

CLIENT CHOICE, CONTRACTUAL RESTRAINTS, AND THE MARKET FOR LEGAL SERVICES*

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I. INTRODUCTION

The freedom of clients to discharge their lawyers at any time, with or without cause, greatly facilitates competition among lawyers.¹ An era of lawyer mobility that has destabilized law firms and rewarded lawyers able to command the loyalty of their clients rests on the simple and largely unquestioned premise that clients should be free to discharge their lawyers, with or without cause and even, under most circumstances, in contravention of contract.²

This Article explores the norm of client choice and its impact on the market for legal services. It discusses the historical foundations of the norm, the policy reasons for and against the freedom accorded to clients to change their lawyers at any time, and ways in which the exercise of client choice is limited by application of other principles of law and ethics. For a comparative perspective, it also looks to standards of medical ethics to see the relative roles of consumer choice over service providers in the two professions.

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1. "It is now uniformly recognized that the client-lawyer contract is terminable at will by the client. For good reasons, poor reasons, or the worst of reasons, a client may fire the lawyer." CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.5.2, at 545 (1986).

2. See generally ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY ch. 1 [hereinafter HILLMAN, LAWYER MOBILITY] (discussing the rise of lawyer mobility and its effect on law firms).

II. LEGAL SERVICES AND CLIENT CHOICE

A. *The Foundations of Client Choice*

At the core of client choice is the premise that an individual has a right to legal counsel and that “choice” necessarily suggests alternatives from which to choose. From a constitutional perspective, however, an express right to legal representation is limited, with some exceptions, to criminal proceedings³ and is implemented through a standard of effective representation rather than, at least in cases of court-appointed counsel, maximizing choices available to the defendant.⁴

Beyond criminal prosecutions or the assertions of constitutional rights, the right to a lawyer acting as a representative is more attenuated but nevertheless generally accepted with little question.⁵ In civil cases, a right to counsel may exist by virtue of the Fifth Amendment’s due process clause,⁶ but an extension of this right to include effective assistance of counsel generally has been limited to immigration cases.⁷

Just as a constitutional right to counsel does not create a corresponding constitutional right to effective assistance of counsel

3. The Sixth Amendment to the United States Constitution provides, in part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his *defence*.”

4. Implicit in the Sixth Amendment’s right of counsel is a standard that defendant is entitled to the effective assistance of counsel. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 684-87 (1984).

5. Even in the limited circumstances in which using a lawyer as spokesperson is expressly restricted, there is nothing to stop the person in need of assistance from consulting with an attorney. This often happens with small claims proceedings. The website of the Oregon State Bar, for example, notes “you must have special permission from the judge to bring a lawyer with you to small claims court” but adds that a party is free to use a lawyer to prepare for the proceeding. Oregon State Bar, Small Claims Court, <http://www.osbar.org/public/pamphlets/smallclaims.html> (last visited Oct. 12, 2007).

6. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970). The Court noted:

We do not say that counsel must be provided at the [hearing relating to the termination of welfare benefits], but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing.

Id.; *see also* WOLFRAM, *supra* note 1, § 14.5, at 807 (“Litigants are normally entitled to retain a lawyer to represent their interests in both civil court actions and administrative proceedings, but government has no general obligation to supply counsel.”).

7. *See, e.g., Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 374-75, 377 (3d Cir. 2003); *see also* Nelson v. Boeing Co., 446 F.3d 1118, 1120, 1122 (10th Cir. 2006) (although Title VII allows courts to appoint counsel at the request of a litigant, it does not create a right to effective assistance of counsel).

(with the exception of criminal and immigration proceedings), the right to counsel does not necessarily entail a right to a *specific lawyer* chosen by the party seeking representation. Nevertheless, when a party is not limited by the constraints of a process yielding court-appointed counsel and is prepared to pay for legal representation, the largely unchallenged assumption is that the party can select as a lawyer whomever she wishes.

