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ETHICAL PROBLEMS OF LAW FIRM ASSOCIATES
LEONARD GROSS *

I. INTRODUCTION

The purpose of this Article is to provide guidance to law firms and law firm associates so that they can avoid or resolve satisfactorily certain ethical problems that law firm associates often face. The ethical problems of the law firm associate differ from the ethical problems of the law firm partner or the sole practitioner. Each of the three, as an attorney, is an agent of his respective client and thus owes fiduciary duties to that client. Each, as an attorney, owes further duties both to the legal profession as a whole and to the public at large. Yet the duty of the associate to his law firm, particularly the duty of obedience to the firm, differs from the duties and corresponding conflicts of either the law firm partner or the sole practitioner.

This Article examines the relationship between the associate and the firm, the duties that the associate owes to the firm, and the duties that the associate owes to the client and to the public. The Article suggests a framework within which to analyze the ethical problems of the law firm associate. The analytical framework requires an identification of the parties that have an interest in the outcome of the associate's ethical decision. These parties include the associate, his law firm, the particular client, law firm clients in general, the legal profession, and society as a whole. This Article proposes that, in the absence of a statute clearly resolving an associate's ethical problem, the courts balance the relative importance of the interests involved in a particular situation in formulating a rule to resolve the problem.

Specifically, the analytical framework proposed in this Article can guide a law firm and a firm associate in handling the following

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representative ethical problems:

(A) purchases by associates of client securities;
(B) moonlighting by associates; and
(C) assignments or instructions in the following areas which may require an associate to perform an unethical act:
   (1) the handling of a client's case when adequate time or expertise is lacking; and
   (2) the billing of a client.

This Article analyzes these problems under both the current American Bar Association (ABA) Model Code of Professional Responsibility and the proposed ABA Model Rules of Professional Conduct (adopted by the American Bar Association in August 1983). The Article criticizes certain deficiencies in the revised ethical standards of the ABA's Model Rules of Professional Conduct. The Appendix to this Article contains a survey conducted by the author in which law firm associates were questioned regarding various ethical problems that they may have encountered. References to the results of this survey are incorporated throughout the Article.

II. DEFINING THE ROLE OF THE ASSOCIATE IN THE FIRM

This Article adopts the customary use of the term "law firm associate" to refer to an attorney who is a regular employee of a law firm. The law firm typically pays the associate's salary. The overhead expenses connected with the associate's work are also borne by the law firm employing the associate.

As an employer, the law firm has the right to control the associate in the law firm's business. Thus, the associate's superior (here-

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3. See RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958); cf. Odess v. Taylor, 282 Ala. 389, 211 So. 2d 805 (1968) (associate of physician held not to be an employee for purposes of statute making it unlawful for any contract to restrain one from exercising a lawful profes-
after referred to as “partner” for convenience) can give the associate particular assignments. He can direct the associate regarding the type of work that should be done, how it should be done, and when it should be done.  

If an associate enters a formal contract with the law firm, the associate is bound by the terms of that contract. Even in the absence of a formal contract, an associate owes certain duties to the firm that are implied in law by virtue of the relationship of the associate to the law firm. The associate, as a regular employee of a law firm, is generally subject to the partner’s control, or at least to the partner’s right to control. Thus, the associate fits within the legal classification of an “agent.” The associate also fits within the legal classification of a “servant,” a particular kind of agent who is subject to more of the principal’s control than is a nonservant. Because the partner is an agent of both the law firm and the client, the associate also fits within the definition of “sub-agent.”
given in the *Restatement (Second) of Agency*.

**A. The Legal Duties of the Associate to the Law Firm**

As both a servant and a sub-agent, the associate owes fiduciary obligations to the law firm consistent with those that servants and agents traditionally have owed to principals. Thus, the law firm associate owes the following duties, among others, to the law firm by which he is employed: good care and skill, loyalty and obedience.

**1. The Duty of Good Care**

An agent impliedly warrants to his principal that he possesses the requisite skill and experience ordinarily required to perform the service. He also promises to exercise reasonable care, skill, and diligence in serving the principal. The law firm associate, as a servant of the firm, warrants to the law firm that he possesses and will exercise the skill of the ordinary attorney. An attorney with a particular speciality, such as a patent attorney, warrants to the law firm employing him that he will practice his specialty with the knowledge and skill of an ordinary attorney in his specialty.

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13. *See H. Reuschlein & W. Gregory, supra note 5, §§ 65-69; see also Evans, Fiduciary Obligations of Agents, 2 Case W. Res. 5 (1950).*
15. *See H. Reuschlein & W. Gregory, supra note 5, § 68; see also Restatement (Second) of Agency §§ 387-98 (1958); F. Mechem, supra note 14, §§ 500-06.*
16. *See H. Reuschlein & W. Gregory, supra note 5, § 69; see also Restatement (Second) of Agency § 385 (1958); F. Mechem, supra note 14, § 515; W. Seavey, supra note 14, § 145.*
17. *F. Mechem, supra note 14, § 524.*
18. *Id.*
19. *Id. § 525. The Restatement (Second) of Agency provides: Unless otherwise agreed, a paid agent is subject to a duty to the principal to act with standard care and with the skill which is standard in the locality for the kind of work which he is employed to perform and, in addition, to exercise any special skill that he has.*
the associate is negligent, his employer, the law firm, will be liable to the client who is injured by the associate’s negligence. If the law firm is liable to the client because of the associate’s negligence, the firm may obtain indemnity from the associate for its loss.

Malpractice § 253 (2d. ed. 1981); F. Mechem, supra note 14, § 525; Isaacs, Liability of the Lawyer for Bad Advice, 24 Calif. L. Rev. 39, 39-40 (1935); cf. W. Prosser, Handbook of the Law of Torts § 32, at 162 n.48 (4th ed. 1971) (authorities cited are malpractice cases against doctors); Restatement (Second) of Torts § 552(1) (1976); see also Blaustein, Liability of Attorney to Client in New York for Negligence, 19 Brooklyn L. Rev. 233, 254-58 (1953) (suggests that the trend will be to hold attorney-specialists to a higher standard of care than general practitioners, but that the cases as yet do not support such a distinction); Wade, The Attorney’s Liability for Negligence, 12 Vand. L. Rev. 755, 776-77 (1959).


In negligence actions against the law firm, vicarious liability is a misnomer because the law firm is never really free of blame. The law firm warrants to the client that it will supervise the work of the associate and that it will make the important decisions. In re Neimark, 13 A.D.2d 676, 214 N.Y.S.2d 12 (1961); see Moore v. State Bar, 62 Cal. 2d 74, 396 P.2d 577, 41 Cal. Rptr. 161 (1964); In re Schelly, 94 Ill. 2d 234, 446 N.E.2d 286 (1983). Neimark, Moore, and Schelly all involved incidents where an attorney was disciplined for employing an incompetent or disbarred attorney. Therefore, the law firm’s liability arises not merely from its having employed an associate who was negligent, but also from its own negligence. See W. Seavey, supra note 14, §§ 156(B), 156(D). The Restatement (Second) of Agency provides:

Unless otherwise agreed, an agent is responsible to the principal for the conduct of a subervant or other subagent with reference to the principal’s affairs entrusted to the sub-agent, as the agent is for his own conduct; and as to other matters, as a principal is for the conduct of a servant or other agent.

Restatement (Second) of Agency § 406 (1958).

A law firm associate is a subagent of the firm. Restatement (Second) of Agency § 5 comment c (1958); see H. Reuschlein & W. Gregory, supra note 5, § 8D. (A subagent need not be a servant of the agent. See Restatement (Second) of Agency § 5 comment c.) Therefore, under section 406 of the Restatement (Second) of Agency, the law firm is liable to the client for the negligence of the associate in matters entrusted to the associate by the law firm. Cf. Fitzgerald v. State Bar, 20 Cal. 3d 73, 83, 569 P.2d 763, 768, 141 Cal. Rptr. 169, 174 (1977) (in disciplinary proceeding, law firm partner had to accept responsibility for actions of associates whom he was supposed to be supervising). The law firm will also be liable on the basis of apparent authority to one whom it clothes with the appearance of associate status if the latter gives negligent advice to a third person. In re Sacks, 21 A.D.2d 483, 251 N.Y.S.2d 133 (1964).

22. See Restatement (Second) of Agency § 399 (1958). Lawsuits between associates and
2. The Duty of Loyalty

A law firm associate owes a fiduciary duty of loyalty to his law firm. In all matters connected with his employment, the associate has a duty to act for the firm's benefit rather than for his own benefit or for the benefit of another party whose interests are adverse to those of the firm. In other words, absent the law firm's permission, the associate is not free to compete with his law firm for business. Thus, while employed by the firm, the associate cannot attempt to lure a client away from the firm or try to convince the client to employ him personally as an attorney.

In some instances the associate's duty of loyalty to the law firm survives the termination of his employment. An associate's duty of loyalty prevents him from leaving his law firm and then employing high pressure tactics to solicit the clients of his former employer. However, except for an agreement made in connection with the

law firms are virtually nonexistent, in part because malpractice insurance policies cover both the partners and the associates at the law firm. See Berry, Professional Liability Insurance Policies, 20 L. OFF. ECON. & MGMT. 499, 502 (1980); see also R. MALLEN & V. LEVIT, supra note 20, § 706.

23. A law firm associate fits the Restatement definition of a subagent. RESTATEMENT (SECOND) OF AGENCY § 5 (1958). Section 428(2) of the Restatement specifically provides that "[u]nless otherwise agreed, a subagent owes the agent the duties of an agent to his principal." Id.; see, e.g., Estergard Eberhardt & Ackerman v. Carragher, 105 Ill. App. 3d 816, 820, 434 N.E.2d 1185, 1187-88 (1982). Under section 387 of the Restatement (Second) of Agency an agent owes a "duty to his principal to act solely for the benefit of the principal in all matters connected with the agency." Therefore, pursuant to section 428(2), a law firm associate owes a duty of loyalty to the law firm. See also F. MECHEN, supra note 14, §§ 500-06; H. REUSEHLEN & W. GREGORY, supra note 5, §§ 68; W. SEAVEY, supra note 14, §§ 147-53.

24. See Restatement (Second) of Agency § 387 (1958). Of course, the associate owes a different duty to the client of the law firm on whose behalf he is working. See infra text accompanying notes 40-53.


27. Id. at 435-36, 393 A.2d at 1185; see D.C. Bar Ethics Committee, Op. 77 (1979). In opinion 77, a contractual clause requiring an associate to pay his former law firm a fee of $4000 plus bonuses for each year of employment "if, within three years of termination, he or anyone under his direction or control directly and personally, solicits any of the clients of the firm OTHER THAN BY THE MAILING OF A PRINTED ANNOUNCEMENT CONTEMPLATED BY THE CODE OF PROFESSIONAL RESPONSIBILITY" was held not to violate the Canons of Ethics. Id. (emphasis in original). The Ethics Committee refused to speculate whether a court would enforce such a provision. Id; see infra text accompanying notes 102-23.
payment of retirement benefits, a restrictive covenant limiting an associate’s right to practice law after leaving the law firm constitutes a violation of the new Model Rules of Professional Conduct.\(^{28}\) Courts also have refused to enforce such covenants on the ground that they violate Disciplinary Rule 2-108(A) of the Model Code of Professional Responsibility.\(^ {29}\)

The duty of loyalty owed by the associate to the law firm also encompasses the duty to refrain from making use of confidential information for the associate’s own benefit. For example, if an associate acquires inside information about an impending tender offer and purchases shares of stock from the target company, his conduct would violate his duty of loyalty to the law firm.\(^ {30}\) The associate’s conduct also would constitute a violation of section 10(b) of the Securities Exchange Act of 1934 and of SEC Rule 10b-5.\(^ {31}\)

Similarly, the associate’s duty of loyalty prevents him from disclosing confidential information that he learned at the law firm, even if he has no profit motive for the disclosure.\(^ {32}\)


\(^{29}\) See, e.g., Gray v. Martin, 63 Or. App. 173, 663 P.2d 1285, pet. denied, 295 Or. 541, 668 P.2d 384 (1983) (restrictive covenant in partnership agreement that conditioned the withdrawing partner’s right to certain payments on his not practicing in certain geographic area held to be unenforceable because the covenant violated DR 2-108(A)).

\(^{30}\) See Restatement (Second) of Agency § 388 comment c (1958); see also F. Mecham, supra note 14, § 504; cf. Gower v. Andrews, 59 Cal. 119 (1881) (accounting clerk who used information from employer’s books to procure a lease for himself was required to return the property to his employer); Diamond v. Oreamuno, 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969) (corporation recovered profits made by president and chairman of the board from inside information); H. Reuschlein & W. Gregory, supra note 5, § 68; W. Seavey, supra note 14, § 148(B). But cf. Freeman v. Decio, 584 F.2d 186, 192, 195 (7th Cir. 1978); Polin v. Conductron Corp., 552 F.2d 797, 811 (8th Cir.), cert. denied, 434 U.S. 857 (1977).


\(^{32}\) See Restatement (Second) of Agency § 388 (1958); W. Seavey, supra note 14,
internal firm policies regarding the billing of clients usually are confidential. Many disclosures by an associate about the firm’s billing policies would violate the associate’s duty of loyalty.

3. The Duty of Obedience

An associate is also under an obligation to obey all reasonable instructions of the law firm regarding the manner of performance of his job. Unlike a partner, an associate, as a servant of the law firm, owes a duty of obedience to the law firm and to each partner. For example, an associate might view as unfair an assignment by a law firm partner on a Friday afternoon requiring the associate to work all weekend. Nevertheless, the associate has a duty to obey the partner and perform the assignment. Obviously, if the associate feels that such assignments occur too frequently in light of the compensation he is receiving, he has the option of seeking another job.

When an associate is privileged to protect his own or another’s interest, he need not obey the instructions of a law firm partner. Thus, an associate instructed to perform an unethical act is under an ethical obligation not to comply. For example, if the partner instructs the associate to initiate a frivolous law suit, the associate should disobey the instructions of the partner and adhere to the dictates of Disciplinary Rule 7-102(A)(2) and Ethical Considera-

§ 152.

33. See Restatement (Second) of Agency § 385 (1958); see also F. Mechem, supra note 14, § 515; H. Reuschlein & W. Gregory, supra note 5, § 69; W. Seavey, supra note 14, § 145.

