyer pay the seller either a sum certain for the business or an amount contingent on revenues over a period of years; (2) the seller write her clients, advise each of them that she is selling her business to the buyer, and disclose the fact and method of payment; (3) the seller communicate that, although each client has the right to withdraw his business and take back his files, she recommends that they continue their legal business with the buyer; (4) the seller request permission to transfer the clients' files to the buyer in a reasonable

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19. The American Bar Association, after intensive scrutiny and numerous drafts, adopted the Model Rules in August, 1983 and recommended that the states adopt the rules.

20. The American Bar Association adopted the Model Code in 1969, and most states have used it as a Model Code of Ethics. It is organized into nine Canons or axiomatic principles. Under each Canon, there are Ethical Considerations [hereinafter EC] that serve as aspirational statements; there are also Disciplinary Rules [hereinafter DR], that are mandated rules.



period of time; (5) the seller may agree to a reasonable covenant not to compete; (6) the seller must include in her letter to clients that she will be legally responsible, as if she were a partner of the buyer, for all the buyer's acts and omissions related to all client cases that the seller, if she had not retired, would have been obligated to finish; and (7) the buyer may use any indicia of the seller's business, such as the same office, the same telephone, even the same name, as long as such use is not misleading or deceptive.

This article first will examine the primary authority that supports the proposition that a solo practitioner cannot sell the goodwill in her law practice and will show that this authority is sparse. It then will examine the alleged problems, focusing first on the seller and then on the buyer. It will scrutinize the relevant values, examine the new Model Rules, and make reference, where appropriate, to constitutional developments.

## II. PRIMARY AUTHORITY

Despite many commentators' assertions that a solo practitioner cannot sell the goodwill associated with a law practice, there is little primary authority to support this position. Neither the Model Code nor the Model Rules expressly prohibits the sale of a law practice. The Model Code does, however, implicitly prohibit such a sale. Ethical Consideration 4-6 provides: "Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets."<sup>21</sup> The Model Rules make no reference to the sale of a law practice.

The leading authority on the sale of a law practice is the ABA Committee on Ethics and Professional Responsibility, Formal Opinion 266. Although it dealt with the sale of a law practice by an

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21. The Model Code provides:

The obligation of a lawyer to preserve the confidence and secrets of his client continues after the termination of his employment. Thus, a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets. A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instruments and wishes of the client should be a dominant consideration.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-6 (1969) (footnotes omitted).

estate, its dicta makes it relevant to a retiring lawyer's sale. The Committee, in dicta, questioned the ethical propriety of purchasing the practice and goodwill of a deceased attorney from the heirs or personal representatives, whether by payment of a lump sum or by an agreement to pay a stated percentage of the future receipts, gross or net, from his clients.<sup>22</sup> The Committee, citing Opinion 109 of the Committee on Professional Ethics of the New York County Lawyers' Association, stated that such a transaction was improper.<sup>23</sup>

The Committee focused first on Canon 34. At the time, it read: " 'No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility.' " <sup>24</sup> The Committee concluded that the described arrangement would be an impermissible division of legal fees with a layperson (the estate). The Committee added, by way of dictum, that even if the transaction were with a lawyer, it would violate Canon 34 because the fee division would not be in proportion to the respective lawyers' work or responsibility.<sup>25</sup>

The Committee briefly asserted there might be an improper disclosure of client confidences, thus violating Canon 37.<sup>26</sup> The Committee did no more than briefly assert this point; as shown below, this is not an important reason for the outright proscription of a sale.

The Committee next opined that a sale would result in unwarranted client solicitation in violation of Canon 27.<sup>27</sup> The Committee recognized that there are two types of activities prohibited by Canon 27. It noted that a lawyer is prohibited from "soliciting by arrangement with the estate of a deceased lawyer the latter's clients to continue their business with him."<sup>28</sup> The Committee also observed that a lawyer is precluded from "permitting the widow or heirs of the deceased to urge such clients to continue their business

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22. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 266 (1945).

23. *Id.*

24. *Id.* (quoting Canons of Professional Ethics, Canon 34 (1928) (amended 1933)). The Model Code replaced the American Bar Association's Canons of Ethics that were adopted in 1908.

25. *Id.* The Committee apparently assumed that the described transaction involved splitting legal fees. This results when a payment schedule is based on future fees. If, however, there is a lump sum payment for the practice, a split in legal fees will not necessarily occur.

26. *Id.*

27. *Id.*

28. *Id.*

with him."<sup>29</sup> Such activities would give an advantage to the highest bidder for the practice, which should not be the basis for retaining an attorney.<sup>30</sup>

There are few reported cases disciplining attorneys for the purchase or sale of a law practice. This lack of authority demonstrates that perhaps the courts tacitly condone the practice, or that the common modes of transfer (inflating the value of the physical assets and entering into a "quickie" partnership arrangement) are so common that cases do not arise. Some precedent does exist, however. In a pair of companion cases, the Supreme Court of Wisconsin censured both the buyer and seller of a law practice.<sup>31</sup> The court's principal concern was the misrepresentation associated with the transfer. The buyer represented himself as a partner of the seller, and he kept the name of the partnership after the seller left. The court also concluded that the seller violated his duty to keep his clients' confidence, as well as his duty not to withdraw improperly from his representation.<sup>32</sup>

The non-disciplinary cases fall into two categories. First, there are those cases in which the buyer is suing to enforce a covenant not to compete. Second, there are those cases in which the seller is suing to receive his payment or the buyer is suing to have his obligation set aside. These cases are treated separately.<sup>33</sup>

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29. *Id.*

30. *Id.*

31. *In re Campbell*, 113 Wis. 2d 715, 335 N.W.2d 881 (1983); *In re Disciplinary Proceedings Against Laubenheimer*, 113 Wis. 2d 680, 335 N.W.2d 624 (1983).

32. *In re Disciplinary Proceedings Against Laubenheimer*, 113 Wis. 2d 680, 335 N.W.2d 624 (1983). The court in *Laubenheimer* did not focus on the fee-splitting problem. Instead, the court disagreed with the referee's finding that there was impermissible fee-splitting and concluded that the method used was only a means to pay for the practice.

33. Although authorities frequently cite partnership dissolution cases for the proposition that a solo practitioner cannot sell her goodwill, this article will only briefly mention partnership dissolution cases in which the sale of the goodwill of a going concern was contested. In fact, the courts have, on occasion, stated that a law partnership has no goodwill to divide.

These cases can be viewed in three ways. First, there are cases that state the "no good will proposition" by way of dictum. See *Little v. Caldwell*, 101 Cal. 553, 36 P. 107 (1894); *Heywood v. Sooy*, 45 Cal. App. 2d 423, 114 P.2d 361 (1941).

Second are those cases, such as *Lyon v. Lyon*, 246 Cal. App. 2d 519, 54 Cal. Rptr. 829 (1966), that find, as a matter of fact, that for the particular partnership there is no goodwill. The *Lyon* court demonstrated that the law firm in question was really several independent lawyers, each with their own client base. Therefore, there was no goodwill to divide. The court wrote:

The manner in which the law practice of Lyon & Lyon was carried on by the partners reflects the highly personal and confidential nature of the relationship of each individual partner and the client—for whom he did legal business and to whom the client looked for legal services and responsibility. The great majority

Although there are no cases in which a court has refused to enforce a reasonable covenant not to compete pursuant to the sale of a law practice, there are several cases in which the courts have enforced such covenants.<sup>34</sup> Most recently, in *Hicklin v. O'Brien*,<sup>35</sup> the court found that the seller's agreement not to practice in a single county was a reasonable restriction. The court noted that the seller had drafted the agreement, that it was fair and equitable at the time the seller drafted it, and that it did not impose any hardship on the seller.<sup>36</sup> This analysis conformed with prior case law. Even though the court recognized the argument that the agreement required the defendant to engage in unethical practices, it found no constitutional provisions, statutes, or judicial decisions that would make the contract illegal. Furthermore, the court found that it was unnecessary to determine whether the contract violated canons of professional ethics.<sup>37</sup>

Several older cases either denied the seller the right to enforce the buyer's promise to pay or allowed the buyer to void his agreement.<sup>38</sup> These cases, however, are weak authority for the general proposition that a solo practitioner cannot sell her law practice as

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of clients who came to Lyon & Lyon came to the individual partner; the individual partner took care of the work and was responsible for it and maintained the account. In answer to the court's question concerning his opinion of the value of the good will of Lyon & Lyon on January 8, 1962, defendant Leonard S. Lyon, Jr., testified that the value was "nothing"; "that the good will in the sense that it can be subject to a valuation does not exist and by the nature of a law partnership cannot exist, because such good will as attaches to a legal partnership, attaches to the individuals as such, and if you apply the good will to the partnership itself, what you are doing is applying an aggregate of good wills."