That said, a variety of circumstances may impede the exercise of client choice, with the result that the client is unable to retain her preferred lawyer. The lawyer may be uninterested in the matter, have conflicts (schedule or client) that preclude representation, doubt the potential client's ability or willingness to stay current in fee payments, or for some other reason elect not to establish a professional relationship with the potential client. In short, there are no guarantees that the lawyer of first choice is the lawyer that the client will eventually have.

If allowed, contractual restraints on competition may be another reason why the lawyer of first choice is not available. An example of such a restraint would be a restrictive covenant in a law firm's partnership agreement that prohibits a departing lawyer from competing with the firm following withdrawal. For reasons discussed below, however, contractual restraints on competition among lawyers are prohibited in virtually all jurisdictions.⁸ Because the prohibitions are implemented through norms of legal ethics rather than by operation of statutory or common law, they apply only to lawyers, and, as will be discussed later, other professions (notably the medical profession) may be more tolerant of restrictive covenants.⁹

B. Legal Ethics and Client Choice

1. Solidifying the Standard: The Ethics Codes and Client Choice

Because the lawyer-client relationship is personal in nature and dependent on the client's trust in the lawyer,¹⁰ both the Model Code¹¹ and the Model Rules¹² mandate lawyer withdrawal upon discharge by a

8. See *infra* text accompanying notes 34-35.

9. See *infra* text accompanying notes 76-80.

10. See Mark H. Epstein & Brandon Wisoff, Comment, *Winding Up Dissolved Law Partnerships: The No-Compensation Rule and Client Choice*, 73 CAL L. REV. 1597, 1604 (1985) (“[W]ithout complete confidence in the attorney, the client’s decision to follow the attorney’s instructions or to execute the prepared documents is impaired.”).

11. MODEL CODE OF PROF’L RESPONSIBILITY DR 2-110(B)(4) (1986).

12. MODEL RULES OF PROF’L CONDUCT R. 1.16(a)(3) (2007); see also RESTATEMENT OF THE LAW GOVERNING LAWYERS § 44(1) (Tentative Draft No. 5, 1992) (“A client may discharge a lawyer at any time.”).

client.¹³ In theory, the client's power to choose, discharge, or replace a lawyer borders on the absolute.¹⁴ Neither the firm nor any of its members may claim a possessory interest in clients. As one court stated, "[a]lthough the firm may refer to clients of the firm as 'the firm's clients,' clients are not the 'possession' of anyone, but, to the contrary, control who will represent them."¹⁵

Even a contract purporting to bind the client to a lawyer or a firm is terminable at the will of the client.¹⁶ Lawyers and clients most frequently litigate this issue when the contract involves a contingent fee and the client discharges the attorney prior to the occurrence of the contingency.¹⁷ From the discharged lawyer's perspective, removal without cause under these circumstances may seem harsh and unfair. Fairness to lawyers, however, is a policy consideration subordinated to the right of clients to choose and change their legal representatives.¹⁸

The ease with which clients may change lawyers and law firms promotes competition within the market for legal services and facilitates grabbing and leaving by lawyers changing firms with client portfolios in hand.¹⁹ If constraints on grabbing and leaving exist, the principle of

13. Curiously, the California rule omits client discharge as a reason for mandatory withdrawal. *See* CAL. RULES OF PROF'L CONDUCT R. 3-700(B) (2005). One commentator has called this inexplicable. *See* WOLFRAM, *supra* note 1, § 9.5.2, at 546 n.43.

14. The right of clients to choose their lawyers, of course, is not absolute. *See, e.g.,* Howard v. Babcock, 863 P.2d 150, 158-59 (Cal. 1993).

Nor does the attorney have the duty to take any client who proffers employment, and there are many grounds justifying an attorney's decision to terminate the attorney-client relationship over the client's objection. . . . Further, an attorney may be required to decline a potential client's offer of employment. . . . For example, the attorney may have a technical conflict of interest. . . . Finally, the client in the civil context, of course, ordinarily has no "right" to any attorney's services, and only receives those services he or she can afford.

Id.