34. A partner, however, does not have to obey the commands of another partner. In the absence of an agreement to the contrary, all partners have an equal voice in the management of the partnership. See Uniform Partnership Act § 18(e) (1969). If differences arise among the partners over ordinary matters connected with the operation of the partnership, the decision is made by a majority of the partners’ vote. See id. § 18(h). Like an associate, a law firm partner owes a fiduciary obligation to the law partnership. See Uniform Partnership Act § 21 (1969); see also J. Crane & A. Bromberg, Law of Partnership § 68 (1968); H. Reuschlein and W. Gregory, supra note 5, § 188; Beane, The Fiduciary Relationship of a Partner, 5 J. Corp. L. 483 (1980). The fiduciary duties of a partner are not identical with those of an associate. See Note, Fiduciary Duties of Partners, 48 Iowa L. Rev. 902, 917 (1963).

35. See generally P. Hoffman, Lions in the Streets 129-30 (1973); E. Smigel, supra note 4, 239-43.

36. See Restatement (Second) of Agency § 385(2) (1958).
tion 7-4, both of which render such conduct unethical. Moreover, the firing of an associate because he refuses to follow unethical law firm instructions has been construed by at least one commentator as a violation of the new Model Rules of Professional Conduct. In some states such a firing also may give rise to a civil cause of action.

B. The Duties the Associate Ows to the Client and to the Public

In addition to the fiduciary duties that the associate owes to his law firm, the associate has other responsibilities. He owes a fiduciary duty to the client on whose behalf he is working. His duty to the client is much the same as if he were the attorney in charge of the representation. The bases for this responsibility can be found in the law of agency and in the attorney's professional duty to the client as set forth in the various codes of professional responsibility. In many situations, the associate also has a duty to the public, or at least to a segment of the public.

1. The Duty to the Law Firm Client

Unlike the law firm, the associate has no contractual relationship with the client. If the associate knows the identity of the client, however, the associate is an agent of the client under principles of agency, and therefore owes the same duties to the client that the law firm itself owes to the client. Thus, when the associate knows the identity of the client, the associate owes a fiduciary duty to that client.

The law of agency provides the basis for determining the poten-
tial civil liability both of the associate and of the law firm to the client for the associate's conduct. If the associate is negligent, the client initially bears the burden of the associate's negligence in much the same way that he bears the burden of the law firm's negligence. For example, the failure of an associate to prosecute diligently an action on behalf of a client could produce the same result as the failure of a law firm partner to prosecute—dismissal of the action.\textsuperscript{43} Of course, the client subsequently can bring an action against the associate and the law firm for malpractice.\textsuperscript{44} The associate and the partner are jointly and severally liable in a malpractice action.\textsuperscript{45}

A basis for the associate's duty to the client also arises from the applicable codes of professional responsibility. The ABA Model Code of Professional Responsibility, as enacted by the various states, applies to all members of the legal profession, regardless of the nature of their professional activities.\textsuperscript{46} An attorney who violates the disciplinary rules is subject to disciplinary action.\textsuperscript{47} The Code, however, does not purport to impose civil liability on the attorney,\textsuperscript{48} and the courts generally have not provided civil remedies for violation of the disciplinary rules of the Code.\textsuperscript{49} Under the

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\textsuperscript{44} RESTATEMENT (SECOND) OF AGENCY §§ 406-428 (1958); see supra note 21 and accompanying text.

\textsuperscript{45} See RESTATEMENT (SECOND) OF AGENCY § 217A comment a (1958).

\textsuperscript{46} MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1981); In re Meeker 76 N.M. 354, 357, 414 P.2d 862, 864 (1966), cert. denied and appeal dismissed, 385 U.S. 449 (1967); ABA Comm. on Professional Ethics and Grievances, Formal Op. 203 (1940) ("The Canons of this Association govern all its members irrespective of the nature of their practice, and the application of the Canons is not affected by statutes or regulations governing certain activities of lawyers which may prescribe less stringent standards.").

\textsuperscript{47} MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1981). In states which have adopted their own separate ethical standards, an attorney may be disciplined for violating those rules. See, e.g., Abeles v. State Bar, 9 Cal. 3d 603, 510 P.2d 719, 108 Cal. Rptr. 359 (1973).

\textsuperscript{48} MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1981); R. MALLEN & V. LEVIT, supra note 20, § 256.

\textsuperscript{49} Bickel v. Mackie, 447 F. Supp. 1376, 1383-84 (N.D. Iowa), aff'd, 590 F.2d 341 (8th Cir. 1978); Greening v. Klamen, 652 S.W.2d 730 (Mo. App. 1983); see MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1981); R. MALLEN & V. LEVIT, supra note 20,
Model Code of Professional Responsibility, the associate owes the client many of the same duties that he owes the client under the law of agency. Specifically, the associate owes the client the duty to act competently, to avoid conflicts of interest, and to keep the client's secrets.

The fact that the law firm is satisfied that the associate has complied with the duty of good care does not necessarily mean that the work will satisfy the client. The associate owes both the law firm and the client a duty to act competently on their behalf. For a number of reasons, including its responsibilities to other clients, the small size of the case, or the small size of the prospective fee, the law firm might instruct the associate that only a minimal amount of work is needed or that the research prepared by the associate is adequate. However, if the work prepared by the associates'

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§§ 67, 256.

Voluntary compliance with the standards of professional conduct has been poor. Schwartz, The Death and Regeneration of Ethics, 1980 AM. B. FOUND RESEARCH J. 953, 958. Moreover, even the threat of discipline has done little to raise the perceived level of attorney conduct. Enforcement has proved weakest in the areas of greatest concern to clients: inattention, incompetence, delay, mishandling of client property, and fee abuses. Marks & Catheart, Discipline Within the Legal Profession: Is it Self-Regulation? 1974 U. ILL. L.F. 193. For these reasons, commentators have suggested that the Code of Professional Responsibility should serve as a basis for creating liability for attorneys in civil proceedings. See, e.g., Schneyer, The Model Rules and Problems of Code Interpretation and Enforcement, 1980 AM. B. FOUND RESEARCH J. 939, 946-47; Wolfram, The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation, 30 S.C.L. REV. 281 (1979). Indeed, in many cases, evidence of the violation of a disciplinary rule has been used to help define not only the scope of ordinary skill and care but also the parameters of fiduciary obligations. R. Malen & V. Levit, supra note 20, § 256; Wolfram, supra, at 303-19.


51. Id. Canon 5 & DR 5-101 to 5-105 (1981).

52. Id. Canon 4 & DR 4-101 (1981). The duty imposed by Canon 4 to keep a client’s secrets may place an associate who has switched law firms in an uncomfortable position. If an associate works for client X in the case of X v. Y, and then joins another firm that is representing Y in X v. Y, there is a possibility that both the associate and the new law firm will be disqualified from representing Y in X v. Y.

53. The problem of the attorney’s economic interest in a case is particularly severe when a contingent fee is involved. See N. Galston, Professional Responsibility of the Lawyer 115, 126 (1977) (reproducing a seminar entitled Ethical Problems Faced by the Estate Practitioner, Feb. 19, 1975); M. Pirig & K. Kirwin, Professional Responsibility 265-81 (West 1976); Grady, Some Ethical Questions about Percentage Fees, 2 LITIGATION 20, 27 (Summer 1976).

Contingency fees are proper in most civil cases in the United States, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1981), although they are used predominantly in tort cases. The principal justification for a contingency fee is that it enables individuals who
ciate does not satisfy the client, and if the amount and quality of the work do not measure up to the standards of the ordinary attorney in the community, both the associate and the law firm would be liable to the client for malpractice.

2. The Duty to the Public

The common law imposes no fiduciary duty on the associate to the public. Under the law of agency, a fiduciary duty arises from a consensual relationship between a principal and an agent. In would otherwise not be able to afford counsel to obtain services of a competent attorney to prosecute their claim. Id. EC 2-20 (1981). One commonly cited disadvantage of the contingency fee arrangement is that a contingency fee may turn out to be much higher than a flat fee. See Kohlman, An Equitable Contingency Fee Contract, 50 Cal. St. B.J. 268 (1975). In cases handled on a contingency fee basis, the amount of time and effort that a law firm spends on a particular matter often will be directly proportional to its perception of the likelihood of recovery in the case and the potential size of that recovery. A law firm will not want to spend an excessive amount of time and energy on a case in which it is not likely to prevail or in which it is not likely to sustain a large recovery because the amount that the firm will earn is tied directly to the amount of the recovery.

54. See R. Mallen & V. Levit, supra note 20, § 40. Attorneys, however, can be liable to nonclients for common law causes of action as well as for violations of statutes when the nonclients are directly affected by the attorney's conduct. Some of the most common causes of action for which attorneys have been held liable to nonclients include fraud, see, e.g., Slotkin v. Citizens Casualty Co. of New York, 614 F.2d 301 (2d Cir. 1979) cert. denied, 449 U.S. 981 (1980); R. Mallen & V. Levit, supra note 20, § 43, negligent misrepresentation, see Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976); R. Mallen & V. Levit, supra note 20, § 44, malicious prosecution, see, e.g., Wong v. Tabor, 422 N.E.2d 1279 (Ind. App. 1981); Deville v. Zaunbrecher, 401 So. 2d 643 (La. Ct. App. 1981); Fried v. Bower & Gardner, 46 N.Y.2d 765, 386 N.E.2d 258, 413 N.Y.S.2d 650 (1978); R. Mallen & V. Levit, supra note 20, §§ 45-60, and abuse of process, id. § 61. In addition, attorneys have been held liable to third persons in the absence of privity, usually on a third party beneficiary theory. See generally id. § 80. For example, beneficiaries under a will have successfully sued attorneys on negligence claims. Compare Stowe v. Smith, 184 Conn. 194, 441 A.2d 81 (1981) with Pelham v. Griesheimer, 92 Ill. 2d 14, 440 N.E.2d 96 (1982).

55. Restatement (Second) of Agency § 1 (1958); H. Reuschlein & W. Gregory, supra note 5, §§ 2-4; W. Seavey, supra note 14, § 3. Under an estoppel theory, an agency relationship can exist in the absence of express consent. Agency by estoppel can exist if a third person has been misled or has relied to his detriment on the appearance of an agency relationship if the appearance of agency was either intentionally or carelessly caused by the principal. An agency by estoppel also can exist when the presumed principal is aware that third persons mistakenly believe that an agency relationship exists and will change their positions because of it and when the presumed principal fails to notify them of the true facts. Restatement (Second) of Agency § 88 (1958); H. Reuschlein & W. Gregory, supra note 5, § 25; W. Seavey, supra note 14, § 8(E).
short, under the common law, the associate's occupation creates no special duty for the associate vis-a-vis the general public.\textsuperscript{56}

The ABA Model Code of Professional Responsibility is an ethical norm by which attorneys can judge the propriety of their conduct.\textsuperscript{57} When the Code is passed by a state legislature or adopted by a court, it has the full force of law and establishes an ethical obligation on the part of attorneys toward the general public.\textsuperscript{58} Most federal district courts give effect to the Code, as promulgated by the ABA or as enacted by a given state.\textsuperscript{59} Finally, many other statutory duties are imposed on attorneys to protect the public.\textsuperscript{60}

\textsuperscript{56} Of course, an associate can be liable in tort for negligently running over a pedestrian, and his firm can be liable under respondeat superior if the associate was acting in the course of his employment. In this situation, the associate's liability to the public does not rest on any fiduciary duty that he owes to the public. Instead, his duty is to drive as would a reasonable and prudent driver—the same duty owed by any driver to the public. Moreover, there are many statutes that impose a duty on the attorney for reasons other than his profession. For example, section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (b) (1982), and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1983), prohibit anyone from trading in stock with inside information that was obtained from a confidential relationship. See Dirks v. Securities Exchange Comm'n, 103 S. Ct. 3255 (1983); Chiarella v. United States, 445 U.S. 222 (1980).

\textsuperscript{57} MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1981); see People ex rel. Chicago Bar Ass'n v. McCallum, 341 Ill. 578, 590, 173 N.E. 827, 831 (1930) ("The American and the State Bar Associations are not legislative tribunals, and their canons of ethics are not of binding obligation and are not enforced as such by the courts, although they constitute a safe guide for professional conduct in the cases to which they apply, and an attorney may be disciplined by this court for not observing them."); Hull v. Celanese Corp., 513 F.2d 568, 571 n.12 (2d Cir. 1975); see also H. DRINKER, LEGAL ETHICS 26-30 (1953).

\textsuperscript{58} H. DRINKER, supra note 57, at 27 n.25.

\textsuperscript{59} See Note, Developments in the Law—Conflicts of Interest in the Legal Profession, 94 HARv. L. REV. 1244, 1249 nn.18 & 19 (1981). For example, General Rule 4(f) of the Southern District of New York provides:

\begin{quote}
Any member of the bar of this court who is guilty of fraud, deceit, malpractice; conduct prejudicial to the administration of justice; conduct violative of the Code of Professional Responsibility of the American Bar Association or of any violation of a Disciplinary Rule of the Code of Professional Responsibility of the New York State Bar Association; or any other conduct unbecoming of a member of the bar of this court; may be disbarred, suspended or censured.
\end{quote}

\textsuperscript{60} States have established statutory requirements for admission to practice, see, e.g., Ill. Rev. Stat. ch. 110A, § 703 (1983), and have placed restrictions on attorney advertising, see, e.g., N.Y. ADMIN. CODE tit. 22, § 603.22 (1983) (rules for the Appellate Division, First Department). Thirteen states also have established continuing education requirements that attorneys must fulfill in order to continue practicing. See Domash, Does Illinois Need Mandatory Continuing Legal Education? Why It's Necessary, Chicago Daily L. Bull., Apr. 28, 1984, at 7, col. 1.; see also Rules of the Supreme Court for Continuing Legal Education
The associate's duty to the public under the Model Code of Professional Responsibility is basically the same as the duty of all attorneys to the public. The canons of the ABA Model Code of Professional Responsibility that most directly focus on the attorney's obligation to the general public are Canons One, Two, Three, and Nine. According to these Canons, a lawyer should assist in maintaining the integrity and competence of the legal profession, assist the legal profession in fulfilling its duty to make legal counsel available, assist in preventing the unauthorized practice of law, and avoid the appearance of professional impropriety.

In certain instances, the associate's role in the firm imposes ethical obligations on the associate that differ from the obligations imposed on partners and sole practitioners. For example, pursuant to Canon Two of the Model Code of Professional Responsibility and Ethical Consideration 2-25, all lawyers have a responsibility to see that indigents receive legal services. Ethical Consideration 2-25 urges that every lawyer, regardless of professional prominence or workload, find the time to help provide legal services to the poor. The associate's ability to comply with this ethical consideration could be severely impaired by the amount of work given to him by the law firm. For this reason, it is necessary to reconcile the associate's obligation to the law firm with his duties to the client and to the public.