*Id.* at 523-24, 54 Cal. Rptr. at 831.

Third are those cases that state that a retired partner cannot receive an accounting for future fees and earnings of the partnership attributable to the goodwill of the law firm because this involves the unethical fee-splitting arrangement discussed in Canon 34. See *Moffatt v. Cresap*, 33 A.D.2d 54, 304 N.Y.S.2d 719 (1969), *aff'd*, 29 N.Y.2d 856, 277 N.E.2d 926, 328 N.Y.S.2d 6 (1971); *Siddall v. Keating*, 8 A.D.2d 44, 185 N.Y.S.2d 630, *aff'd*, 7 N.Y.2d 846, 164 N.E.2d 860, 196 N.Y.S.2d 986 (1959). Recent interpretations of Canon 34 and subsequent Model Code changes, however, severely undermine these cases. See *supra* note 6.

34. See *Thorn v. Dinsmoor*, 104 Kan. 275, 178 P. 445 (1919); *Heinz v. Roberts*, 135 Iowa 748, 110 N.W. 1034 (1907); *Smalley v. Greene*, 52 Iowa 241, 3 N.W. 78 (1879).

35. 11 Ill. App. 2d 541, 138 N.E.2d 47 (1956). *Contra* *Dwyer v. Jung*, 133 N.J. Super. 343, 336 A.2d 498 (Ch. Div.), *aff'd*, 137 N.J. Super. 135, 348 A.2d 208 (App. Div. 1975), criticized in Note, *Attorneys—Professional Responsibility—Restrictive Covenants—Attorney Must Not Enter Into Partnership Agreement Prohibiting Themselves from Representing Former Clients Upon Termination of the Partnership*, 4 FORDHAM URB. L.J. 195 (1975).

36. *Hicklin*, 11 Ill. App. 2d at 550, 138 N.E.2d at 52.

37. *Id.* at 550, 138 N.E.2d at 52.

38. See authorities cited *infra* note 39-51 and accompanying text.

a going concern. These older cases fall into two categories: cases in which too little was transferred and those in which too much was transferred.

First, there are cases in which the court believed the seller's promised referral was so valueless that there was no consideration, and therefore no enforceable contract. In *Ryman v. Kennedy*,<sup>39</sup> the court permitted the buyer of a law practice from an estate to set aside her promissory note because the sale of the attorney's goodwill was not adequate consideration to support the contract. The court said that "the possibility that after his death his clients would consent to the selection of other counsel by the executors or others is too remote a contingency to render the 'good will' of the testator a subject-matter of sale."<sup>40</sup>

There are also cases in which too much was transferred. In *Smalley v. Greene*,<sup>41</sup> the seller attempted to assign the contracts of employment. This goes beyond the case in which the buyer bargains only for a referral. A forced assignment is improper because it imposes a new lawyer on a client without the client's prior consent.

Two cases in the last decade deserve closer scrutiny. In *Geffen v. Moss*,<sup>42</sup> two attorneys explicitly agreed that the sale of the seller's physical assets did not include the goodwill of the business. Nevertheless, they agreed that the seller would "exert his influence for the continued welfare of the practice and to encourage present and former clients to utilize the legal services of the office in the future."<sup>43</sup> The court found that both buyer and seller "considered the expectation of future business from present clients and former clients as a principal motivating factor in this transaction."<sup>44</sup> The court correctly believed there was an attempted transfer of goodwill. Therefore, when the buyer refused to pay the agreed-upon consideration, the court refused to permit the seller to sue for damages.

Although *Geffen* seems to hold that a solo practitioner cannot sell her goodwill, there is an alternative interpretation of the case. As previously noted, the seller agreed to exert his influence to per-

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39. 141 Ga. 75, 80 S.E. 551 (1913); accord *In re Estate of Martin*, 178 Misc. 43, 33 N.Y.S.2d 81 (Surr. Ct. 1941).

40. *Ryman*, 141 Ga. at 76, 80 S.E. at 552.

41. 52 Iowa 241, 3 N.W. 78 (1879).

42. 53 Cal. App. 3d 215, 125 Cal. Rptr. 687 (1975).

43. *Id.* at 219, 125 Cal. Rptr. at 688.

44. *Id.* at 222, 125 Cal. Rptr. at 690-91.

suade his clients to retain the buyer. The court found "that the expected business from former and current clients of the plaintiff did not materialize" and that the seller "ha[d] received the fair value for the physical assets transferred pursuant to the agreement."<sup>45</sup> A reasonable interpretation of the opinion is that a precondition of payment was the effectiveness of the referral and, because it was ineffective in this case, the seller could not sue. Because the seller had received fair value for physical assets transferred, it would be unjust enrichment to let him recover additional payments.

In *Koehler v. Wales*,<sup>46</sup> the plaintiff attorney planned to be out of the country for fourteen months. She entered into an agreement whereby the defendant would assume her law practice for that time. Defendant was entitled to 85% and plaintiff 15% of the revenues of new cases. This arrangement was similar to a temporary sale of a law practice.

Much of the *Koehler* court's discussion suggested that it would not object to the sale of a law practice. The abandonment of clients or the sharing of confidential information did not trouble the court—if an attorney has to be absent from her practice because of an illness or a vacation, she has to do what is necessary to protect the immediate interests of the clients. The court could have extended this reasoning to equate retirement with an illness or vacation that necessitates the sale of the practice.<sup>47</sup>

The *Koehler* court also seemed to recognize the inherent value of a law practice as a going concern.<sup>48</sup> It noted that the transferring lawyer wanted to preserve her business. The court observed that there was nothing wrong with this because the practice was of value and deserved to be protected.<sup>49</sup> This is analogous to the situation in which the seller wants to convey the intact law practice to a buyer.

Despite this analysis which supported the arrangement and the sale of a law practice, the court assumed that a solo practitioner cannot sell the goodwill connected with her business.<sup>50</sup> It concluded that to permit the seller to recover the agreed-upon per-

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45. *Id.* at 221, 125 Cal. Rptr. at 690.

46. 16 Wash. App. 304, 556 P.2d 233 (1976).

47. *Id.* at 307-08, 556 P.2d at 236. The court noted that clients are not merchandise and that the relationship between attorney and client is confidential. Because neither party intended to violate these principles, there was not breach of duty. *Id.* at 308, 556 P.2d at 236.

48. *Id.*

49. *Id.*

50. *Id.* at 311, 556 P.2d at 238.

centage of revenues of business begun during her absence and not completed by the buyer until after she returned would be an impermissible transfer of goodwill is under the authority of *Geffen*.<sup>51</sup>

Nevertheless, in affirming the trial judge's award for damages under the business interference theory, the court allowed the equivalent of recovery under a sale of goodwill theory. The court, in effect, returned to its initial instincts and permitted the transfer of goodwill.

There is little primary authority to support the proposition that a solo practitioner cannot sell the goodwill associated with her law practice. There are a few cases and they are inconclusive. Neither the Model Rules nor the Model Code explicitly prohibits such a sale.

The 1945 Committee on Ethics and Professional Responsibility reported that the sale of a law practice would breach client confidences, result in unwarranted client solicitation, and constitute an impermissible division of legal fees. Disfavor expressed forty years ago, however, should not preclude a contemporary examination of these concerns. The Model Rules, recently adopted by the American Bar Association (ABA), offer a framework in which the sale of a law practice can be executed without violating ethical standards. Both the seller and the buyer can take steps to assure that these concerns are met.