61. See Model Code of Professional Responsibility Canon 1 (1981) ("A lawyer should assist in maintaining the integrity and competence of the legal profession."); id. Canon 2 ("A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."); id. Canon 3 ("A lawyer should assist in preventing the unauthorized practice of law."); id. Canon 9 ("A lawyer should avoid even the appearance of professional impropriety."); see also Model Rules of Professional Conduct Rule 4.1 comment (1983) ("A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts."). But cf. Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507 (E.D. Mich. 1983) (plaintiff's attorney in a personal injury action had an ethical obligation to inform both the court and the opposing counsel that plaintiff had died prior to the attorneys concluding a settlement).

62. Ethical Considerations are only aspirational in character. See Model Code of Professional Responsibility Preliminary Statement (1981). Consequently, the associate's obligation in the given example can be more readily ascertained than it could be if there were a potential conflict between the Disciplinary Rules and the partner's instruction to the associate because Disciplinary Rules are mandatory. See id.
ASSOCIATES' ETHICAL PROBLEMS

III. THE COURTS AND THE ABA: BALANCING COMPETING INTERESTS TO RESOLVE ETHICAL PROBLEMS

An associate has ethical responsibilities to his firm, the client, the legal profession, and the public in general.\textsuperscript{63} An associate and his law firm also have financial interests that may affect their perception of their ethical obligations. In many instances, these interests conflict. Resort to one set of rules, such as the Model Code of Professional Responsibility, often will not help the associate resolve an ethical dilemma created by the conflicting interests. Instead, determining the exact scope of the associate's ethical duties requires a balancing of the competing interests. Frequently, a compromise between the competing interests is appropriate. At other times, one entity's interests may so greatly outweigh another entity's interests that the associate must comply with the ethical dictates of the entity with the greater interest. As seen below in \textit{Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation},\textsuperscript{64} in the Model Rules of Professional Conduct governing attorney disqualification,\textsuperscript{65} and in \textit{Adler, Barish, Daniels, Levin & Creskoff v. Epstein},\textsuperscript{66} the courts and the ABA have, in many instances, resolved associates' ethical problems by balancing the competing interests involved.

A. Attorney Disqualification and the New Firm

1. Silver Chrysler Plymouth

When an associate leaves one law firm to join another, the following question often arises: should the associate's new law firm be able to represent client X if the associate's former law firm represented a client whose interests were adverse to those of X, although the associate did not substantially participate in the re-

63. See generally Morgan, \textit{The Evolving Concepts of Professional Responsibility}, 90 \textit{Harv. L. Rev.} 702 (1977) (arguing that the current Code of Professional Responsibility consistently inverts the proper ranking of interests because it places the interests of the attorney above those of the client and the public).
lated matter at his former law firm?\textsuperscript{67}

In a landmark case, \textit{T.C. \& Theatre Corp. v. Warner Bros. Pictures, Inc.},\textsuperscript{68} the United States District Court for the Southern District of New York faced a similar issue. The attorney had represented a motion picture theatre operator who was suing a motion picture distributor in an antitrust proceeding; the attorney had previously represented the distributor in a related government antitrust proceeding.\textsuperscript{69} As a prophylactic measure, the court ruled that, because the movant had shown that the former representation was substantially related to the second representation, the need to safeguard the secrets and confidences previously disclosed to the attorney required that the attorney be disqualified.\textsuperscript{70} How-

\textsuperscript{67} It is beyond the scope of this Article to attempt an exhaustive analysis of the confusing and often contradictory case law involving attorney disqualification. \textit{See generally} Liebman, \textit{The Changing Law of Disqualification: The Role of Presumption and Policy}, 73 NW. U. L. Rev. 976 (1979); \textit{Note,} Attorney's Conflicts of Interests: Representation of Interests Adverse to that of Former Client, 55 B.U.L. Rev. 61 (1975); \textit{Note, Motions to Disqualify Counsel Representing an Interest Adverse to a Former Client,} 57 Tex. L. Rev. 726 (1979). Attorney disqualification cases are discussed in this article for the purpose of demonstrating the utility of an interest-balancing analysis of associates' ethical problems.

\textsuperscript{68} 113 F. Supp. 265 (S.D.N.Y. 1953).

\textsuperscript{69} \textit{Id.} at 266-67.

\textsuperscript{70} In explaining the "substantially related" test in \textit{T. C. \& Theatre Corp.}, Judge Weinfeld stated:

\textit{[T]he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appeared on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation, confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. \ldots [T]he court must ask whether it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject of his subsequent representation. If so, then the relationship between the two matters is sufficiently close to bring the later representation within the prohibition of Canon 6.}

\textit{Id.} at 268-69.

Modern code provisions governing both confidentiality, \textit{see} Model Code of Professional Responsibility DR 4-101 (1981), and independence of professional judgment, \textit{see id.} DR 5-105(A) \& (B), derive from the former Canon Six to which Judge Weinfeld refers. \textbf{American Bar Foundation, Annotated Code of Professional Responsibility} DR 5-105, at 225 nn.35 \& 226.

Absent a showing of a "substantial relationship," the party seeking disqualification must prove the prior acquisition of pertinent financial information. In view of the difficulty of obtaining such evidence, motions for disqualification will generally fail absent a showing of a "substantial relationship." \textit{Note,} \textit{Attorney's Conflicts of Interest: Representation of Inter-
ever, the attorney with whom the disqualified attorney was associated was not disqualified from proceeding with the lawsuit against the distributor.\textsuperscript{71} The court was unwilling to presume that the associated attorney had obtained confidences, and a review of the record did not lead the court to draw such an inference.\textsuperscript{72}

The next major development in this area was to impute the knowledge of the attorney representing the first client to other members of the new firm with which the attorney had become affiliated, causing the disqualification of the new firm.\textsuperscript{73} Disciplinary Rule 5-105(D) was frequently the basis for imputing knowledge to the members of the new law firm.\textsuperscript{74} Rule 5-105(D) requires a partner or associate either to refuse to accept or to withdraw from employment if any other member of the law firm is required to refuse to accept or to withdraw from employment pursuant to a Disciplinary Rule.\textsuperscript{75} According to an ABA Formal Opinion interpreting est Adverse to that of Former Client, supra note 67, at 75 nn.70-71.

Disciplinary Rule 5-105(A) also has been invoked to prevent an attorney from switching sides to the detriment of his former client on any matter in which the former client confided in the attorney. Model Code of Professional Responsibility DR 5-105(A) (1981); see E. F. Hutton & Co. v. Brown, 305 F. Supp. 371, 394 (S.D. Tex. 1969). One court has held that Disciplinary Rule 5-105(A) requires disqualification when the plaintiff establishes "'(1) the former representation, (2) a substantial relation between the subject matter of the former representation and the issues in the later lawsuit, and (3) the later adverse representation.'" Marketti v. Fitzimmons, 373 F. Supp. 637, 639 (W.D. Wis. 1974).

71. 113 F. Supp. at 272.
72. Id. at 271-72.

[T]he court need not, indeed cannot, inquire whether the lawyer did, in fact, receive confidential information during his previous employment which might be used to the client's disadvantage. Such an inquiry would prove destructive of the weighty policy considerations that serve as the pillars of Canon 4 of the Code, for the client's ultimate and compelled response to an attorney's claim of non-access would necessarily be to describe in detail the confidential information previously disclosed and now sought to be preserved.

566 F.2d at 608 (emphasis in original) (quoting Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973)).


Rule 5-105(d), ""The relations of partners in a law firm are so close that the firm, and all the members thereof, are barred from accepting any employment, that any one member of the firm is prohibited from taking.'"'

A second basis for automatically disqualifying the attorney's new firm frequently has been the need to avoid the appearance of impropriety pursuant to Canon Nine and Disciplinary Rule 9-101. In the decisions relying on these provisions the associate was treated in the same manner as the law firm partner: if the associate had previously worked on a substantially related matter that was adverse to client X, the associate's new law firm could not represent client X even if the associate himself did not work on the matter at his new law firm.

Another landmark decision in the field of attorney disqualification was Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corpo-

76. AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 comment, at 246 (1979) (quoting ABA Comm. on Professional Ethics and Grievances, Formal Op. 33 (1931)). The possibility that a court will impute the associate's knowledge to the firm and disqualify the firm has important implications for the associate's ability to moonlight. See infra notes 153-55 and accompanying text.


78. See, supra note 77. More recently, in situations where the associate worked for the former firm on a "substantially related" matter, some courts, including the United States Court of Appeals for the Seventh Circuit, have held that the presumption in favor of disqualifying the associate's new firm can be rebutted. See Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 722 (7th Cir. 1982). Other recent Seventh Circuit cases adopting a similar approach, but not involving the movement of an associate from one firm to another, include Schiessle v. Stephens, 717 F.2d 417 (7th Cir. 1983); LaSalle National Bank v. County of Lake, 703 F.2d 252 (7th Cir. 1983); and Novo Therapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc., 607 F.2d 186 (7th Cir. 1979) (en banc); see also Lemaire v. Texaco, Inc., 496 F. Supp. 1308, 1309-10 (E.D. Tex. 1980).

For a good discussion of attorney disqualification cases, see Peterson, Rebuttable Presumptions and Intra-Firm Screening: The New Seventh Circuit Approach to Vicarious Disqualification of Litigation Counsel, 59 NOTRE DAME LAW. 399 (1984). District courts in the Seventh Circuit are now required to make specific factual determinations on the issue of whether the presumption has been rebutted, unless the new law firm has no "institutional mechanism" to prevent the new associate from spreading confidences to his new firm. Id. at 407. In Freeman, the district court was instructed that it could rely on such factors as "the size of the law firm, the area of specialization of the attorney, the attorney's position in the firm, and the demeanor and credibility of witnesses at the evidentiary hearing." 689 F.2d at 723.
In *Silver Chrysler*, the defendant, Chrysler Motors (Chrysler), moved to disqualify counsel for plaintiff, Hammond & Schreiber, P.C., because Dale Schreiber of that firm had worked on certain matters for Chrysler while an associate with the law firm of Kelly, Drye, Warren, Clark, Carr, & Ellis (Kelly Drye). The district court refused to disqualify plaintiff's counsel, and the decision was affirmed by the United States Court of Appeals for the Second Circuit.

In reaching its conclusion, the Second Circuit considered Schreiber's duty to Chrysler to maintain Chrysler's confidences and secrets pursuant to Canon Four of the Model Code of Professional Responsibility. The Second Circuit held that the district court was correct in concluding that Schreiber had rebutted any presumption arising from the mere fact of his former employment at Kelly Drye that he possessed confidences that could be used against Chrysler. In reaching this decision, the court reasoned that there was no basis for distinguishing between partners and associates on the basis of title alone. However, it recognized that at least in large firms associates are less likely to be heavily involved in the factual context of a suit and are more likely to have some limited involvement related solely to legal questions. The court added that "[t]his is not to say that young attorneys in large firms never become important figures in certain matters but merely to recognize that some of their work is often of a far more limited variety."

The court also considered whether the duty to avoid the appearance of impropriety under Canon Nine should cause a disqualifica-

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79. 518 F.2d 751 (2d Cir. 1975).
80. Id. at 752.
82. 518 F.2d 751 (2d Cir. 1975).
83. Id. at 754-57.
84. Id. at 757.
85. Id. at 756.
87. 518 F.2d at 757.
tion of Schreiber and his firm.\textsuperscript{88} The court reasoned that even a cynical public would realize that an associate's mere employment by a large law firm would not automatically result in his exposure to confidential information in every case that the firm was handling.\textsuperscript{89} The court also noted that Canon Nine should not override the delicate balance created both by Canon Four and by the decisions interpreting that Canon.\textsuperscript{90} Also relevant, but of lesser importance in resolving the issue of whether Canon Nine required a per se disqualification, was the importance of allowing the client to obtain counsel of his choice.\textsuperscript{91}

\textsuperscript{88} Id. Although many if not most courts that have considered the issue have refused to disqualify an attorney on the sole basis of Canon Nine and the appearance of impropriety, a few courts have done just that. \textit{Compare} Board of Educ. of the City of New York v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979) ("appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest of cases"); International Electronics Corp. v. Planzer, 527 F.2d 1288, 1295 (2d Cir. 1975); Society for Good Will to Retarded Children, Inc. v. Carey, 466 F. Supp. 722, 724 (E.D.N.Y. 1979); City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 205-06 (N.D. Ohio), aff'd, 573 F.2d 1310 (6th Cir. 1977), cert denied, 435 U.S. 996 (1978); Gulf Oil Corp., 588 F.2d 221, 224 (7th Cir. 1978); Schloetter v. Rilof of Indiana, Inc., 546 F.2d 706, 709 (7th Cir. 1976); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976); Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975); W. E. Bassett Co. v. H. C. Cook Co., 201 F. Supp. 821, 825 (D. Conn. 1961), aff'd, 302 F.2d 268 (2d Cir. 1962) (per curiam); see generally Kramer, \textit{The Appearance of Impropriety Under Canon 9: A Study of the Federal Judiciary Process Applied to Lawyers}, 65 MINN. L. REV. 243 (1981); O'Toole, \textit{Canon 9 of the Code of Professional Responsibility: An Elusive Ethical Guideline}, 62 MARQUETTE L. REV. 313 (1979).

One commentator has suggested that the courts should not use the Code of Professional Responsibility as a guide in deciding disqualification cases. \textit{See} Lindgren, \textit{Toward a New Standard of Attorney Disqualification}, 1982 Am. B. Found. Res. J. 421. Lindgren has suggested that courts should restrict disqualifications "to situations where continued representation would tend to taint the underlying trial by upsetting the balance of presentations." \textit{Id.} at 423.

\textsuperscript{89} 518 F.2d at 757; \textit{accord} Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 609 (8th Cir. 1977), \textit{cert. denied}, 436 U.S. 905 (1978); \textit{see also} Kramer, \textit{supra} note 88.

\textsuperscript{90} 518 F.2d at 757.