### III. THE SELLER

#### A. *Disclosure of Confidences*

A client legitimately expects that his lawyer will keep his files and relevant information confidential and not disclose them without prior consent. In Formal Opinion 266 the Committee on Ethics and Professional Responsibility asserted that selling a law practice might jeopardize this confidentiality interest.<sup>52</sup> Ethical Consideration 4-6 restates this position.<sup>53</sup> The Model Rules, however, make no explicit reference to the sale of a law practice. Any conclusion that the Model Rules restrict the sale of a law practice must be made by inference. At a minimum, the Model Rules are less re-

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51. *Id.* at 311-12, 556 P.2d at 238.

52. The Committee stated: "Canon 37 provides: 'It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment. Every lawyer's files contain confidential information from clients which neither he nor his heirs or personal representatives may properly disclose without the client's express permission.'" ABA Comm. on Ethics and Professional Responsibility, Formal Op. 266 (1967).

53. *See supra* note 21.

strictive than the Model Code.

There are two phases in the sale of a law practice: first, the negotiations with respect to the transfer; second, the actual transfer of the business. The risks of an unwarranted disclosure of information during either phase are very slight.

During the negotiation phase, the buyer will want to know the status of the entire practice that he is acquiring. How else would he know how much to pay? The important information will be aggregate in nature. The buyer may want to see financial statements and generalized statements about the make-up of the seller's practice, but the buyer will have no legitimate reason to want to delve into particular case files during this stage. Disclosure of this general financial information would not jeopardize any particular client's confidences, because clients could reasonably expect lawyers to disclose this kind of information in operating their law practices.<sup>54</sup>

One analogy to the sale of a practice is the situation in which an attorney approaches a bank for bookkeeping services or to borrow money for her business. Ethical Consideration 4-3 states that "a lawyer [may] give limited information from his files to an outside agency necessary for . . . banking . . . purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential."<sup>55</sup> In Informal Opinion 1364, the ABA Committee on Ethics and Professional Responsibility noted that this information could include client names, financial information, and even information involving work performed.<sup>56</sup> In that opinion, although the Committee focused on the fact that clients expect law firms to use the outside agencies, it suggested that clients anticipate that their lawyer will reveal certain information in order to run his practice.

Information useful to the buyer has also been readily available in the cases of publicly funded law firms, such as public defender

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54. One commentator believes that even to disclose this aggregate information would violate the lawyer's duty. Minkus, *supra* note 1, at 378.

55. The Model Code provides:

Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-3 (1969).

56. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1364 (1976) (This Opinion reconsidered and withdrew Informal Op. 1267 (1973)).



offices and legal aid offices. Because these institutions are accountable to the public, disclosure of the operation of their business is necessary so that the public can determine whether they are doing their jobs properly, and whether they are worth the amount of money spent on them. In Formal Opinion 334, the Committee examined the kind of information legal aid offices can disclose. There, the Committee expressed a concern for a client's confidences and secrets;<sup>57</sup> it was reluctant to give the board of directors of a legal services office access to particular files of particular clients. Although legal services offices might disclose certain information if needed to assure the board that its policies were correctly followed, the Committee still insisted that the office reveal confidential information only with client consent. In Informal Opinion 1443, the Committee observed, however, that the board could require a legal services office to prepare audited financial reports for public scrutiny.<sup>58</sup> Because such information is general in nature, disclosure did not jeopardize the legitimate interests of particular clients. Similarly, the selling lawyer's clients would have no interest in preventing her from disclosing general financial information to a potential buyer.

During the second transfer phase, the risks of unwarranted disclosure are less. The seller should not transfer files without the fully informed consent of the client.<sup>59</sup> The selling lawyer should write her clients in advance of retirement to seek permission to transfer her files to the purchaser of the practice. This rule is designed to protect client confidences and should be applied to inactive and active files. After advising her clients of her impending retirement, it is unlikely that the selling lawyer will encounter much difficulty in seeking permission to transfer the files.

To permit candidly the sale of a law practices will avoid the unwarranted disclosure invited by current practices. Under current practices, the seller enters into a partnership with the buyer. Ethical Consideration 4-2 provides: "Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm."<sup>60</sup> When the seller retires a few months after

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57. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974).

58. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1443 (1979).

59. One commentator has suggested that if the seller must transfer the files, they should be sealed until the client gives consent. Sterrett, *supra* note 1, at 312-13. The court in *Koehler v. Wales*, 16 Wash. App. 304, 556 P.2d 233 (1976) showed little concern over disclosures made with no consent.

60. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-2 (1969).

the sale, the buyer will therefore have access to the files.

The rationale behind allowing partners to share information among themselves is that clients expect it. It is unlikely that clients would expect a lawyer who has long been in solo practice to share client information with another lawyer. If they expected anything at all, it would be that she would retire at some point in time. Allowing the disclosure of client information without client consent, merely because of compliance with the formalities of a partnership, clearly violates the spirit and substance of the confidentiality principle in the sale of a law practice. In other words, prohibition of the sale of a law practice based on the confidentiality rationale only makes matters worse. Sellers would resort to practices that lead to unexpected disclosures of confidential client information anyway. Furthermore, the clients are deprived of the opportunity to object to the new representation. On the other hand, such an opportunity would be available if the selling lawyer had given appropriate notice of her retirement to her clients and explained to them their right to reclaim their files and decline representation by her successor.

The threat of an unwarranted disclosure of confidential information in the sale of a law practice is slight. In the negotiation phase, there is no reason to disclose confidential information. The disclosure of information necessary to the sale will not violate any particular client's confidences and secrets. In the actual transfer phase, the risks of unwarranted disclosure are less because nothing will be conveyed without client consent. Allowing the solo practitioner to sell her law practice, provided she obtains client consent to the actual transfer of the files, will better protect client confidences than allowing unanticipated disclosure to "quickie" partners.<sup>61</sup>

### B. *Objectivity of Referral*

One way of characterizing the sale of a law practice is that the buyer, in one way or another, is paying the seller to recommend the buyer's services. The seller's recommendation may therefore be suspect. Characterized this way, and under certain sales arrangements, there arguably may be several violations of the Model Code and the Model Rules. Disciplinary Rule 2-103(B) and Rule 7.2(c) prohibit a lawyer from giving anything of value to a person to rec-

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61. See, e.g., Minkus, *supra* note 1, at 360 (clients may not think that a *partner* will share any information).

commend his employment;<sup>62</sup> DR 5-101(A) and Rule 1.7(b) prohibit a lawyer from accepting employment if his own financial or personal interest may affect his professional judgment;<sup>63</sup> and DR 2-107(A) and Rule 1.5(e) prohibit the sharing by lawyers of a single legal fee.<sup>64</sup> The major concern underlying these rules is the poten-

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62. The Model Code provides:

A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(B) (1969) (footnotes omitted).

Similarly, the Model Rules provide:

A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the usual charges of not-for-profit lawyer referral service or other legal service organization.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2(c) (1983).

63. The Model Code provides: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial business, property, or personal interests." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1969) (footnote omitted).

Similarly, the Model Rules provide:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983).

64. The Model Code 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 OF PROFESSIONAL RESPONSIBILITY DR 2-107 (1969) (footnotes omitted).

Similarly, the Model Rules provide:

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;

tial unreliability of the seller's referral.

Because all lawyers are licensed and therefore presumed competent to practice law, one commentator has argued that there cannot be a referral inconsistent with the client's best interest.<sup>65</sup> This position is unrealistic. Lawyers vary in quality, and in some cases a referring lawyer may be tempted to recommend a less qualified or even unqualified lawyer. The temptation may vary with the circumstances of the sale.

If the purchase is for a specific sum, the seller will have less reason to care about the buyer's competency than if the payments are related to the buyer's future revenues. Most purchase agreements, however, will be tied to future revenues. It would be a rare buyer who would be willing to spend much for the referral without demonstration of its success. Lawyer referrals are highly uncertain in that there is no guarantee that a client will continue his business with the buyer. Because a dissatisfied client will result in smaller payment to the seller, the normal economics of the transaction suggest that the seller will exercise considerable care in selecting a buyer.