\textsuperscript{91} 518 F.2d at 757 (the court stated: "As in \textit{Emle} [Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 564-65 (2d Cir. 1973)], we recognize 'our responsibility to preserve a balance, delicate though it may be, between an individual's right to his own freely chosen counsel and the need to maintain the highest ethical standards of professional responsibility.' ") \textit{Id.} at 753; \textit{accord} Malamed v. ITT Continental Baking Co., 592 F.2d 290, 293 (6th Cir. 1979); Woods v. Covington County Bank, 537 F.2d 804, 810 (5th Cir. 1976); Realco Services, Inc. v. Holt, 479 F. Supp. 867, 872 n.4 (E.D. Pa. 1979); Moritz v. Medical Protective Co., 428 F. Supp. 865, 874 (W.D. Wis. 1977); \textit{see also} Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (en banc), \textit{vacated on other grounds and remanded}, 449 U.S. 1106 (1981).

It should be noted that attorney disqualification motions are often made for the tactical
In its decision, the district court recognized the need to allow law firms to obtain highly trained and specialized attorneys from large law firms without fear of being disqualified merely because the associate’s former firm had represented a client with a conflicting interest, regardless of whether the associate had obtained confidential information. The district court also noted the need to avoid restricting the mobility of young attorneys.

2. The ABA Model Rules

On August 2, 1983, the American Bar Association adopted a new set of ethical standards known as the Model Rules of Professional Conduct. The Model Rules now represent official ABA policy, but

reason of attempting to eliminate counsel most familiar with the case and thereby disadvantaging the other side. See, e.g., id.; Lindgren, supra note 88, at 440 n.86.


The same sort of problem exists when government attorneys move into private practice, but courts have been more liberal when disqualification concerns government attorneys. Generally, firms that employ attorneys with previous government service have not been disqualified because the courts do not want to discourage attorneys from working for the government. See Kesselhaut v. United States, 555 F.2d 791, 793 (Cl. Ct. 1977). This is allowed even when the attorney joining the new firm actually has acquired relevant confidential information during the course of his government service. The major provisos are that the former government attorney be screened from matters that are within the scope of his former employment, and that the attorney not share in fees derived from the case. See id.; Armstrong v. McAlpin, 625 F.2d 433, 444-46 (2d Cir. 1980) (en banc), vacated on other grounds and remanded, 449 U.S. 1006 (1981); Kramer, supra note 88, at 260-64; see also Model Rules of Professional Conduct Rule 1.11 (1983); cf. Model Code of Professional Responsibility DR 9-101(B) (1981) (“A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.”). See generally G. Hazard, Ethics in the Practice of Law 107-19 (1978); Morgan, Conflicts of Interest and the Former Client in the Model Rules of Professional Conduct, 1960 Am. B. Found. Res. J. 993, 996-99; Morgan, supra note 63, at 728-31.

they will not become effective until the states adopt them. The Model Rules basically codify existing case law with respect to attorney disqualifications caused by attorneys moving from one firm to another. Thus, Model Rule 1.9(a) follows the rule in *T.C. & Theatre Corp.*: an attorney cannot represent "another client in the same or a substantially related matter in which that client's interests are materially adverse to . . . [a] former client unless the former client consents after consultation." 

Model Rule 1.10(b) codifies the rule set forth in *Silver Chrysler*, although it eliminates any distinction between an associate and a partner. Under Model Rule 1.10(b), an attorney's new law firm cannot represent a client if (1) the attorney formerly represented another client on a substantially related matter, (2) the former client has an interest adverse to that of the client represented by the new law firm, and (3) the attorney acquired material confidential information while representing the former client.

In *Silver Chrysler* the court recognized that associates' ethics cannot be analyzed in a vacuum. The court weighed the interests of all concerned parties—the associate, the associate's old and new firms, the clients represented by the old and new firms, and the public—in formulating a rule regarding attorney disqualification. Taking an approach similar to that of the court in *Silver Chrysler*, the ABA in Model Rules 1.9 and 1.10 attempted to reconcile the competing interests of the former client who wants his secrets and confidences preserved, the new client who wants to be able to re-


96. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(a) (1983).

97. Id. Rule 1.10(b).


tain counsel of his choice, and the attorney who wants to be able to join another firm or to go out on his own and obtain clients without being unduly hampered by the rule of disqualification. By logical extension, in the absence of specific statutes governing particular ethical problems of associates, the courts should weigh the interests of the various parties affected by the outcome of the associate's decision.101 Such an approach would aid courts in formulating a concrete rule.

B. Adler Barish

Another circumstance in which the existence of competing interests has prompted the use of a balancing test is when the associate leaves the law firm to practice on his own. The issue of what tactics the associate can use to approach the clients of his former employer and to attract them to his new law firm was addressed by the Pennsylvania Supreme Court in Adler, Barish, Daniels, Levin, & Creskoff v. Epstein. In Adler Barish, the court held that it was improper for the former associates of Adler Barish to engage in in-person and telephone solicitation of clients of Adler Barish and then to mail form letters to the clients. The form letters could be executed to discharge Adler Barish as counsel, to name the former associates as new counsel, and to create a contingency fee arrangement. The court added in dicta that if the associates

100. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 comment (1983).
101. Courts generally have used interest-balancing analyses to determine when attorney disqualification is appropriate. Note, Development in the Law-Conflicts of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1479 (1981); see also General Mill Supply Co. v. SCA Services, Inc., 505 F. Supp. 1093 (E.D. Mich. 1981), aff'd, 697 F.2d 704 (1982) (in determining whether it is appropriate to disqualify an entire law firm from representing a client when an attorney for the firm testifies for the client, the court must weigh potential prejudice to the parties, to the profession, and to the judicial process); Estep v. Johnson, 383 F. Supp. 1323 (D. Conn. 1974). In Estep the court held that when a staff member of the legal assistance association and a member of its board of directors were on opposite sides of a dispute, the remedy was not necessarily limited to the board member's withdrawal. Id. The remedy depended on a balancing of the following factors: whether disclosure of information had occurred, the impact of the disclosure on the client, and the relationship of board members to staff members within the legal services agency. Id. at 1325-26.
103. Id. 393 A.2d at 1175.
104. 482 Pa. at 421, 393 A.2d at 1178.
had merely mailed out formal business announcements to prospective clients, this conduct would have been permissible according to a ruling issued under Disciplinary Rule 2-103(A).

The court first determined that the associates’ right of free speech under the first amendment to the United States Constitution had not been unconstitutionally curtailed. The court balanced the associates’ right of free speech against the interests of the law firm and of the client and concluded that the associates’ speech constituted “commercial speech.” Because it was commercial speech, it was entitled to limited first amendment protection. Making use of information that was obtained from their former employer, Adler Barish, by contacting Adler Barish clients was not “pure speech,” but rather was a mixture of speech and conduct. Therefore, without explicitly saying so, the court employed a balancing test to resolve the issue. The court decided that the interest of the law firm in protecting its relationship with its clients, and the interest of the clients in not being pressured to make an uninformed decision regarding which counsel to employ, outweighed the former associates’ right of free speech, at least in the form of expression in which the speech was made. As the court in Adler Barish stated,

105. Id. at 428 n.10, 393 A.2d at 1181 n.10.
106. Id. at 423-28, 393 A.2d at 1179-81.
107. See id. at 423-24, 393 A.2d at 1179.

Similarly, in the area of equal protection, a balancing test is often employed. The decision that a classification is suspect depends on whether the classification is one in which discrimination has traditionally existed. See, e.g., Korematsu v. United States, 323 U.S. 214 (1944); Loving v. Virginia, 388 U.S. 1 (1967). If the classification is not suspect, only a legitimate state interest need be present to uphold the constitutionality of the classification. See, e.g., Korematsu, 323 U.S. 214; Loving, 388 U.S. 1. This setting, like the free speech area, is one in which strong interests support both sides.

110. See 482 Pa. at 427-28, 393 A.2d at 1181.
'[T]o reduce the likelihood of overreaching and the exertion of undue influence on lay persons; to protect the privacy of individuals; and to avoid situations where the lawyer's exercise of judgment on behalf of the client will be clouded by his own pecuniary self-interest,' . . . we must reject appellees' argument and conclude that, just as in Ohralik, the Constitution permits regulation of their conduct.\textsuperscript{111}

Therefore, the associates' conduct fell outside the type of truthful advertising of routine legal services that the United States Supreme Court held to be constitutionally protected in \textit{Bates v. State Bar of Arizona}.\textsuperscript{112}

Although the court in \textit{Adler Barish} appeared to ground its decision largely in a first amendment analysis of the form of speech used by the associate—aggressive in-person and telephone solicitation as opposed to passive third-person mailing of formal business announcements—a significant basis for the court's decision was the associates' breach of their duty of loyalty to the law firm. The court in \textit{Adler Barish} relied upon the decision of the United States Supreme Court in \textit{Ohralik v. Ohio State Bar Association}\textsuperscript{113} to support its position that the associates' conduct amounted to improper arm-twisting.\textsuperscript{114} As pointed out by the dissent in \textit{Adler Barish}, however, \textit{Ohralik} involved in-person solicitation that deprived persons of an opportunity for reflection before they signed on the dotted line,\textsuperscript{115} whereas \textit{Adler Barish} did not involve such tactics.

The dissent in \textit{Adler Barish} cogently pointed out that the mailing of the form letters in \textit{Adler Barish} was not nearly as coercive as the in-person solicitation that the Supreme Court condemned in \textit{Ohralik}.\textsuperscript{116} Therefore, the court's constitutional decision in \textit{Adler Barish} would appear to rest in part on the associates' violation of their duty not to compete with their former employer by using client information that they acquired while working at their former

\textsuperscript{111} Id. at 428, 393 A.2d at 1181; see \textit{Ohralik} v. Ohio State Bar Ass'n, 436 U.S. 447, 461 (1978).
\textsuperscript{112} Id. at 424, 393 A.2d at 1179 (citing \textit{Bates v. State Bar of Arizona}, 433 U.S. 350 (1977)).
\textsuperscript{113} 436 U.S. 447 (1978).
\textsuperscript{114} 482 Pa. at 420, 393 A.2d at 1181.
\textsuperscript{115} Id. at 440-41, 393 A.2d at 1187-88 (Manderino, J., dissenting).
\textsuperscript{116} Id.
law firm.  Moreover, if the decision in Adler Barish is based on the impropriety of mailing the letters rather than on the impropriety of the associates’ breaching their fiduciary duty to the firm, the decision arguably conflicts with the United States Supreme Court’s later decision in In re R.M.J. In re R.M.J. concerned certain restrictions on attorneys’ solicitation of clients by mail that were held unconstitutional under the first and fourteenth amendments.

The court in Adler Barish also determined whether the law firm had a right of action against the associates. Again, the court implicitly balanced the legitimate interests advanced by the associates’ conduct against the interests disturbed by that conduct. The interests advanced by the associates’ conduct included the associates’ pecuniary self-interest and the clients’ interest in having a greater range of counsel from which to choose. The associates’ conduct conflicted with the law firm’s interest in protecting its business secrets and in preserving contractual relationships with its clients. In particular, the associates unfairly competed with Adler Barish by improperly taking advantage of the confidential attorney-client relationship created during the course of their prior employment.

117. Cf. Snepp v. United States, 444 U.S. 507 (1980) (former CIA agent who violated agreement not to divulge classified information without prepublication clearance breached fiduciary obligation when he published a book about CIA and, notwithstanding first amendment claim, proceeds from sale of the book placed in constructive trust for government); Dallas Cowboy Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1188 (5th Cir. 1979) (“The First Amendment is not a license to trammel on legally recognized rights in intellectual property.”); see also In re R.M.J., 455 U.S. 191, 206-207 (1982) (“[T]he states retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice. There may be other substantial state interests as well that will support carefully drawn restrictions.”).

118. 455 U.S. 191 (1982). In In re R.M.J., the Supreme Court held unconstitutional under the first and fourteenth amendments a Missouri Supreme Court rule under which an attorney was reprimanded for unprofessional conduct for having mailed out business cards to persons other than those permitted under the rule. Id. The Supreme Court also held that the attorney was unconstitutionally reprimanded for having published announcements that listed areas of his practice other than those specified in the rule, and for having listed jurisdictions in which the attorney was licensed to practice in violation of the rule. Id.

119. Id.

120. 482 Pa. at 431-33, 393 A.2d at 1183.

121. Id. at 435-36, 393 A.2d at 1185; accord Velo-Bind, Inc. v. Scheck, 485 F. Supp. 102 (S.D.N.Y. 1979); Town & Country House & Home Serv., Inc. v. Newberry, 3 N.Y.2d 554,
Adler Barish partners trusted . . . [the associates] with the high responsibility of developing its clients' cases. From this position of trust and responsibility, . . . [the associates] were able to gain knowledge of the details, and status, of each case to which . . . [they] had been assigned.\textsuperscript{122}

The associates' conduct also conflicted with the clients' interest in not being confused by the high pressure tactics of the former associates. The court framed the test for a cause of action in terms of the propriety of the associates' interference with the contractual relations of the law firm:

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

(a) The nature of the actor's conduct,
(b) The actor's motive,
(c) The interests of the other with which the actor's conduct interferes,
(d) The interests sought to be advanced by the actor,
(e) The proximity or remoteness of the actor's conduct to the interference and
(f) The relations between the parties.\textsuperscript{123}

In sum, \textit{Adler Barish} involved a conflict of interests between the law firm partnership and some of its former associates. The public and the clients of Adler Barish were interested in information about and access to reasonably priced legal counsel. Because these same interests generally are present when associates encounter ethical problems, the use of a balancing test is helpful in evaluating the scope of an associate's ethical obligations. The following are the interests that must be balanced: the associate's economic interest, the law firm's economic interest, the associate's fiduciary obligation to the law firm and the extent to which the questioned conduct adversely affects that duty, the interest of the client in

\begin{thebibliography}{9}
\bibitem{} 558, 147 N.E.2d 724, 726, 170 N.Y.S.2d 328, 331 (1958); see also 2 Callman, Unfair Competition, Trademarks and Monopolies § 14.31 (4th ed. 1983).
\bibitem{} 122. 482 Pa. at 435-36, 393 A.2d at 1185.
\bibitem{} 123. Id. at 433, 393 A.2d at 1184 (footnote omitted) (quoting \textit{Restatement (Second) of Torts} § 767 (1979)).
\end{thebibliography}
securing effective and reasonably priced legal services, the economic interest of the legal community in wishing to be perceived in the best possible light, and the interest of the public. In general, the interests of the client and the public should take precedence over the economic interests of the associate or the law firm.

It is important to consider not only the test that should be employed in evaluating the propriety of the conduct of the associate or the partner, but also who should be the decisionmaker to apply the test. In short, neither the associate nor the partner always is the appropriate person to make the initial ethical judgment. In those situations in which the activity undertaken by the associate is motivated by the associate’s own pecuniary interests, he tends to lose objectivity in evaluating the propriety of the conduct. Similarly, when the law firm partner has a greater financial stake in the outcome of an issue than does the associate, he is less likely to be able to appraise objectively whether a certain action is ethical. Circumstances in which the associate’s actions are motivated by his own pecuniary interests are discussed in Part IV A and Part IV B below. Circumstances in which the partner’s actions are motivated largely by his own pecuniary interests are discussed in Part IV C below.

IV. COMMON ETHICAL PROBLEMS

A. The Purchase of Client Securities

One frequent problem faced by law firm associates is whether to purchase shares of stock of a corporate client. The first step that the associate who is considering purchasing client securities should take is to ascertain whether the firm has a policy covering the purchase of client securities. If the law firm has a policy that

124. A survey was sent to law firm associates in Illinois. See Appendix. Only 12% of the law firm associates surveyed had invested in the securities of a client of their law firm. However, 36% of the associates had purchased securities while working for their firm. Survey Response to Question #13, Appendix. Of those who purchased securities, 63% failed to investigate the possibility that the firm had any confidential information about the company whose stock was purchased. Survey Responses to Question #14, Appendix. This figure overstates any possible ethical problem because most of the associates work for small law firms in which the associate would know that his investment in, for example, General Motors would cause no problem.

125. Eighty-five percent of the associates surveyed in Illinois, see Appendix, responded
entirely prohibits the purchase of securities, or places restrictions on such purchases, the associate’s duty of obedience requires him to adhere to that policy.

If there is no policy prohibiting the purchase of client securities, an associate who wants to purchase client securities must make sure that such a purchase does not violate the federal securities laws. In particular, the associate must not make use of material inside information in making the purchase. Even if the associate becomes privy to such information inadvertently, his fiduciary duty to the client creates both a duty not to disclose that information that is prohibited by the policy. Formal policies are much more prevalent among the large firms. Of those firms with 40 or more attorneys whose associates answered the question (6% of the respondents), 40% had a policy regarding investments in client securities.

Of all of the firms that were surveyed that had an investment policy, 25% permitted investments, 37.5% forbade investments, and 37.5% restricted investments in some fashion.

A policy prohibiting the purchase of all client securities, subject to a few exceptions, has existed at the New York law firm of Cravath, Swaine & Moore since the early part of the twentieth century. R. Swaine, The Cravath Firm (1948).

Law firms are required to maintain procedures that ensure compliance with the standards of professional responsibility. E.g., Spindell v. State Bar, 13 Cal. 3d 253, 530 P.2d 168, 118 Cal. Rptr. 480 (1975); In re Palmieri, 75 N.J. 488, 383 A.2d 1142 (1978); In re Rude, 88 S.D. 416, 221 N.W.2d 43 (1974). The required procedures can vary with the size of the firm. Less formal procedures and supervision are required in small firms than are required in large ones. Furthermore, some firms have a procedure enabling associates to refer difficult ethical problems to a disinterested senior partner or a special committee. Model Rules of Professional Conduct Rule 5.1 comment (1983).


If the associate's law firm is acting as counsel for an issuer, underwriter, or selling security holder, and is named in a prospectus of the client corporation “as having passed upon legal matters in connection with the registration, or offering of securities,” the firm must disclose any financial interest that the firm, a partner, or a participating attorney has in “the issuer or offering”. SEC Release No. 5094 [1970-1971 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,917 (October 21, 1970). Disclosure is not required if the aggregate amount of the interest owned, received, or to be received by the firm or by all of the attorney's employed by the firm does not exceed $30,000, and if no more than $10,000 is held by any one of such individuals. Id. Therefore, an associate purchasing the securities of a client that is registering or offering securities must be sure that his ownership interest is reported, as required by SEC Release No. 5094. Id.

A typical situation arises when an associate learns through firm gossip that a client is planning to acquire another company. The associate should presume that the information was transmitted to the law firm by the client through a confidential communication, although the associate is free to verify this with the partner in charge of the matter. When the
mation and a duty to abstain from trading in the securities.\textsuperscript{130}

Assuming that there is no firm policy against purchasing client securities, and assuming that the associate has not acquired material inside information, a question still remains whether the associate is free to purchase client securities. Although there is no specific disciplinary rule or ethical consideration governing purchases

source of the information is the client’s confidential communication, section 10(b) of the Securities Exchange Act and Rule 10b-5 prohibit the associate from purchasing shares in either the client’s company or the target company. \textit{See generally Illegal Inside Trading Seems to be on Rise; Ethical Issues Muddled}, Wall St. J., Mar. 2, 1984, at 1, col. 6.

In September 1981, Wachtell, Lipton, Rosen & Katz, a New York law firm specializing in tender offers, demanded the resignation of a partner, Carlo M. Fiorentino, after he had admitted trading in the stocks of several of the firm’s clients. Fiorentino was charged with illegally using inside information to buy stock. N.Y. Times, Sep. 12, 1981, at 29, col. 1.

In 1982, the SEC sued Kenneth Rubinstein, an attorney with Fried, Frank, Harris, Shriver, & Jacobson in New York City, for trading on inside information that he acquired concerning the takeover of Texasgulf by ELF Acquitaine. N.Y. Times, June 22, 1982, at D24, col. 5. Rubinstein gave up his profits of $196,000 and was enjoined from future violations of the securities law. N.Y. Times, Nov. 17, 1982, § 4, at 15, col. 1.

\textsuperscript{130} \textit{See} Dirks v. Securities Exchange Comm’n, 103 S. Ct. 3255 (1983); Chiarella v. United States, 445 U.S. 222, 227-30 (1980). Ethical Consideration 4-5 states that a lawyer should not use information obtained during the course of his employment for his own purposes, except after full disclosure to the client and consent by the client. \textbf{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} EC 4-5 (1981); \textit{see also} Securities Exchange Comm’n v. Lerner, Litigation Release No. 9049 [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,334 (April 2, 1980). In \textit{Lerner}, the SEC brought a complaint against both partners and associates of a New Jersey patent law firm and their tippees alleging that these individuals purchased securities of a corporate client while the attorneys were in a position to receive material nonpublic information concerning developments in a patent application for a laser. \textit{Id}. The SEC charged a violation of Section 10(b) of the Securities Exchange Act. \textit{Id}. The defendants settled, agreeing to give up their profits. \textit{Id}. The law firm was ordered to implement procedures to prevent the use or dissemination by any of its members or employees of material nonpublic information obtained during the course of their employment. \textit{Id}.

In the \textit{Lerner} opinion, the SEC explained its policy concerning the abuse of inside information by partners, associates, and employees of law firms:

\begin{quote}
Law firms, like others which have confidential information in their possession that may affect the securities trading markets, have an affirmative obligation to safeguard such information. While . . . no procedures can guarantee that individual employees will not take unfair advantage of their position, law firms are encouraged to establish policies and procedures regarding confidential information and take steps to ensure that all firm personnel are familiar with those policies, including the serious consequences that may result from conduct violating such policies.
\end{quote}

of client securities, certain provisions of the Model Code of Professional Responsibility implicitly restrict an associate’s purchase of client securities. According to Disciplinary Rule 5-101(A), an attorney must refuse to accept employment when his professional judgment might be swayed by his personal interests, including his financial interests.131 Yet Disciplinary Rule 5-101(A) does not directly address the scope of an associate’s permissible activity after the client has hired the law firm. Most courts have interpreted Disciplinary Rule 5-101(A) as requiring that the attorney attempt to minimize any conflict between his own interests and those of his client by avoiding the acquisition of financial interests that might affect his judgment concerning his client’s interests.132

To the extent that an associate might be able to influence the price of a company’s stock by his actions, there might be a conflict between his personal interests and his duty to the client. This problem is most likely to arise when the associate purchases stock in a small, closely held corporation.133 Similarly, if the associate were to adopt a “short” position in the stock, hoping for the stock to decline in value so that he could profit by purchasing it at a lower price, the personal interest of the associate is more likely to conflict with the interest of the client. For this reason, some law firms restrict purchases of stock by associates to large, publicly traded companies and forbid the acquisition of “short” positions in client stock.134

Canon Nine and Disciplinary Rule 9-101 require that an associate avoid the appearance of impropriety. Moreover, the associate’s duty of loyalty to the firm requires that he avoid subjecting the

131. Disciplinary Rule 5-101(A) 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 a 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) (1981).


133. R. Mundheim & A. Fleischer, Sixth Annual Institute on Securities Regulation 243-45 (6th ed. 1975). Of those associates surveyed who purchased client securities, three out of five, or 60% purchased the securities of a client whose stock traded on other than a national securities exchange. Survey Responses to Question #16, Appendix.

134. One law firm in the Illinois survey limited purchases of securities to clients who are “reputable.” Survey Responses to Question #12, Appendix.
firm to the appearance of impropriety.\textsuperscript{135} If the firm has confidential information about the corporate client, the associate's purchase of its stock might reflect badly on the firm. In particular, the firm might be viewed as having violated the securities laws or Disciplinary Rule 5-101(A). Even though the associate might decide that his purchase will not appear improper, the law firm will be in a better position than the associate to judge the potential impact of such a purchase on the firm's reputation in the community. Therefore, the law firm should decide whether the associate may purchase client securities. In all cases, prior to his purchase of corporate securities, an associate should check the client files of his firm to ascertain whether the company whose stock he wants to purchase is a client of the firm.\textsuperscript{136} If the company is a client of the firm, the associate's duty of loyalty and his duty to avoid the appearance of impropriety require that he obtain partnership approval of his purchases of client securities.

Under the Model Rules, an attorney's duty to avoid the acquisition of a financial interest that might conflict with his representation of the client's interests is more explicit. Model Rule 1.7(b) provides that "[a] lawyer shall not represent a client if the representation of that client may be materially limited 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."\textsuperscript{137} The comment to Model Rule 1.7 states that a "lawyer's own interests should not be permitted to have adverse effect on representation of a client."\textsuperscript{138} The Rule also states that "[a] lawyer may not allow related business interests to affect representation."\textsuperscript{139} The Model Rules and comments thus try to accommodate the competing interests of the attorney, the client, the law firm, and the public. The Rules make the client's interest paramount. The client retains a veto power over attorney invest-

\textsuperscript{136} For a discussion of law firm index systems and how they can be used to prevent conflicts of interest and other potential ethical problems, \textit{see} R. MalRen & V. Levit, \textit{supra} note 20, \S\ 13.
\textsuperscript{137} Model Rules of Professional Conduct Rule 1.7 (1983).
\textsuperscript{138} \textit{Id.} comment.
\textsuperscript{139} \textit{Id.} Rule 1.7; \textit{see also} Model Rule 8.4(C) (conduct involving dishonesty or fraud is professional misconduct).
ments in circumstances where the attorney initially determines that his financial interests limit his ability to represent the client. The language of Model Rule 1.7 is broad enough to cover a variety of financial interests. Unfortunately, the Model Rules do not enumerate the specific investment situations in which it should be presumed that the attorney's interest materially limits his representation of the client. If such a presumption existed, the attorney's investment in client securities while the attorney continued to represent the client would be proper only if both of the conditions in Model Rule 1.7(b) had been met.

In addition, Model Rule 1.7 does not give sufficient weight to the interests of the public and the legal profession in avoiding the appearance of impropriety. Attorneys who trade in client securities, particularly closely held corporate stock, might be perceived as acting improperly even when they are not doing so. The Model Rules do not contain Canon Nine's somewhat amorphous appearance of impropriety test. However, by rejecting the admittedly imperfect standard of Canon Nine, the Model Rules have upset the delicate balance of competing interests. The Model Rules give somewhat greater weight to the financial interest of the attorney at the expense of the interests of the legal profession and the public.

B. Moonlighting by Law Firm Associates

Moonlighting is the practice of simultaneously holding two or more jobs with more than one employer. As the term is used in this Article, moonlighting by law firm associates refers to the practice of law by an associate for someone other than his regular employer. With the exception of doing work for family and friends, generally without pay, the vast majority of associates do not moonlight.
light. 143 Of those firms that have moonlighting policies, some completely forbid moonlighting, whereas others only restrict the practice in some fashion. 144 These restrictions include, among others: that the work be done only for family or friends, that the work be done without charge, and that the work not consume an inordinate amount of the associate's time. 145 This section, first, will examine the propriety of law firm policies that restrict or prohibit moonlighting and, second, will discuss the appropriateness of moonlighting when there is no law firm policy on the subject.

There are four major reasons why some law firms have anti-moonlighting policies. Probably the most important reason is to prevent an associate from taking on outside work that would impair the efficiency of his work for the firm. 146 The associate's efficiency could be impaired if he has less time available to spend on work for the firm. 147 Moreover, the associate might spend part of his normal working hours doing work that he began while moonlighting. In addition, the associate's outside work might make him

143. See Glaberson, The Case of a "Firm Within a Firm," N.Y.L.J., Oct. 25, 1982, at 1, col. 2. Although 41% of the associates responding to the Illinois survey stated that they had moonlighted at some time, 68% of the associates who moonlighted received no pay for the work, and 89% of the associates who moonlighted only worked for their family and friends. Survey Responses to Questions #6-9, Appendix.

144. Fifty-three percent of the law firms whose associates responded to the Illinois survey had policies on moonlighting. Survey Responses to Question #3, Appendix. Of those law firms with moonlighting policies, 65% of the firms prohibited moonlighting, 7% permitted moonlighting, and 28% restricted it. Survey Responses to Question #4, Appendix.

145 Survey Responses to Question #5, Appendix.

146. Cf. Baity v. Civil Service Comm'n of Los Angeles County, 103 Cal. App. 3d 155, 162 Cal. Rptr. 812 (1980). In Baity, a county ordinance prohibited full time employees from performing more than twenty-four hours of outside work per week. Id. The purpose of the ordinance was to prevent the employment of persons in full time county positions whose efficiency would be impaired by outside work. Id.