To minimize further the risks of referrals to incompetent lawyers, the seller should disclose to her clients that the buyer is paying her to make the referral and that she will remain legally liable, as if she were a partner of the buyer, for all current cases. These requirements enhance client protection by making the client aware of one of the reasons for the referral and encouraging the seller to screen potential purchasers to make certain that they would not burden her with vicarious liability. These are the implied assurances clients receive when they engage a law firm. Partners refer cases to each other and they, including retired partners, split the legal fees. Although the client is not necessarily told of the split fees, it is assumed that he consents to the arrangement. Each partner remains vicariously liable for the work of his colleagues.<sup>66</sup>

The paradigm for this suggested approach is Model Rule 1.5(e), which permits a fee-split if "the client is advised of and

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(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 OF PROFESSIONAL CONDUCT Rule 1.5(e) (1983).

65. Cantor, *The Value of a Lawyer's Interest in His Practice*, 43 N.Y. St. B.J. 47 (1971). But see Sterrett, *supra* note 1, at 311.

66. See UNIF. PARTNERSHIP ACT § 13 (1968). It is arguable that the client also gets the screening and consideration that comes from choosing partners in long-standing relationships. The difficulty with this is that not all partnerships are long-standing relationships.

does not object to the participation of all the lawyers involved" and "each lawyer assumes joint responsibility for the representation."<sup>67</sup>

Disclosure to the client is the easiest way of assuring that financial considerations do not taint the referral. Of course, the temptation remains but so do the legitimate reasons for making the referral. At the very least, it shows respect for the client to let him make an informed choice. Further, the Model Code suggests informed consent as a safeguard. Both DR 5-101(A),<sup>68</sup> which prohibits a lawyer from taking employment if a financial interest would affect her judgment, and DR 2-107(A),<sup>69</sup> which prohibits fee-splitting, could be avoided if the client consents to the arrangement after full disclosure.

The Model Rules also adopt, and extend, the informed consent solution. Model Rule 1.7(b) provides that if the lawyer's own interests affect her judgment, it may nevertheless be appropriate to represent the client if there is client consent after consultation.<sup>70</sup> Model Rule 1.5(e) provides that lawyers can split fees if "the client is advised of and does not object to the participation of all the lawyers involved."<sup>71</sup> This language suggests that a client who passively acquiesces in the fee-split, as clients of a partnership do, will be deemed to have consented to it. This is more permissive than the Model Code and reflects an effort to approach the sale of a law practice as if it were a partnership.<sup>72</sup>

The client need not rely only upon his own informed judgment. To encourage the seller to screen potential buyers as if they were potential partners, the seller ought to be liable for the buyer's errors in judgment. This liability should be both direct and vicarious. First, the seller will be directly liable if she makes a negligent referral or negligently selects a buyer.<sup>73</sup> This is analogous to a fiduciary duty not to negligently sell a controlling interest in a corpora-

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67. See *supra* note 64.

68. See *supra* note 63.

69. See *supra* note 64.

70. See *supra* note 63.

71. See *supra* note 64.

72. The Model Rules provide that a lawyer may "pay the usual charges of a not-for-profit lawyer referral service." MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2(c) (1979). This is more permissive than the Model Code and reflects an awareness that where there is no temptation on the part of the referring lawyer, payments should be allowed.

73. See MALLEN & LEVIT, *LEGAL MALPRACTICE* § 220 (1977); see also *Tormo v. Yormark*, 398 F. Supp. 1159 (D.N.J. 1975) (attorney transferring case to out-of-state attorney may be negligent for failing to check on progress of case).

tion to a looter.<sup>74</sup> The seller owes a duty to her clients at least to make minimal checks with respect to the integrity and competence of the buyer. Second, the seller ought to be vicariously liable for the current cases as if she were a partner of the buyer.<sup>75</sup> This too will encourage her to exercise due care in choosing a buyer for her business.

Disciplinary Rule 2-107(A)(2) provides that two lawyers may divide a fee for legal services if the division is made in proportion to the services performed and responsibility assumed by each.<sup>76</sup> Although authorities have been clear as to the meaning of services, they have been unclear as to the meaning of responsibility.<sup>77</sup> Most agreed that a mere referral was not "responsibility" as defined in the Model Code.<sup>78</sup> The origins and purpose of allowing proportional fee-splitting were also unclear.<sup>79</sup>

The Model Rules clarify the meaning of responsibility and the purpose of the provision better than previous authority. As before, lawyers can divide fees if the division is in proportion to the services performed by each lawyer. The Model Rules further provide that fees can be split if, "by written agreement with the client, each lawyer assumes joint responsibility for the representation."<sup>80</sup>

The purpose of the Model Rules is to allow the referring lawyer to split a fee if she continues to be responsible for the matter as if she were a partner of the lawyer to whom the client is referred.<sup>81</sup> Partners do not necessarily work on the same case. A client may actually contact one partner, only to have that lawyer refer the case to his partner. Yet, the partners can split fees. What the client gets is ultimate responsibility, that is, legal liability, from the first partner. The client thus has reason to believe that

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74. See Minkus, *supra* note 2, at 364; Sterrett, *supra* note 1, at 309.

75. See UNIF. PARTNERSHIP ACT § 13 (1968).

76. See *supra* note 64. Ethics committee opinions and court opinions rarely review the exact proportion of services and fees divided. As long as each attorney provides some of the services, the committees and courts take a permissive attitude. See Hall & Levy, *Intra-Attorney Fee Sharing Arrangements*, 11 VAL. U.L. REV. 1 (1976).

77. See, e.g., ABA Comm. on Professional Ethics and Grievances, Formal Op. 204 (1940).

78. See A Panel Discussion *The Determination of Professional Fees From the Ethical Viewpoint*, 7 U. FLA. L. REV. 433, 434 (1954).

79. As suggested in *Corti v. Fleisher*, 93 Ill. App. 3d 517, 523-24, 417 N.E.2d 764, 770 (1981), the responsibility provision served as a method of protecting clients. A lawyer doing work or assuming responsibility would be paid for his efforts, and therefore a client could rely on the lawyer to do competent work. Several purposes for the rule are articulated in Hall & Levy, *supra* note 76, at 25-26.

80. See *supra* note 65.

81. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (Discussion Draft 1980).

the partner will monitor his other partners. The Model Rules are designed to encourage the referring lawyer to use care in choosing her temporary partners. A client should get the same care from a lawyer who sells her business.

How extensive should the seller's assumption of responsibility be? If the seller of a law practice receives a percentage of the buyer's gross revenue over several years, the payment can be characterized as a fee-split with respect to: (1) the seller's clients on matters that the seller is obligated to complete;<sup>82</sup> (2) the seller's clients on new matters, initiated with the buyer; and (3) clients who had no contact with the seller who initiate matter with the buyer. The seller's assumed responsibility should be no more extensive than if the seller were a retired partner. This would limit the assumed liability to only the first category. To require greater responsibility would be unfair to the seller, might result in the client's improper perception of the guarantee as a reason in itself for retaining the buyer, and would be unnecessary to assure adequate screening of buyers.

The selling lawyer should remain responsible for active cases. The seller is obligated to her clients because they expected her to do the work. The general principle applicable to the legal profession is that the obligated lawyer cannot delegate her responsibility to another lawyer.<sup>83</sup> Similarly, a retiring partner cannot delegate her liability. As to matters a law firm is obligated to complete, a retired partner in a firm properly remains liable for acts or omissions of partners after his retirement.<sup>84</sup> Further, the partnership is obligated to complete existing work, and even though it may take several years, the partnership owes the client the same legal protection he had when the matter began.

The leading case is *Redman v. Walters*.<sup>85</sup> In 1969, Redman retained MacDonald, Brunsell & Walters to institute a lawsuit. After the trial court dismissed his suit in 1974 for want of prosecution, Redman was able to bring a malpractice action against Walters despite the fact that in 1970 Walters had withdrawn from the firm and had never had any contact with Redman. Redman's dealings

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82. See *Heywood v. Sooy*, 45 Cal. App. 2d 423, 114 P.2d 361 (1941).