147. In October 1982, three associates at the New York law firm of Haight, Gardner, Poor & Havens "resigned" after the firm confronted them with evidence that showed that the associates had formed a firm of their own to moonlight. The associates acknowledged that they had printed stationery and business cards with their names as a firm on them and had "handled some legal work 'on the side.' " When questioned about the resignations, a partner stated that, "when he hired an associate, an implied term of the relationship is that the associate will devote full time to the practice of law on behalf of the firm and its clients." Glaberson, The Case of a "Firm Within a Firm," N.Y.L.J., Oct 25, 1982, at 1, col. 2; cf. Stewart, Extracurricular Work by Law Professors is Source of Controversy, Wall St. J., Mar. 1, 1984, at 1, col. 1 (moonlighting by law school professors raises many of the same problems that moonlighting by law firm associates raises).
too tired to perform at his normal level.\textsuperscript{148}

A second reason for antimoonlighting policies is the concern that the associate will attempt to compete with the law firm and will take away business that might otherwise flow to the firm.\textsuperscript{149} Apparently for this reason, some firms have adopted policies that permit moonlighting only if it is done without charge.\textsuperscript{150} A third reason for antimoonlighting policies is to prevent associates from using firm resources to work on moonlighting matters.\textsuperscript{151} For example, associates might use resources such as the firm's secretaries, photocopying machines, telephones, and messengers to work on nonfirm jobs.\textsuperscript{152}

A fourth reason for antimoonlighting policies is to prevent conflicts of interest.\textsuperscript{153} When an associate represents a client independently, knowledge gleaned by the associate from the client might

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\textsuperscript{148} See Human Resources Management (CCH) ¶ 2406 (June 1983); see also Flood v. Kennedy, 12 N.Y.2d 345, 346, 348, 190 N.E.2d 13, 14, 15, 239 N.Y.S. 2d 665, 667 (1963).

\textsuperscript{149} Human Resources Management (CCH) ¶ 2406 (June 1983). Of course, even in the absence of a moonlighting policy, an associate has a fiduciary duty not to compete with the law firm. See supra notes 23-32 and accompanying text. If the associate breaches that duty, the firm can discharge him without subjecting itself to liability, even if the associate is employed for a term. See Brown v. DuPuy, 4 F.2d 367 (7th Cir. 1924); Perfection Mattress & Spring Co. v. Dupree, 216 Ala. 303, 113 So. 74 (1927); Dawson v. Clark, 145 Col. 278, 358 P.2d 591 (1961).

\textsuperscript{150} Survey Responses to Question #5, Appendix. Law firms also are motivated by their ethical responsibility to allow their associates to do volunteer work without charge. Model Code of Professional Responsibility EC 2-25 (1981); Model Rules of Professional Conduct Rule 6.1 (1983); see Implementing the Lawyers Public Interest Practice Litigation, 63 A.B.A.J. 678 (1977) (ABA House of Delegates Resolution stating that all lawyers have a responsibility to do some public service work, either for no fee or at a reduced fee); Margolick, Big Law Firms in New York Stepping Up Volunteer Work, New York Times, May 2, 1984, at 1, col. 5. In 1980, the memberships of the Bar Association of the City of New York and the New York State Bar Association overwhelmingly rejected a proposed change in the Code of Professional Responsibility Act that would have required 30-50 hours of public service activities per annum for all attorneys. Id.; A 'Palatable' Form of Public Service, New York Times, Jan. 4, 1981, § 4, at 5, col. 5; New York Bar Group Rejects Overhaul of Ethics Code, New York Times, Nov. 2, 1980, at 45, col. 4; see also Gerson, Idealistic Lawyers, Corporation Bound, N.Y. Times, May 29, 1984, at 25, col. 1.

\textsuperscript{151} Human Resources Management (CCH) ¶ 2406 (June 1983).


\textsuperscript{153} See Model Code of Professional Responsibility EC 5-14 (1981). Even in the absence of antimoonlighting policies, an associate's duty of loyalty should prevent him from entering into another relationship that is inconsistent with his relationship with the law firm. See generally 9 S. Williston, A Treatise on the Law of Contracts §§ 1013, 1014C (3d ed. 1967).
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be imputed to the associate’s firm. Consequently, the entire firm could be barred from representing another client, even if the firm did not permit the associate to work on the matter.

There is no provision of the Model Code of Professional Responsibility specifically addressing the issue of moonlighting by associates. The principal argument against antimoonlighting policies springs from Canon Two of the ABA Model Code of Professional Responsibility, which calls for lawyers to assist the legal profession in fulfilling its duty to make legal counsel available. Arguably, an agreement restricting or prohibiting moonlighting prevents some people from obtaining counsel.

Given the great number of lawyers currently practicing, paying clients should not have to rely on moonlighting counsel to secure effective representation. Furthermore, even if some clients would prefer to hire a moonlighting attorney because such an attorney might charge a lower fee, the interests of the moonlighting attorney’s firm and the clients whom the associate represents dur-

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154. See W. Seavey, supra note 14, § 97A.
155. See Model Code of Professional Responsibility DR 5-105(D) (1981); Model Rules of Professional Conduct Rule 1.10 (1983). See supra notes 73-78 and accompanying text. This situation is similar to the situation in which the associate leaves one firm to work for another, and the associate’s prior affiliation results in his new firm’s disqualification because his prior work was substantially related to the current representation. Moreover, the ongoing receipt of information by the moonlighting associate creates an even greater appearance of impropriety. See Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386-87 (2d Cir. 1976).
156. Despite the broad language of Canon Two, there is no disciplinary rule or ethical consideration that prevents a law firm from restricting or prohibiting moonlighting. Disciplinary Rule 2-108 prohibits an employment agreement “with another lawyer that restricts the right of the 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) (1981). Because it does not mention employment agreements that restrict the attorney’s right to practice law during the employment relationship, Disciplinary Rule 2-108(A) implicitly appears to permit antimoonlighting policies.
ASSOCIATES' ETHICAL PROBLEMS

ing normal working hours should outweigh the interest of the client who chooses to search for a bargain.

On the other hand, if an associate's moonlighting work consists only of work without a fee, the relative interest of the employer who prevents moonlighting becomes less obvious. If an associate is providing his service for a client who cannot obtain counsel, and if the associate is working without a fee, the associate is following the suggestion of Ethical Considerations 8-3 and 2-25 to provide legal services to those unable to pay for them. Moreover, the potential for competition between the associate and the law firm does not exist because the law firm cannot profit from people unable to pay for legal services. Thus, a law firm's antimoonlighting policy that restricts rather than prohibits moonlighting is more consistent with the bar's interest in encouraging associates to handle matters pro bono. For example, a law firm could permit an associate to handle family matters without charge or public interest matters on a pro bono basis, provided that such representation did not consume an inordinate amount of time and did not interfere with the associate's normal duties. Of course, the law firm could adopt instead a policy that permits associates to use firm time to handle pro bono matters that have been approved by a partner. The law firm would then be able to fulfill its "responsibility" under Ethical Considerations 8-3 and 2-25, and at the same time, prohibit moonlighting.

Another advantage of restricting rather than prohibiting moonlighting is that enforcement of a restrictive policy is more cost-


Unlike the situation in Ohralik, however, appellant's act of solicitation took the form of a letter to a woman with whom appellant had discussed the possibility of seeking redress for an allegedly unconstitutional sterilization. This was not in person solicitation for pecuniary gain. Appellant was communicating an offer of free assistance by attorneys associated with the ACLU, not an offer predicated on entitlement to a share of any monetary recovery. 436 U.S. at 422.

159. See Survey Responses to Question #5, Appendix.
ective. The costs incurred in policing a policy that prohibits all moonlighting might very well exceed the value of the associate’s disputed time to the law firm.\textsuperscript{160} Thus, in order to prevent all moonlighting, a partner might have to spend a considerable portion of his time monitoring associates when he could spend his time more productively by working on matters for clients.

As a contractual matter, a law firm should be able to enforce an antimoonlighting policy as it would enforce any other condition of employment.\textsuperscript{161} An associate who enters into a contract with a law firm that has a restrictive moonlighting policy is not in a particularly good position to complain about the fairness of that policy, unless that policy conflicts with the bar association’s ethical constraints.\textsuperscript{162}

A law firm’s contractual right to restrict or prohibit moonlighting is economically efficient. If a law firm has an antimoonlighting policy, it probably bargains for such a policy with each associate that it hires. More specifically, the firm pays the associate more money so that the associate does not work elsewhere. The law firm makes the decision to pay more because it believes that the extra hours that the associate works for the firm compensate the firm for the premium that it pays the associate. The associate must decide that he profits more if he works for the employer that restricts moonlighting than if he moonlights while working for an employer that permits moonlighting. The restrictive law firm presumably charges its clients more for the associate’s work than the sum of

\begin{footnotesize}
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\item[160.] See W. Klein, supra note 5, at 26.
\item[161.] Cf. In re Capps, 250 Ga. 242, 243, 297 S.E.2d 249, 250 (1982). In Capps an attorney was employed on a full time basis for Brown Transport Corporation, which had a policy prohibiting the attorney from engaging in private practice. Id. While employed by Brown, the attorney incorporated and applied for authority from the ICC to operate a trucking company in competition with his employer. Id. The attorney was disciplined by the Georgia State Bar not for violating company policy but rather for violating the State Bar's rules against an attorney acting adversely toward a client's interest. Id.
\item[162.] Even if the antimoonlighting policy became known to the associate only through reading the law firm's associate manual, the policy could be contractually enforceable. Cf. Weiner v. McGraw Hill, 57 N.Y.2d 458, 443 N.E.2d 441, 458 N.Y.S.2d 193 (1982). In Weiner the New York Court of Appeals held that the defendant employer could not terminate the employee at will, even though the employee had not been hired for a fixed term. Id. Defendant's application for employment incorporated by reference the company's handbook on personnel policies. Id. These policies, which precluded dismissal absent a showing of just and sufficient cause, were found to be part of the contract. Id.
\end{itemize}
\end{footnotesize}
the charges of the firm that permits moonlighting and the associate who moonlights.

Conversely, if uniform ethical standards prevent an associate from moonlighting and his firm does not have a moonlighting policy, economic efficiency decreases.¹⁶³ This decrease occurs because the associate cannot moonlight even when the law firm is not able to maximize its use of his time. Because efficiency decreases, moonlighting should be treated as a contractual problem rather than subjected to a uniform ethical standard.

C. A Partner's Unethical Instructions to An Associate

An associate is confronted with an unpleasant problem when a partner gives him instructions that the associate believes are unethical. Under the ABA Model Code of Professional Responsibility, the associate receives little guidance except for the warning that he may be disciplined for violations of the Model Code of Professional Responsibility.¹⁶⁴ Even if he fears the loss of his job, an associate must comply with the Model Code of Professional Responsibility.¹⁶⁵ Disobeying the instructions of a partner raises different problems.

An associate who disobeys the unethical instructions of a partner is not liable to the partner or to the law firm for any damages that result from his disobedience.¹⁶⁶ However, an associate who disobeys instructions that he believes are unethical risks discharge. In many states, no cause of action is available to an employee who is terminable at will and is discharged for an improper reason.¹⁶⁷ Fur-

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¹⁶⁶ Restatement (Second) of Agency § 411 & comment (d) (1958).

¹⁶⁷ There is a split of authority on whether the discharge of an "at-will" employee as a reprisal for opposition to the employer's unethical or illegal conduct is actionable. In Murphy v. American Home Products Corp., 58 N.Y.2d 293, 448 N.E.2d 88, 461 N.Y.S.2d 232 (1983), an accountant employed by the defendant corporation contended that his discharge was wrongful because it constituted retaliation for his whistle blowing on alleged improprieties of corporate personnel. Id. The New York Court of Appeals held that the cause of action properly had been dismissed because there is no statutory or common law cause of
thermore, the Model Code of Professional Responsibility does not appear to make unethical the discharge of an associate who refuses to follow unethical instructions.\textsuperscript{168}

The new Model Rules do not specifically prohibit a partner from discharging an associate who does not comply with unethical instructions. However, Model Rule 5.1(b) requires that a supervising lawyer make reasonable efforts to ensure that the conduct of the

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168. This author found no cases in which a law firm partner was disciplined by a bar association for dismissing an associate arbitrarily. \textit{But see} Los Angeles County Bar Association, Formal Op. 391 (1981) (an associate who refuses to approve fraudulent billing cannot be discharged for that reason because such conduct makes the participation in fraudulent conduct a condition of the associate’s continued employment) \textit{cited in}, \textsc{Lawyers’ Manual on Professional Conduct} (ABA/BNA) ¶ 801:1704 (1984).

supervised lawyer conforms with the Model Rules of Professional Conduct.\textsuperscript{169} Model Rule 5.2(a) provides that an associate is bound by the Rules of Professional Conduct even though he acted at the direction of another lawyer.\textsuperscript{170} Model Rule 8.4 states that it is professional misconduct knowingly to assist or induce another to violate or to attempt to violate the Rules of Professional Conduct.\textsuperscript{171} Professor Levinson has construed these provisions to mean that it is unethical for a partner to discharge a law firm associate who refuses to follow unethical instructions.\textsuperscript{172}

The main problem for the associate is to determine whether he must behave unethically in order to execute his instructions. Model Rule 5.2(b) attempts to remove some of the pressure on the associate who must make such a determination by providing that "a subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."\textsuperscript{173}

Model Rule 5.2(b) is troublesome for several reasons. First, the Rule makes it much easier for an associate to follow the questionable instructions of a partner. Failure to follow the instructions would violate the associate's duty of obedience to the partner.\textsuperscript{174} Therefore, absent some defense to the violation of the duty of obedience, the partner would be justified if he dismissed the associate. Unless the rules of professional responsibility impose disciplinary

\textsuperscript{169} Model Rules of Professional Conduct Rule 5.1(b) (1983).
\textsuperscript{170} Id. Rule 5.2(a).
\textsuperscript{171} Id. Rule 8.4.
\textsuperscript{172} See supra note 38.
\textsuperscript{173} Model Rules of Professional Conduct Rule 5.2(b) (1983). The comment to Model Rule 5.2 makes it clear that an associate is not relieved of ethical responsibility merely because he follows the instructions of a law firm partner. Even if an associate violated a rule of ethical conduct because he feared that he would lose his job, the associate would be liable for the misconduct, although the court could consider that fact in mitigation of the penalty imposed. The comment to the May 30, 1981, draft of Model Rule 5.2, Model Rules of Professional Conduct Rule 5.2(b) comment (1983), cited the following cases in support of this proposition: In re Mogel, 18 A.D.2d 203, 238 N.Y.S.2d 683 (1963); In re Knight, 129 Vt. 428, 281 A.2d 46 (1971); see In re Lemisch, 321 Pa. 110, 184 A. 72 (1936); In re Goldberg, 321 Pa. 109, 184 A. 74 (1936); see also In re Kiley, 22 A.D. 2d 527, 256 N.Y.S.2d 848 (1965). As pointed out in the comment, all these cases involved situations in which the associate was involved in clearly wrongful conduct. The comment added that there is no case authority to support Model Rule 5.2(b).
\textsuperscript{174} See supra notes 33-39 and accompanying text.
sanctions for failure to report the questionable conduct of the partner, in some states the associate's ability to report such conduct and still maintain a civil action for abusive or wrongful discharge is reduced.\(^\text{175}\) Model Rule 5.2(b) leaves the conscientious associate in a real quandary.\(^\text{176}\) Furthermore, because an associate might be less likely to report questionable ethical practices, Model Rule 5.2(b) might have the effect of further lowering the public's unfavorable opinion of the legal profession.\(^\text{177}\) The Rule might also have a detrimental impact on attorneys' self-perception.\(^\text{178}\)

Finally, Model Rule 5.2(b) fails to account for those particular situations in which an associate is as well equipped as a partner to make ethical decisions. In such cases, deference by the associate to the questionable ethical decisions of a partner is unwarranted. For example, a partner might tell an associate who is skilled in discovery practice to withhold documents on the ground that the docu-


\(^\text{176}\) As Professor Levinson has noted, Model Rule 5.2(b) is troublesome because it introduces the defense of superior orders, which has been asserted by the defendants in various contexts from Nuremberg to My Lai to Watergate—with disastrous results. Levinson, supra note 38, at 852 n.13. See generally United States v. Konovsky, 202 F.2d 721, 730-31 (7th Cir. 1953) (obedience to the orders of a superior does not necessarily negate the specific intent requirement set forth in Screws v. United States, 325 U.S. 91 (1945)); United States v. Ehrlichman, 376 F. Supp. 29, 34-35 (D.D.C. 1974) (conviction of John Ehrlichman, President Nixon's National Security Advisor, for his role in the break-in of Daniel Ellsberg's psychiatrist's office), aff'd, 546 F.2d 910 (D.C. Cir. 1976), cert denied, 429 U.S. 1120 (1977); H. ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1964); T. TAYLOR, NUREMBERG AND VIET NAM: AN AMERICAN TRAGEDY (1970).

\(^\text{177}\) See Burger, The Role of the Law Schools in the Teaching of Legal Ethics and Professional Responsibility, 29 CLEV. ST. L. REV. 377 (1980) (noting that in a 1977 Gallup Poll, the honesty and ethical standards of lawyers were rated lower than members of the clergy, medical doctors, engineers, college teachers, bankers, police, journalists, undertakers, business executives, and building contractors); Frazer, A Few Myths About the Legal Profession, B. LEADER, Nov.-Dec. 1981, at 25; Podgers, The Lawyer's Image—A Problem That Won't Go Away, B. Leader, Nov.-Dec. 1980, at 11. An ABA poll found that 68% of the public believed that attorneys charged more than their services were worth; 60% believed attorneys worked harder for rich clients than for poor ones; and 42% believed that attorneys were "not concerned about the bad apples in the legal profession." Schanberg, What Price a Waiter's Life, N.Y. Times, June 22, 1980, at A27, col. 2. But see Mindes and Acoc, Trichster, Hero, Helper: A Report on the Lawyer Image, 1982 AM. B. FOUND. RESEARCH J. 177 (attorneys believe the public entertains a more unfavorable image of them than it actually does).

ments are not indicated in the formal request for document production. In that situation, an associate who is skilled in discovery can interpret the document request as easily as can the partner.\footnote{179} On the other hand, an associate should most often defer to the decision of a partner regarding client billing.\footnote{180}

Probably the best practical advice for an associate faced with what he believes are unethical instructions is to confront the partner and explain the reasons that he believes the partner's instructions are unethical.\footnote{181} At that point, the partner might agree with the associate and withdraw his previous instructions. If the partner does not relent, the next step for the associate is to discuss the matter with a firm ethics committee or with a senior partner whom the firm has designated as the partner responsible for supervising ethical problems.\footnote{182} In the absence of such a committee or of a designated senior partner, the associate should discuss the matter with another partner in the firm.\footnote{183} If the associate remains convinced that the instruction is unethical and either that the matter is not arguable or that the partner's resolution of the question is not reasonable, Rule 5.2(b) of the Model Rules of Professional Conduct does not permit the associate to acced to the partner's instructions.

\footnote{179. In Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404 (S.D.N.Y. 1978), rev'd in part, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980), a senior partner of the law firm representing Kodak ignored a whispered reminder from an associate of the firm that a crucial document was still available. The trial judge subsequently initiated a criminal investigation regarding the conduct of the senior partner. The partner ultimately pleaded guilty to criminal contempt and was imprisoned for one month and "severe[ly] censured," though not disbarred, for failure to produce the document. Wessell, Institutional Responsibility: Professionalism and Ethics, 60 Neb. L. Rev. 505, 506-09 (1981); New York City Bar Unit Criticized Over Discipline, N.Y. Times, Feb. 17, 1979, at 26, col. 2.}

Because the associate decides under Model Rule 5.2(b) what is an "arguable question" and what is a "reasonable question," Model Rule 5.2(b) could provide an associate who is skilled in discovery with sufficient flexibility to determine whether to defer to the partner's decision.

\footnote{180. See infra text accompanying notes 205-06.}

\footnote{181. Seventy-two percent of the associates in the Illinois survey indicated that when they disagree with a partner's ethical decision they generally discuss the matter with the partner and reach an agreement. An additional 21% discuss the matter with the partner and sometimes disagree with the partner. Survey Responses to Question \#18, Appendix; see also Committee on Professional Judicial Ethics of the Association of the Bar of the City of N.Y., Op. 82-79 (1983).}

\footnote{182. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 comment (1983).}

\footnote{183. J. Freund, LAWYERING—A REALISTIC APPROACH TO LEGAL PRACTICE 113 (1979).}
instructions. In addition to refusing to obey the instructions, the associate may be required to report the matter to the appropriate bar association or court. The following discussion offers common situations in which the associate receives instructions from a law firm partner that he believes are unethical.

1. Lack of Time or Expertise

A major difficulty for the law firm associate arises when a partner assigns the associate to a job for which he lacks either the time, the expertise, or the ability to acquire the expertise in the available time. Many associates, apparently fearful of crossing their employers, will make their best effort at what turns out to be an impossible task. Very few associates have sufficient confidence to tell partners consistently that they are too busy to handle a matter or that they do not have the time to acquire the expertise necessary to do an adequate job on a project. Lack of time, knowledge, or

184. Model Code of Professional Responsibility DR 1-103(A) & EC 1-4 (1981). Rule 8.3(a) of the proposed Model Rules of Professional Conduct does not require that an associate report all ethical violations. It requires only that a lawyer report "a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Model Rules of Professional Conduct Rule 8.3(a) (1983). The comment to the Rule states that "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. Id. Rule 8.3 comment. The comment to Model Rule 8.3 adds that the old rule was virtually unenforceable. Id. Thus, it was thought that a change was necessary to limit reporting to "those offenses that a self-regulating profession . . . must vigorously endeavor to prevent." Id. For further evidence that Disciplinary Rule 1-103 has become a dead letter, see Brill, Wilkie Farr's Cover-up, The American Lawyer, Aug. 5, 1981, at 4 (the legal profession is reluctant to report disciplinary violations committed by fellow attorneys as required by DR 1-103). In the "Wilkie Cover-up," partners of a major New York law firm dismissed two associates for billing to clients of the firm's hours actually spent moonlighting by the two attorneys. Id. According to Brill, such indifference to the demands of the Code makes a mockery of a profession supposedly representing to the public that it will uphold honor and justice. Id.

185. Eighty-nine percent of the associates in the Illinois survey stated that at some time they had felt that they lacked sufficient knowledge or expertise to handle an assignment. Survey Responses to Question #21, Appendix. Eighty-three percent of the associates stated that at some time they had felt that they lacked sufficient time to handle a particular assignment. Survey Responses to Question #24, Appendix.

186. Of those associates in the Illinois survey who felt that there were times when they lacked sufficient knowledge or expertise to handle an assignment, 3% never expressed this problem to the partner giving them the assignment, 28% expressed it rarely, and 57% expressed it only occasionally. Survey Responses to Question #22, Appendix. Similarly, of those associates who felt that there were occasions when they lacked sufficient time to han-
expertise may prevent the associate from performing the assignment to his satisfaction. In inferior work that is produced under these conditions can produce liability for negligence on the part of both the law firm and the associate to the client. Disciplinary action against both the associate and the law firm for unethical conduct also is possible.

Although the law firm owes a fiduciary duty to the client, its interest is not coextensive with the interest of the client insofar as the firm seeks to maximize its own profit. The associate is essentially trapped between his duty to the firm and his duty to the client. Arguably, an associate confronts the dilemma of whether to follow the instructions of the law firm or to serve what the associate believes are the best interests of the client only when the law firm is acting unethically by placing its interest before the interest of its client. In such a situation, the associate’s duty to the client under the Model Code of Professional Responsibility, and perhaps his duty to the profession as a whole, should override his duty of loyalty to the law firm.

One can envision a situation in which the law firm decides that the associate has spent enough time on a matter and that the work product is adequate. The associate might feel that the client has not been served properly because the quality of the work is not commensurate with the associate’s capabilities. Below, I discuss the issue of whether the associate is subject to civil or disciplinary liability for negligence, because of his lack of time or expertise, when acting under the direction of a partner who is or who should be aware of the associate’s problem.

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187. Those associates who stated that there were occasions when they lacked knowledge or expertise to handle an assignment were asked if their lack of knowledge or expertise when they initially received an assignment prevented them from performing the assignment to their satisfaction. The responses were as follows: never-28%, rarely-46%, occasionally-18%, frequently-1%, and often-5%. Survey Responses to Question #23, Appendix.

Those associates who stated that there were occasions when they lacked sufficient time to handle an assignment also were asked how often the lack of time to handle an assignment prevented them from performing the assignment to their satisfaction. The responses were as follows: never-12%, rarely-50%, occasionally-31%, frequently-2%, and often-4%. Survey Responses to Question #26, Appendix.
a. Civil Liability for the Associate’s Negligence

Under the doctrine of respondeat superior, the law firm is liable for the negligence of an associate when the associate is acting within the scope of his employment.\textsuperscript{188} In addition, a law firm partner can be independently liable for the negligence of one of its associates if the partner was negligent in instructing or supervising the associate.\textsuperscript{189} Thus, if a partner instructs an associate to research the matter and to give him an answer in an hour, and the partner knows or should know, or the associate tells him, that the allotted time is insufficient to research the subject properly, the partner is liable to the client for the associate’s negligent performance of his task.

Correspondingly, the associate who lacks sufficient time to handle a given assignment properly because the partner has over-loaded him with work is nonetheless liable to the client for negligent performance of that assignment.\textsuperscript{190} In short, lack of time or expertise is not a sufficient excuse to relieve an associate of civil liability, even if he is acting under the express direction of a law firm partner.

b. Disciplinary Liability for the Associate’s Negligence

An attorney may also be subject to discipline for neglecting a matter,\textsuperscript{191} for failing to prepare adequately,\textsuperscript{192} or for handling a

\begin{itemize}
\item \textsuperscript{188} See supra note 21 and accompanying text.
\item \textsuperscript{189} R. Malen & V. Levit, supra note 20, ¶ 35.
\item \textsuperscript{190} See Model Code of Professional Responsibility DR 6-101(A)(2), (3)(1981); see also In re Bartlett, 283 Or. 487, 584 P.2d 296 (1978); In re Reimnller, 213 Or. 680, 325 P.2d 773 (1958); In re Norlin, 104 Wis. 2d 117, 310 N.W.2d 789 (1981) (the demands and pressures of a busy practice were no excuse for an attorney's neglect of his client's needs).
\item \textsuperscript{191} Model Code of Professional Responsibility DR 6-101(A)(3) (1981); see Annot., 96 A.L.R. 2d 823 (1964). For the purpose of determining compliance with the ABA Code of Professional Responsibility, the ABA defines neglect as follows:
\begin{quote}
Neglect involves indifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disregard for the responsibility owed to the client. The concept of ordinary negligence is different. Neglect usually involves more than a single act or omission. Neglect cannot be found if the acts or omissions complained of were inadvertent or the result of an error of judgment made in good faith.
\end{quote}
\item ABA Comm. on Professional Ethics and Grievances, Informal Op. 1273 (1973); see Gaudineer, Ethics and Malpractice, 26 Drake L. Rev. 88, 107, 114-15 (1976-1977) (favors clear distinction between the standard of care applicable in malpractice actions and that
matters without possessing adequate legal knowledge and skill.\textsuperscript{193} Disciplinary problems arise when a partner assigns work to an associate, and the associate knows he lacks both the knowledge or skill necessary to handle the matter competently and the time in which to acquire such knowledge or skill. Similarly, an associate who is unable to devote enough time to a matter because of other cases assigned to him by the law firm might also be subject to discipline if he neglects the matter.

Neither the current ethical rules, which are contained in the ABA Model Code of Professional Responsibility, nor the proposed ABA Model Rules of Professional Conduct indicate that an associate should be treated differently from partners regarding negligent work. On the contrary, Official Note One to Disciplinary Rules 6-101 and 6-102 of the Model Code of Professional Responsibility suggests that every lawyer faces the complexities of modern practice and must struggle continually to maintain the requisite degree of competence.\textsuperscript{194}

Similarly, Rule 5.2(a) of the Model Rules of Professional Con-
duct requires that an attorney follow the Rules of Professional Conduct even though he acts at the direction of another. As already noted, however, Rule 5.2(b) states that an associate does not violate the Rules of Professional Conduct if he acts in accordance with a supervisory attorney's reasonable resolution of an arguable question of professional duty. Nevertheless, the problems posed by lack of time or by lack of expertise probably fall outside the scope of those arguable questions to which the associate can defer to the judgment of the law firm partner. In particular, the partner is not in as good a position as the associate to know the associate's own limitations. Moreover, the partner might not be able to judge the situation as objectively as the associate. The partner's interest in maximizing the profit of the law firm, which might be greater than the interest of the associate who receives a fixed salary and who is only indirectly affected by modest changes in the profits of the firm, might diminish the partner's objectivity.

In sum, the associate is in a better position than the law firm partner to evaluate his knowledge of a subject area and to evaluate the time he has to devote to a problem. Therefore, in these situations, the associate should not escape liability merely because he has followed the instructions of a partner. If the associate's conduct is an ethical violation, however, the tribunal that is determining the sanction for the associate's conduct might reduce the severity of the sanctions if the associate has followed the instructions of a partner.