83. See RESTATEMENT (SECOND) OF AGENCY §§ 17-18 (1938).

84. See CRANE & BROMBERG, LAW OF PARTNERSHIP 445 (1968).

85. 88 Cal. App. 3d 448, 152 Cal. Rptr. 42 (1979); see also *Blackmon v. Hale*, 1 Cal. 3d 548, 463 P.2d 418, 83 Cal. Rptr. 194 (1970) (partner of attorney misappropriating clients' funds held liable because of lack of evidence that the attorney did not act as a member of the firm).

had been with Brunsell. The court observed that the partnership was merely winding up its business with respect to active cases, and therefore, without an express release, all partners were responsible for completing the work.<sup>86</sup> To avoid the confusion that the results might cause in different jurisdictions, the seller ought to advise her clients she will remain legally responsible for these cases as if she were the buyer's partner.<sup>87</sup>

In spite of the literal language in the Model Rules, which calls for joint responsibility in the case of a fee-split, the seller of a law practice should not be legally responsible for clients contacting the buyer for the first time after the sale. First, this absolute responsibility would make the seller a guarantor of so much of the buyer's business that it would be impossible for the seller to anticipate her potential liability. Second, it would make the seller more responsible than a retired partner. The clients of a partnership who did not rely on the reputation of a retired partner would have no claim against the retired partner.<sup>88</sup> Analogously, none of the buyer's future clients would have relied, in any way, on the seller having sold the business. Third, and most important, the seller is not referring these cases. A purpose of the joint responsibility clause is to assure that the referring lawyer uses care in her referrals. In the case of the sale of a law practice, it is an implausible argument that the seller has referred this category of cases to the buyer.

Those cases where the seller receives a fee-split on new cases for existing clients are the most difficult. On the one hand, to require the seller to remain responsible will assure that the lawyer is careful in choosing her buyer. On the other hand, this makes the seller the guarantor of the buyer's business for several years. Not only is there unlimited liability, but also there is no time limit to such vulnerability. The seller will probably not be able to insure herself against future contingencies. Further, the assumption of legal responsibility may be an improper inducement to the client to retain the buyer. Again, it is appropriate to hold the seller to the

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86. *Redman*, 88 Cal. App. 3d at 454, 152 Cal. Rptr. at 45.

87. *But see* *Gibson v. Talley*, 156 Ga. App. 593, 275 S.E.2d 154 (1980) (exception to rule made because the partnership was dissolved when malpractice occurred); *Collins v. Levine*, 156 Ga. App. 502, 274 S.E.2d 841 (1980) (exception to rule where client had no contact with other firm members).

88. *See, e.g., Middleton v. Francis*, 257 Ky. 42, 77 S.W.2d 425 (1934); *Jewison v. Dieudonne*, 127 Minn. 163, 165, 149 N.W. 20, 23 (1914) (Bunn, J., dissenting); *see also Unif. Partnership Act*, § 35 (1968) (concerning power of partner to bind partnership to third person after dissolution); *CRANE & BROMBERG, supra* note 66, at 464 (noting when a partnership may be bound to a third party).



same standard as if she were a retired partner. She would not be liable, therefore, if clients received notice of her retirement before initiating the new business.<sup>89</sup> The clients would not have relied on the lawyer's membership in the firm and the seller's notice of sale would inform clients of her retirement. She therefore should be relieved of any responsibility even if there is the fee-split. In the typical sale of a law practice, there will be enough potential liability resulting from the first category of cases to assure that the seller will use care in choosing her successor.

### C. *Availability for Future Work*

When a lawyer retires, she withdraws from current matters, and if allowed to sell her business, she will usually enter into a reasonable covenant not to compete with the buyer, thus making herself unavailable to some future clients. Courts and commentators have suggested that both the withdrawal and the noncompetitive covenant are objectionable and a reason for denying solo practitioners the right to sell their law practices.<sup>90</sup>

In anticipation of selling her practice, the seller may write her clients advising them that she is going to retire and transfer her business to the buyer. This will give the client the opportunity to choose whomever he wishes as his next attorney. Under clear principles of contract and agency law, the lawyer may not thereby relieve herself of liability in cases that she is legally committed to continue. Moreover, under the Model Code, it may also be a breach of ethics to withdraw without good cause.<sup>91</sup> Although the authorities are not decisive, there is support for the notion that because there is no requirement to take all cases presented to them, lawyers must at least complete those that they do accept.<sup>92</sup> From this perspective, a poorly drafted letter from the seller could be perceived as an unwarranted and unprofessional withdrawal rather than a proper step in assisting the client in finding a new lawyer.

The Model Rules take a more relaxed approach, condoning a lawyer's withdrawal from any case not pending before a tribunal as long as there will be no material adverse effects on the interest of

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89. See UNIF. PARTNERSHIP ACT § 35 (1968).

90. See *In re Disciplinary Proceeding Against Laubenheimer*, 113 Wis. 2d 680, 335 N.W.2d 624 (1983); Sterrett, *supra* note 1, at 316.

91. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (1969).

92. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 legal background (Proposed Final Draft 1981).

the client. There is no "good cause" requirement. This shift does not affect the law of contract and agency, but it removes any suggestion that a lawyer can be compelled to work for a client even if the client will not be injured. The Model Rules thus enhance the lawyer's freedom. From this perspective, the seller's letter will not be a troublesome withdrawal notice but may be seen as a means of assuring that there will be material injury to the client on the seller's retirement.<sup>93</sup>

The retiring seller may also enter into a reasonable covenant not to compete. If the buyer wants to assure future patronage by the seller's clients, he needs some assurance that the seller will not return to compete with him. As a result, the buyer quite predictably will insist on a restrictive covenant either in terms of geography, time, or clients. The common law has enforced such covenants if they are reasonable.<sup>94</sup> The courts balance the interests of the covenantor, the covenantee and the public to determine the reasonableness of the restrictive covenant in each case.

Both the Model Code and the Model Rules prohibit post-employment, noncompetitive covenants per se.<sup>95</sup> The argument is that

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93. The Model Rules provide:

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:

- (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (2) the client has used the lawyer's services to perpetrate a crime or fraud;
- (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
- (4) 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) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (6) other good cause for withdrawal exists.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1983).

94. *E.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 188 (1979).

95. The Model Code provides: "A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(A) (1969).

Similarly, the Model Rules provide: "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

the public's and the lawyer's interests always outweigh the interests of the covenantee-employer. Commentators have criticized this result.<sup>96</sup> Regardless, it is important to note that neither the Model Code nor the Model Rules specifically addresses a covenant not to compete ancillary to the sale of a business. This is an important distinction because courts have traditionally been more willing to enforce covenants incident to the sale of a business than mere post-employment covenants.<sup>97</sup> Not only is the buyer's interest in getting the benefit of his bargain substantial, the seller has also evinced, by a willingness to sell her business, a disinterest in continuing that particular practice. Moreover, although it is important to allow clients to have the lawyer of their choice, neither the Model Code nor the Model Rules requires a lawyer to work for any client who wishes to retain his services.<sup>98</sup> In a country with an abundance of lawyers, it will not severely handicap any client to preclude him from choosing an attorney who has willingly agreed to a reasonable restrictive covenant incident to the sale of a practice.

In addition, both the Model Code and the Model Rules recognize an exception to the per se rule in the case of a covenant not to compete related to the payment of a partner's retirement benefits.<sup>99</sup> In these cases, both permit a reasonable noncompetition covenant. This is analogous to the sale of a business. The retiring partner not only will be selling her practice to the remaining partners but also her interest in the firm's goodwill. As is the case with the buyers, the remaining partners will want assurances that they are getting the benefit of their bargain.<sup>100</sup> This balance is the appropriate one, and the per se rule as it relates to post-employment covenants should not be extended to a per se approach to restrictive covenants ancillary to the sale of a business. There are no cases or opinions, however, involving lawyers that explicitly pro-

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retirement." MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6(a) (1983); see also *Dwyer v. Jung*, 133 N.J. Super. 343, 336 A.2d 498 (Ch. Div.), *aff'd*, 137 N.J. Super. 135, 348 A.2d 208 (App. Div. 1975); Note, *Attorneys—Professional Responsibility—Restrictive Covenants—Attorney Must Not Enter Into Partnership Agreements Prohibiting Themselves from Representing Former Clients Upon Termination of the Partnership*, 4 FORDHAM URB. L.J. 195 (1976) (discussing restrictive covenants contained in partnership agreements).

96. See Kalish, *Covenants Not to Compete and the Legal Profession*, 29 ST. LOUIS U.L.J. 423 (1985).

97. See Blake, *Employee Agreements not to Compete*, 73 HARV. L. REV. 625, 646-48 (1960).

98. See Kalish, *supra* note 96.

99. See *supra* note 95.

100. See *Gray v. Martin*, 65 Or. App. 173, 663 P.2d 1285 (1983).

hibit such reasonable restrictive covenants.<sup>101</sup>

Although a client has the right not to be abandoned and a right to choose the lawyer he wishes, these rights must be balanced against an attorney's interest. The Model Rules clearly support the notion that a lawyer should be able to resign from a matter if there will be no material harm to the client. Accordingly, a letter of withdrawal incident to a sale will not be an abandonment, but instead will be an effort to assist the client. All things being equal, a client should be able to retain any lawyer he wants. A balancing of the interests suggests that this right ought not automatically offset an attorney's right to sell her business and to enter into the covenants necessary to effectuate the sale.

#### D. *Summary*

There are three sets of concerns associated with the seller of a solo law practice. First, the seller may breach her duty to keep her client's confidences. This is not a substantial concern as long as the lawyer solicits client consent for the file transfer. Second, the seller may be financially interested in her referral. Both the Model Code and the Model Rules suggest disclosure of the fact and nature of her interest, leaving it to the client to evaluate the choice. The Model Rules, more clearly than the Model Code, also suggest that if the seller is legally responsible, as a partner of the buyer, for active cases, there will be the important additional assurance that the seller will use care in selecting a buyer. Third, the seller may improperly withdraw from her retainer and make herself unavailable to future clients. The Model Code arguably prohibits withdrawal without good cause. The Rules permit withdrawal if there is no material injury to the client. In neither the Code nor the Rules is there an explicit prohibition on reasonable covenants not to compete associated with the sale of a law practice. Such a prohibition should not be inferred.

### IV. THE BUYER

#### A. *Solicitation*

The buyer of a law practice can be characterized as paying for referrals. He is soliciting clients—a practice that in the past violated traditional canons of ethics. Authorities believed that solici-

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101. See *supra* notes 34-35 and accompanying text.

tation in this manner was undignified and too commercial.<sup>102</sup> Recent developments in constitutional law have led to amendments to both the Model Code and the Model Rules and relaxed the restrictions on what a lawyer may communicate to potential clients. In *Bates v. State Bar of Arizona*,<sup>103</sup> the Supreme Court held that a state could not prohibit non-misleading communications merely because they were commercially motivated; the attorney had a right to speak, and the client had a right to be informed. Moreover, such commercially motivated communications might enhance the proper allocation of legal services.

The Model Code has become a hodge-podge of rules trying to draw the line between proper and improper communications. Each state has adopted a different formula. In light of *In re R.M.J.*,<sup>104</sup> where the Supreme Court struck down restrictions on lawyer advertising as a violation of attorneys' first amendment rights, it is doubtful that any of these formulations are constitutional. The Model Rules wipe the slate clean. Simply put, "a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."<sup>105</sup>

The buyer and seller of a law practice are now free to engage in commercially motivated communications. In so doing, *Bates* requires the buyer and seller to make non-false and non-misleading statements to their clients. The seller's clients should be apprised of the situation and of their alternatives. Moreover, to permit truthful, commercially motivated speech will reinforce the involved lawyers' duties to assist the clients of a retiring lawyer.

In *Bates*, the Supreme Court stated that a state could place legitimate "time, place, and manner"<sup>106</sup> restrictions on commercial

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102. See *supra* notes 27-30 and accompanying text.

103. 433 U.S. 350 (1977).

104. 455 U.S. 191 (1982).

105. The Model Rules provide:

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 lawyer's services, unless comparison can be factually substantiated.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1983).

106. *Bates*, 433 U.S. at 384 (1977).

speech. In *In re R.M.J.*,<sup>107</sup> the Court qualified this statement, saying, "[t]he State must assert a substantial interest and the interference with speech must be in proportion to the interest served. Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest."<sup>108</sup>

In *Ohralik v. Ohio State Bar Association*,<sup>109</sup> the Supreme Court faced a classic, in-person, ambulance-chasing case. The Court held that the state could prohibit this mode of solicitation because it had a legitimate interest in preventing "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct,'" including invasion of the potential clients' privacy.<sup>110</sup> The soliciting lawyer could choose his would-be clients with care. He might visit only those most susceptible, either because of their situation or their capabilities. The lawyer might force this meeting on the would-be client. The face-to-face meeting would permit the lawyer to use all his persuasive skills to convince the would-be client to retain him, and the would-be client would not have an opportunity to reflect. As a result, he might well be pressured into an immediate decision. Because an in-person solicitation would be involved, the content of the meeting would not be subject to the same scrutiny as it would be if the solicitation were a writing.

In the sale of a law practice a truthful letter by the seller or the buyer does not invade the privacy interest of a client. The letters are channeled to the seller's clients under the auspices of the seller. Clients expect communications from their lawyers. A retiring lawyer does not invade a client's privacy by telling him that she wishes to retire and that she recommends that the buyer continue the client's work. In some circumstances, even the Model Code does not characterize commercially motivated speech directed to current or former clients as being unprofessional.<sup>111</sup> This

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107. 455 U.S. 191 (1982).

108. *Id.* at 203 (citations omitted).

109. 436 U.S. 447 (1978).

110. *Id.* at 462; see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 legal background (Proposed Final Draft 1981) (advertising guidelines for attorneys).

111. The Model Code provides:

(A) a lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that: (1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104 (1969) (footnotes omitted); see also *id.* at DR 2-102(A)(2) (professional announcement cards for change of association or address

is also true under the Model Rules.<sup>112</sup> The ABA Committee has stated that in some circumstances, not only is there no invasion of privacy, but also there is a duty to communicate with one's client.<sup>113</sup>

The issue of whether there is substantial potential for undetected fraud and pressure is more difficult. The question can be analyzed in two ways: first, does the fact that the referral or solicitation will be made by letter obviate concerns of undue pressure or undetected fraud; second, is the fact that the letter will be written to a target group, the seller's clients, significant?<sup>114</sup>

Disciplinary Rule 2-104(A) of the Model Code proscribes "in-person unsolicited advice to a layperson that he should obtain counsel" without indicating whether a written letter of solicitation would be "in-person unsolicited advice."<sup>115</sup> Model Rule 7.3 clarifies the ambiguity. Even if pecuniary gain is a significant motive for solicitation by the lawyer, solicitation by letter is permissible in certain circumstances.<sup>116</sup> This seems the better result. The chances for undue pressure are minimal. The recipient will have the chance to consider the letter and even seek outside assistance in evaluating it. The recipient will be able to do this at his leisure, without the pressure of the soliciting lawyer's presence. In *In re Koffler*,<sup>117</sup> the court held that such direct mail advertising was constitutionally protected speech. The court stated: "To outlaw the use of let-

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allowed with minimal biographical data, excluding the nature of the practice).

112. The Model Rules provide:

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.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983).

113. See ABA Comm. on Professional Ethics and Grievances, Formal Op. 210 & 213 (1941).

114. See generally Comment, *Attorney Direct Mail Communication: The Koffler Commercial Speech Approach*, 4 W. NEW ENG. L. REV. 397 (1981) (discussing letter solicitation use by various law firms).

115. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A) (1969); see *supra* note 111.

116. It is at least arguable, in some cases, that neither the seller nor the buyer will have significant gain as a motive. They may be acting to protect the seller's clients. See *In re Primus*, 436 U.S. 412 (1978).