2. Excessive Billing for the Associate's Work

The associate's duty to the law firm can conflict with his duty to the client in the area of fees. A law firm often bills on the basis of the hourly rate of an attorney, which varies depending on the skill and experience of the attorney and the overhead of the firm, multiplied by the number of hours the attorney spends on the task.

196. Id. Rule 5.2(b).
197. See supra note 173.
198. Ackley, Let's Throw Out the Hourly Basis for Fees, 49 A.B.A.J. 76 (1963); Cantor, Ethics & Economics in Hourly Fees, 50 A.B.A.J. 951 (1964); Fees and Billing, The Lawyer's Handbook (ABA) C3-1 to C3-33 (1975); Gerhart, The Art of Billing Clients, Law Office Economics and Management Manual (Callaghan) § 25.0, Article B (June 1981); McCarty,
The associate reports to the law firm the number of hours he works on a particular matter. The law firm fixes the hourly billing rate of the associate,\(^\text{199}\) calculates the total fee, and makes any adjustment that it considers appropriate. 

The typical law firm requires that the associate bill from 1600 to 2000 hours per year.\(^\text{200}\) Therefore, the associate, in order to maintain his position, must find client matters for which he can bill the necessary amount of time. Problems arise when the associate spends some portion of the time on activity that is not productive or when the associate has had an unproductive day and does not perform at his usual level.\(^\text{201}\) The problems are compounded when firms have policies requiring their associates to report all of the time that they spend on a matter.\(^\text{202}\) These law firms make the appropriate adjustments if they determine that the hours spent were excessive because of the associate's experience, the billing rate, and the complexity of the problem. Moreover, the associate's interest in meeting his quota of billable hours is advanced if he reports all of the hours that he works.

An ethical problem arises when the law firm fails to make the appropriate adjustment when billing the client. Disciplinary Rule 2-106(A) provides that "[a] lawyer shall not enter into an arrangement for a charge or collect an illegal or clearly excessive fee."\(^\text{203}\) If an associate knows that the law firm habitually fails to make the appropriate adjustment in billing the client, he arguably is a par-

\(^\text{199}\) At larger law firms in large cities, the hourly billing rate of the associate is roughly equal to twice the associate's salary, divided by 1000. Thus, an associate earning $40,000 will be billed out at about $80 per hour. Brill, *The Law Firm of the Future*, THE AM. LAWYER, Nov. 1980, at 47; Cantor, *Modern Drive Toward Cost-Effectiveness and Public Responsiveness*, 14 F. 420, 421 (1979).


\(^\text{201}\) In the Illinois survey the associates were asked how often they reduced the amount of time they billed to a client because they were not as productive in the time spent as they usually were. The responses were as follows: never-9%, rarely-14%, occasionally-46%, frequently-13%, and often-18%. Survey Responses to Question #28, Appendix.

\(^\text{202}\) Forty-one percent of the associates who responded to the Illinois survey work for law firms that have a policy requiring associates to bill to a client all the time they spend working for a client on a particular matter. Survey Responses to Question #27, Appendix.

participant in an arrangement to charge an excessive fee. On the other hand, when the firm requires full reporting, both the associate’s duty of loyalty and his self-interest dictate that he report all the hours that he works on a particular matter.

In this type of situation, particularly if the associate is unsure whether the fee is excessive, the associate usually should defer to the decision of the partner or law firm. Both are generally positioned better than the associate to evaluate the factors specified in Disciplinary Rule 2-106(B) and to determine a reasonable fee. In particular, the law firm can better evaluate the firm overhead, the value of the service to the client, the fee customarily charged for the service, and the difficulty of the questions.

A similar problem can arise if an associate feels that the work that he performs on a matter is unnecessary or merely duplicates the work of another associate. Again, the law firm or partner is in a better position to evaluate the need for the associate’s work and the value of that work to the client. Furthermore, because the client may refuse to pay for unnecessary work or takes his business elsewhere, the market will judge the managerial abilities of the partner who is handling the case.

204. See Los Angeles County Bar Association, Formal Op. 391 (1981) (it is fraudulent and a means of charging unreasonable fees for a law firm to bill out secretarial and paralegal time at the rate normally charged for an attorney), cited in Lawyers’ Manual on Professional Conduct (ABA/BNA) ¶ 801:1704 (1984). The opinion further stated that an associate who refuses to approve fraudulent billing cannot be discharged for that reason because such conduct makes the participation in fraudulent conduct a condition of the associate’s continued employment. Id.; see also Model Code of Professional Responsibility DR 1-102(A)(2) (1981).

205. Model Rule 1.5 is substantially similar to Disciplinary Rule 2-106. According to this disciplinary rule, the following factors should be considered as guides in determining whether a fee is excessive:

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

If a firm’s bills are regularly excessive, the firm will lose clients to other firms that charge at a lower rate for the same quality of service. Even though the market might protect clients in general, individual clients can be hurt by excessive fees. Therefore, an associate cannot defer to a partner or to the law firm on all billing issues. In those situations in which the associate knows that the firm is not adjusting properly the time that he submits, he can discuss the matter with the head of the firm’s billing committee or with some partner other than the one in charge of the billing. Ultimately, even if the amount the firm bills the client is not the associate’s decision, and even if the associate cannot change the improper billing by internal firm discussion, the associate is under an obligation to report billing that he knows is excessive to the appropriate bar association fitness committee.\textsuperscript{206}

V. Conclusion

The law firm associate owes fiduciary and contractual obligations to the law firm that employs him,\textsuperscript{207} to the client on whose case he is working,\textsuperscript{208} and to the public.\textsuperscript{209} In resolving an associate’s ethical problem, the associate’s interest is important if the interests of the client and the public are marginal or nonexistent, and if the associate does not breach a fiduciary or a contractual obligation to the law firm.\textsuperscript{210} In the absence of code provisions governing a specific issue, the courts should resolve the associate’s ethical problem by formulating rules that are based on the relative importance of the interests in the particular situation.\textsuperscript{211}

In formulating rules governing an associate’s ethical behavior, the Model Rules of Professional Conduct employ the same mode of analysis as found in prior case law: the Model Rules balance the competing interests that are affected by the associate’s conduct.\textsuperscript{212} However, the Model Rules also have made some important sub-

\textsuperscript{207} See supra notes 1-39 and accompanying text.
\textsuperscript{208} See supra notes 40-53 and accompanying text.
\textsuperscript{209} See supra notes 54-62 and accompanying text.
\textsuperscript{210} See supra notes 93, 99-100, 120, 123 and accompanying text.
\textsuperscript{211} See supra notes 63-123 and accompanying text.
\textsuperscript{212} See supra note 100 and accompanying text.
stantive changes, such as the removal of the allegedly ambiguous "appearance of impropriety test." The changes could lower the attorney's ethical standards when the attorney's decision is arguable.213

Model Rule 5.2(b) is also troublesome. This Rule absolves an associate of liability for ethical misconduct when he follows the arguable ethical decision of a law firm partner,214 but it fails to account adequately for those situations in which the associate has more knowledge or more expertise than the partner in a particular subject, and therefore is the better judge of an ethical issue.215 Model Rule 5.2(b) also fails to consider situations in which an associate may be more objective than a law firm partner.216 Finally, Model Rule 5.2(b) could have the unintended effect of reducing the associate's ability to make ethical decisions without fear of being fired.217

213. See supra note 88, 140-41 and accompanying text.
214. See supra note 173 and accompanying text.
215. See supra notes 179-80, 196 and accompanying text.
216. See supra note 196 and accompanying text.
217. See supra notes 174-75 and accompanying text.
The following survey was sent to 201 law firm associates in Illinois. The associates' names were drawn from *Martindale-Hubbell Law Directory* (11th ed. 1983). An effort was made to equate the percentage of surveys sent to associates at various sized firms with the percentage of similarly sized firms that are found in Illinois. Thus, 84% of the surveys were sent to associates at firms with 1-10 attorneys, 13% of the surveys were sent to associates at firms with 11-40 attorneys, and 3% of the surveys were sent to associates at firms with more than 40 attorneys. As can be seen from the response to question #2, the distribution of the firm size of the associates actually responding to the survey was very similar to the distribution of the firm size of the associates who were mailed a copy of the survey.

There were 112 surveys returned to the author; of those returned, 110 were used. Two survey responses were counted even though the respondents stated that since the 1983 edition of *Martindale-Hubbell* had been published, they were no longer associated with their respective firms. (These respondents stated that they were answering the questions based solely on their experience as associates.) In some instances, rounding prevents the total of the responses from reaching 100%.

**SURVEY**

1. How old are you?
   (a) 25 or under 2% (b) 26-29 33% (c) 30-35 48%
   (d) 36-39 12% (e) 40 or over 5%

2. How many attorneys (partners and associates) are in your firm?
   (a) 1-10 82% (b) 11-40 12% (c) More than 40 6%

3. Does your law firm have a policy on your doing legal work after hours for clients of your own (“moonlighting”)?
   (a) yes 54% (b) no 46%

4. If you answered yes to question #3 what is that policy:
   (a) moonlighting is permitted 7%
   (b) moonlighting is forbidden* 65%
   (c) moonlighting is restricted 28%
*(In a few circumstances, the associate's response to question #5 showed that moonlighting was actually forbidden by his law firm rather than restricted. Therefore, the survey response was altered to be consistent with most associates who described similar restrictions but answered question #4 by stating that moonlighting was forbidden. For example, many smaller firms permit the associate to work for whomever he wants but the client is viewed as a client of the firm and the associate is not considered to be moonlighting when working for that client.)

5. If you answered (c) to question #4, briefly describe the nature of the restrictions.
Responses included: "Must share profits with firm," "limited to family," "limited to family and friends," "only if without pay," "must not consume an inordinate amount of time," "cannot compete with firm," "only with permission of law firm partner."

6. Do you ever moonlight (by doing legal work)?
   (a) yes 41% (b) no 59%

7. If you answered "yes" to question #6, have you ever received pay for moonlighting?
   (a) yes 32% (b) no 68%

8. If you answered "yes" to question #6, have you ever moonlighted for anyone other than your family?
   (a) yes 58% (b) no 42%

9. If you answered "yes" to question #6, have you ever moonlighted for anyone other than your family and friends?
   (a) yes 11% (b) no 89%

10. Does your law firm have a policy on whether and to what extent you are permitted to invest in client securities (i.e., stocks, bonds, etc.)?
    (a) yes 15% (b) no 85%

11. If you answered "yes" to question #10, what is that policy?
    (a) investments are permitted 25%
    (b) investments are forbidden 37.5%
    (c) investments are restricted 37.5%
12. If you answered (c) to question #11, briefly describe that policy:
Responses included: “nothing unethical or even approaching violation of securities law,” “permitted only with prior approval of principal or consultation with client,” and “allowed if a ‘reputable’ client.”

13. Since you have been working for your law firm, have you ever invested in any securities?
   (a) yes 36%    (b) no 64%

14. If you answered “yes” to question #13, what if anything, did you do after making your decision to invest to find out if your law firm had confidential information regarding the client which, when made public, would likely influence the price of the securities?
   (a) nothing 63%
   (b) checked files 6%
   (c) checked with partner 17%
   (d) other (describe) 14%

15. If you answered “yes” to question #13, have you ever invested in securities of a client of your law firm?
   (a) yes 12%    (b) no 88%

16. If you answered “yes” to question #15, have you ever purchased the security of a client whose stock trades on other than a national securities exchange?
   (a) yes* 60%    (b) no 40%
*(Several respondents incorrectly answered question #16 because inspection revealed that 10 people responded to question #16, yet only 5 actually answered “yes” to question #15. Therefore, the percentage was calculated using only those responses in which question #15 was actually answered “yes.”)

17. Have you ever discussed an ethical problem with a partner?
   (a) yes 98%    (b) no 2%

18. If you answered “yes” to question #17, what do you generally do when you disagree with a partner’s ethical decision?
   (a) nothing 4%
   (b) Discuss with partner and usually we end up agreeing 72%
(c) Discuss with partner and we end up disagreeing 2%
(d) Discuss with partner and sometimes we end up disagreeing 19%
(e) Withdraw from case 0%
(f) Other 4%

19. If you answered "yes" to question #17, have you ever withdrawn from a case because of an ethical disagreement with a partner?
   (a) yes 14%  (b) no 86%

20. In August 1983, the American Bar Association approved the latest version of the Model Rules of Professional Conduct of attorneys. (Model Rules do not become binding until adopted by individual states.) Rule 5.2 of the Model Rules provides as follows:

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

   What is your attitude regarding this provision:
   (a) strongly disagree 7%  (b) disagree 10%
   (c) neutral 16%  (d) agree 59%
   (e) strongly agree 7%

21. Have you ever felt you lacked sufficient knowledge or expertise to handle an assignment?
   (a) yes 89%  (b) no 11%

22. If you answered "yes" to question #21, how often have you expressed to a partner that you thought you lacked sufficient knowledge or expertise to handle an assignment?
   (a) never 3%  (b) rarely 28%  (c) occasionally 57%
   (d) frequently 12%

23. If you answered "yes" to question #21, how often do you feel that your lack of knowledge or expertise when you initially received an assignment prevented you from performing the as-
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23. Have you ever felt that you lacked sufficient time to handle a particular assignment?
   (a) yes 83%  (b) no 17%

24. Have you ever felt that you lacked sufficient time to handle a particular assignment?
   (a) never 28%  (b) rarely 46%  (c) occasionally 19%
   (d) frequently 1%  (e) often 5%

25. If you answered “yes” to question #24, how often have you expressed to a partner that you thought you lacked sufficient time to handle an assignment?
   (a) never 9%  (b) rarely 36%  (c) occasionally 46%
   (d) frequently 7%  (e) often 2%

26. If you answered “yes” to question #24, how often do you feel that the lack of time you had to handle an assignment has prevented you from performing the assignment to your satisfaction?
   (a) never 12%  (b) rarely 50%  (c) occasionally 31%
   (d) frequently 2%  (e) often 4%

27. Does your law firm have a policy requiring associates to bill to a client all the time they spend working for a client on a particular matter?
   (a) yes 41%  (b) no 59%

28. How often do you reduce the amount of time you bill to a client because you are not as productive in the time you spent as you usually are?
   (a) never 9%  (b) rarely 14%  (c) occasionally 46%
   (d) frequently 13%  (e) often 18%