117. 51 N.Y.2d 140, 412 N.E.2d 927, 433 N.Y.S.2d 872 (1980).

ters . . . addressed to those most likely to be in need of legal services . . . ignores the strong societal and individual interest in the free dissemination of truthful price information as a means of assuring informed and reliable decision making in our free enterprise system . . . ."<sup>118</sup>

The Model Rules, however, prohibit direct mailings to certain groups. The Model Rules prohibit the seller from directing her mailing to a specific recipient, but sanction "distributing 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."<sup>119</sup> The distinction is a fine one. The purpose of the Model Rules is to fashion a narrow rule that will protect the group that will be most vulnerable at the time of mailing.<sup>120</sup> Illustrative of this vulnerable category is the group targeted in *In re Frank*,<sup>121</sup> in which the attorney improperly sent solicitation letters to twenty persons charged with driving under the influence of alcohol and for whom no attorney had entered an appearance.<sup>122</sup>

A seller's clients are not in need of such protection.<sup>123</sup> As a group, they have no immediate, pressing reason to take legal action. The mere fact that their lawyer is going to retire does not necessarily mean that the client's needs assistance at the moment. They will have time to reflect on their choice of counsel. Moreover, because the clients and their legal business will vary in most law practices, the lawyer will not tailor the letter to individual needs. Further, it will not refer to particular matters to be litigated and

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118. *Id.* at 146, 412 N.E.2d at 931, 432 N.Y.S.2d at 875-76; *see also* *Spencer v. Honorable Justices*, Supreme Court of Pennsylvania, 579 F. Supp. 880 (E.D. Pa. 1984) (challenging the constitutionality of DR 2-103(A) and DR 2-104(A)).

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

120. The Model Rules provide:

General mailings not speaking to a specific matter do not pose the same danger of abuse as targeted mailings, and therefore are not prohibited by this Rule. The representations made in such mailings are necessarily general rather than tailored, less importuning than informative. They are addressed to recipients unlikely to be specifically vulnerable at the time, hence who are likely to be more skeptical about unsubstantiated claims. General mailings not addressed to recipients involved in a specific legal matter or incident, therefore, more closely resemble permissible advertising rather than prohibited solicitation.

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

121. 440 N.E.2d 676 (Ind. 1982).

122. *Id.*

123. *But see* *Adler v. Epstein*, 482 Pa. 416, 393 A.2d 1175 (1978), *cert. denied*, 442 U.S. 907 (1979); Note, *Attorneys—Law Firm May Obtain Injunction Barring Solicitation of Clients By Former Salaried Associates*, 24 VILL. L. REV. 770, 781-82 (1978-79).



will be more general in advising clients of the seller's retirement and the buyer's availability to continue the work. This generality will prevent the letter from unduly focusing upon, and thereby pressuring, particular clients.

There is no unwarranted solicitation when either the seller or buyer of the seller's law practice writes a letter to the seller's clients truthfully stating the circumstances and the fact that the business is being sold and recommending that the clients continue their business with the buyer. Both lawyers, as well as their clients, have an interest in the transmission of non-misleading information. This mode of communication will not invade any client's privacy, nor will it increase the potential for undetected fraud and pressure.

### B. *Loyalty to Clients*

Because the purchase of a law practice is an expense, it is possible that the buyer will try to recoup this cost by charging his new clients too much or by providing them with lower quality service. Either possibility will harm the client. Yet, both possibilities are remote. The buyer is a lawyer, obligated by the law to provide legal services at a reasonable cost.<sup>124</sup> Additionally, both the Model Code and the Model Rules require that the lawyer provide competent service.<sup>125</sup> Moreover, the buyer will have the normal business incentive to do good-quality, fairly-priced work in order to retain and attract clients. Moreover, if the buyer makes the purchase in a lump sum, it is unlikely that he will have any special incentive to overcharge his clients. Single payments will be like any other fixed cost of doing business, and there is no reason to believe that this cost will be treated differently from any other.

The analysis from a business perspective is slightly different if

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124. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(A) (1969); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1983).

125. The Model Code provides:

(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 OF PROFESSIONAL RESPONSIBILITY DR 6-101 (1969). The Model Rules provide: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1983).

the buyer is paying for the business out of future revenues. At a minimum, the buyer will want to cover these costs through charges to the clients. Where the variable cost is a percentage of revenue, however, the cost will be covered no matter what the buyer charges his clients. Moreover, even where the sales price is fixed, the cost will not be directly related to any single file, and the buyer is likely to perceive the seller's share of the revenue as just another cost of doing business. Nevertheless, both the Model Code and Model Rules recognize the potential problem, and both require that if there is to be a fee-split, the total fee should be reasonable.<sup>126</sup> Rather than prohibiting the purchase and sale of a law practice, it would be better to address directly the issue of unreasonable fees.

Both the Model Code and the Model Rules permit fee-splitting between lawyer if the split is made in proportion to the amount of work that each does.<sup>127</sup> This ensures that each lawyer is adequately paid for his work, and that neither has an economic incentive to do his share of the work inadequately. In extreme cases, such as when the buyer does the work and gets no compensation, there is a disincentive to do capable work.<sup>128</sup> There is little likelihood, however, of any buyer entering into such a contract. The buyer will certainly get paid something for the work he does. This is enough to assure the client that the buyer has an economic incentive to work completely for the client. In fee-splitting cases, courts and committees never have carefully scrutinized the agreed allocation of the fee.<sup>129</sup>

The possibility of continued referrals by the seller may also make the buyer susceptible to undue influence by the seller because the buyer will want to please the seller. Neither the Model Code nor the Model Rules addresses this potential problem. Both permit a fee-split with a retired partner,<sup>130</sup> and a partner is much more likely to influence her ex-partners than a seller is to influence a buyer. In the latter case, the parties will not be so close personally. Moreover, both the Model Code and the Model Rules explicitly state that a lawyer should not let a third person influence his

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126. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107(3) (1979); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e)(3) (1983).

127. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107(2) (1979); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e)(3) (1983).

128. *Cf. Corti v. Fleisher*, 93 Ill. App. 3d 517, 524, 417 N.E.2d 764, 770 (1981) (Although this case dealt with referrals, the principle is applicable to the notion of an attorney being paid for his work.).

129. Hall & Levy, *supra* note 76.

130. See *supra* notes 6 & 64.

judgment.<sup>131</sup> If the potential for influence is great, however, as it would be if the seller pays the buyer to finish her cases (which is one way of characterizing the sale of a law practice), then there should be disclosure to, and consent by, the clients. The seller's letter informing her clients of the sale would provide this disclosure. The sale of a law practice need not be prohibited to avoid the possibility of this limited problem.

### C. *Misleading Conduct*

The buyer of a law practice may wish to acquire the furniture, books, office address, and telephone number of seller.<sup>132</sup> Most importantly, in some situations, the seller's business name is an important acquisition. The appearance of continuity assists in developing new business.<sup>133</sup> This, however, can mislead clients. It is this potential for misrepresentation that has prompted some commentators to advocate the prohibition of law practice sales.<sup>134</sup>

The thrust of this article is not to propose a rule that would permit such misleading conduct. Indeed, the seller still should be vicariously liable if any person can prove a partnership by estoppel between the seller and the buyer.<sup>135</sup> Mere splitting of legal fees will not create such an estoppel. But, if the seller and buyer have so mislead existing and future clients as to the nature of their transaction that one of these clients legitimately believes that the seller is still engaged in the buyer's business, then the seller would still remain liable for all of that client's work. This would be the case in a "quickie" partnership. The retiring partner would be liable for

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131. The Model Code provides: "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B) (1969). Similarly, the Model Rules provide: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(c) (1983).

132. See Sterrett, *supra* note 1, at 306-07.

133. Cf. *Lyon v. Lyon*, 246 Cal. App. 2d 519, 54 Cal. Rptr. 829 (1966) (expectation of future business is personal and confidential and attaches to the individual partners of the firm, thus, no monetary value can be attributed to it and there is nothing to sell); *Siddall v. Keating*, 8 A.D.2d 44, 185 N.Y.S.2d 630, *aff'd*, 7 N.Y.2d 846, 164 N.E.2d 60 (1959) (goodwill is not ordinarily attributable to a law partnership); *Master v. Brooks*, 132 A.D. 874, 117 N.Y.S. 585 (1909) (the right to use the individual name of a partnership is not an element of goodwill).

134. *In re Disciplinary Proceedings Against Laubenheimer*, 113 Wis. 2d 680, 335 N.W.2d 624 (1983).

135. See UNIF. PARTNERSHIP ACT § 16 (1969); Wallenstein, *Partnerships—Continued Liability of a Retiring Partner Receiving Payments*, 20 Sw. L.J. 151, 152 (1966).

the buyer's acts or omissions unless explicit notice was given to those who might rely on the apparent fact of partnership. Such a rule would discourage the seller from engaging in or assisting the buyer in any misleading practices.

Every appearance of continuity, however, will not necessarily be misleading. For example, a trade name can communicate something to a business's customers or clients. Depending on its use and the character of the industry, a tradename may be either helpful or misleading to the consumer.<sup>136</sup>

The use by a partnership of the names of retired lawyers is equivalent to the use of a trade name.<sup>137</sup> Typically, the names of many law firms do not necessarily identify the practicing partners. Nevertheless, law firms have traditionally identified themselves by the names of retired partners. Several committee opinions have concluded that because it is the nature of the legal profession to use these names, they are not misleading per se.<sup>138</sup> Although prohibiting the use of trade names, the Model Code ratifies the conclusions of these committees and permits the use of the names of retired partners in the firm name.<sup>139</sup>

Although this permissiveness is premised on the belief that the use of the names of retired lawyers in the firm name is not misleading, clients can be misled when a partnership transfers its practice. If Seller and Buyer enter into a partnership, they can

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136. In *Friedman v. Rogers*, 440 U.S. 1 (1978), the Supreme Court held that a state could ban the use of trade names by an optometrist. Because the trade name itself has no intrinsic meaning, the Court said the name can easily be used to mislead consumers. Thus, to protect consumers, the state could ban the trade name.

137. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.5 comment (1983).

138. ABA Comm. on Professional Ethics and Grievances, Formal Op. 318 (1967); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1268 (1973).

139. The Model Code provides:

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 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. A lawyer who assumes a judicial, legislative, or public executive 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.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(B) (1969) (footnotes omitted).

name their new partnership "Seller & Buyer." If Seller then retires, the business can continue as "Seller & Buyer," even though Buyer remains as the only active practitioner. Arguing that this should not be permitted in a "quickie" partnership, only begs the question of what is a "quickie" partnership.

Although the Model Code prohibits their use, trade names are not necessarily misleading. A solo practitioner, in fact, may practice under the name of "ABC Legal Clinic." The clinic, in all of its several branches, may have a particular quality and cost of work associated with its name. The clients may not know, or care, who the practicing lawyer is, as long as they get the same quality and cost that they have come to associate with the "ABC Legal Clinic." In such a case, as long as the successor continued the quality and cost of work associated with the name, it would not be misleading to permit a successor to use the name "ABC Legal Clinic." Although some cases recently have relaxed its restrictiveness, a literal reading of the Model Code would prohibit such use. In *In re Shannon*,<sup>140</sup> the court found that although the name "Shannon and Johnson's Hollywood Law Center" was a trade name for some purposes, it was not a trade name as defined by the Model Code because, under the facts of the case, it was not misleading.

The Model Rules permit trade names that are not misleading.<sup>141</sup> The Model Rules recognize that such trade names are conceptually no different for traditional law firm names that include the names of retired partners and that a particular trade name may communicate something of value to clients. Because the Model Rules permit the use of a non-misleading trade name by a solo practitioner, there should be nothing impermissible per se in the transfer of the trade name incident to the sale of the practice. It should depend on whether the use of the firm name was, in fact, misleading.

Using the retiring lawyer's name in the successor firm as part and parcel to the "quickie" partnership method of transferring a

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140. *In re Shannon*, 292 Or. 339, 638 P.2d 482 (1982); see also *Florida Bar v. Fetterman*, 439 So. 2d 835 (Fla. 1983). But see *In re Oldtowne Legal Clinic*, 285 Md. 132, 400 A.2d 1111 (1979).

141. The Model Rules provide:

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.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.5(a) (1983).

law practice is deceptive and misleading. It would be better to permit the sale of a law practice, and if not misleading, then also permit the concurrent sale of the firm's name. This method of transfer, coupled with the seller's letter advising her clients of the sale of her practice, would better protect and assist clients.

#### D. *Summary*

The buyer of a solo law practice faces three major ethical concerns. First, he may be soliciting clients. The Model Rules permit the writing of solicitation letters to both clients and to a class of addressees that are not too specific and vulnerable. This is consistent with constitutional standards and modern policy considerations. Second, the buyer may be subject to influences that would not be in the best interest of his new clients. The buyer may be concerned with the costs of having acquired the business, and he may therefore improperly overcharge or cut services. The Model Rules suggest that the buyer or seller should disclose these concerns to the clients, thus giving them an opportunity to consent. Third, there is the chance that the buyer will mislead clients with respect to the seller's involvement in the new business. The Model Rules suggest that it is unwise to mandate a *per se* prohibition in the trade name context. Only if the acquired name is misleading in practice should it be prohibited. The same reasoning should apply to the sale of a law practice. The mere possibility that the buyer might mislead future clients is not sufficient reason to prohibit the sale of the practice.

#### V. CONCLUSION

Traditionally, many authorities asserted that the sale of a law practice as a going concern was too commercial and too undignified. The rhetoric of the New York County Lawyers' Association Opinion #109 captures the mood: "Clients are not merchandise. Lawyers are not tradesmen. They have nothing to sell but personal service. An attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status."<sup>142</sup> When asked about fee-splitting, Chairman Drinker, an authority on legal ethics, stated:

It makes the law too much of a business if you are practicing the way you would as a broker. The lawyer is not supposed to get

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142. New York County Lawyer's Ass'n Comm. on Professional Ethics, Op. 109 (1943).

paid for anything but the legal services that he renders, and selling a man a client is not a legal service. I think it is beneath the dignity of the profession to take money for something that is not a legal service.<sup>143</sup>

It is increasingly obvious, though, that a law practice *is* commercial. It is big business. In 1983, the Department of Commerce estimated legal service receipts at \$38.5 billion.<sup>144</sup> The trade journals continually emphasize the most efficient and business-like way to manage a practice. The Supreme Court recognizes this reality. In *Goldfarb v. Virginia State Bar*,<sup>145</sup> the Court found certain minimum fee schedules violative of the antitrust laws. The court stated: "In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce."<sup>146</sup>

The concept that it is beneath a lawyer's dignity to sell her practice probably reflects the attitudes of a past generation. There is nothing suspect about wanting to profit reasonably from a law practice. In *Bates*, the Supreme Court held that, in spite of the fact that the advertising was commercial speech, certain state prohibitions on lawyer advertising were violative of the first amendment.<sup>147</sup> The Court said:

But we find the postulated connection between advertising and the erosion of true professionalism to be severely strained. At its core, the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar. We suspect that few attorneys engage in such self-deception.<sup>148</sup>

Concepts such as "dignified" too often reflect the observer's subjective attitudes. In the sale of a law practice, a critic, reflecting his particular attitudes about commercialism, can always assert that the transaction is "undignified."

The law ought to reflect commercial realities and not be held hostage to narrow, dated business views. The prohibition on the sale of a law practice denies commercial realities. It is important to

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143. A Panel Discussion, *supra* note 78, at 434 (former chairman of the Standing Committee on Professional Ethics and Grievances discussing the "five percent" practice).

144. DEPARTMENT OF COMMERCE, 1984 U.S. INDUSTRIAL OUTLOOK 52-22.

145. 421 U.S. 773 (1975).

146. *Id.* at 788.

147. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 368 (1977).

148. *Id.* at 368.

discern the values and interest that a given rule affects. The current prohibition on the sale of a law practice not only invites deception but also denies the values and interests inherent in the Model Rules. Subject to the restrictions stated previously, that protect the client as well as the buyer and seller, the solo practitioner ought to be able to sell her law practice as a going concern.