15. Kelly v. Smith, 611 N.E.2d 118, 122 (Ind. 1993).

16. *See* WOLFRAM, *supra* note 1, § 9.5.2, at 545-46. Similarly, economic disincentives imposed on a client in the event of a discharge encounter ethics difficulties. *See, e.g.,* Fla. Bar v. Doe, 550 So. 2d 1111, 1111-13 (Fla. 1989) (directing the private reprimand of a lawyer whose contingent fee contract included a "discharge clause" requiring the client to pay the lawyer the greater of \$350 per hour for all time spent on the case or forty percent of the greatest amount offered in settlement).

17. *See* WOLFRAM, *supra* note 1, § 9.5.2, at 546-47.

18. *See, e.g.,* Fracasse v. Brent, 494 P.2d 9, 13 (Cal. 1972) (stating that the interests of clients are superior to the interests of attorneys).

19. The phrase "grabbing and leaving" is often used in discussions of lawyer mobility. As used in this Article, it refers to the taking of clients from a firm by a former member of the firm. *See, e.g.,* Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX. L. REV. 1, 5 (1988). Other commentators have used the "grabbing" terminology to refer to attempts by partners to extract higher portions of profits at the expense of their co-partners.

client choice requires that they be founded on a premise other than the disproved notion that law firms have the right to “possess” their existing clients.²⁰

2. Ethics Opinions and the Evolution of the Legal Profession’s Culture: The Case of Restrictive Covenants

Because attorneys cannot bind clients to their services by contract, an enforceable agreement precluding competition by a partner who withdraws from a firm would prove an effective alternative restraint on grabbing and leaving. Such an agreement would not only discourage withdrawals but would also deny clients the ability to choose between the firm and the withdrawing partner who previously represented them. As private ordering arrangements between members of a firm, such contracts would allow lawyers to accomplish indirectly what is disallowed by established standards of legal ethics, discussed above, that implement the norm of client choice by allowing clients to hire and fire lawyers at will.

Norms of legal ethics, however, clearly preclude the use of restrictive covenants as antigrabbing devices.²¹ Significantly, the prohibitions initially were developed rather quietly through the discrete procedure employed for ethics opinions, formal and informal, rather than through the more transparent process used for the Model Rules and Model Code. Moreover, the early opinions that planted the seed for the prohibition were rendered before the present era of intense competition in the market for legal services. Law firms were comparatively stable, lawyer mobility was limited, and choices available to clients were far more restricted than they are today.

To begin, in 1961 the American Bar Association’s Committee on Professional Ethics issued Formal Opinion 300, which considered as a case of first impression whether a law firm could include a provision in an employment contract with an associate that would prohibit the associate from practicing law in the city and county for a period of two

See, e.g., Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry Into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 321 (1985).

20. *Cf. Summary, Constructive Trust Claim Is Dismissed in Law-Firm Breakup*, 206 N.Y. L.J. 21 (1991) (discussing a case where the court rejected the imposition of a constructive trust on profits from clients taken from a firm because “clients are not merchandise”). *But cf. Hogan v. Morton*, No. 03A01-9206-CH-00214, 1993 Tenn. App. LEXIS 186, at *20 (Tenn. Ct. App. 1993) (rejecting withdrawing lawyer’s claim of interference with business relationships because relationships of client were with the firm rather than with the lawyer).

21. *See infra* notes 34-35 and accompanying text.

years after termination of employment.²² The obvious purpose of the clause was to preclude an associate from leaving and taking clients from the firm. The Committee wasted no time in concluding the provision would be an “unethical” restrictive covenant.²³ Although the opinion acknowledged a role for restrictive covenants in commercial transactions, the Committee took some care to distinguish professional from business activity: “Clients are not merchandise. Lawyers are not tradesmen. They have nothing to sell but personal service. An attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status.”²⁴ Thus, in the Committee’s view, a contractual restraint on competition is nothing more than an attempt to “barter in clients” that cannot be squared with the ethics norms of the profession.

This language, standing alone, might suggest the Committee’s principal concern was to facilitate a client’s free choice of a lawyer. Further statements in the opinion, however, reveal a contrary intention. Relying upon the Canons’ prohibitions against “encroachment” on employment and solicitation, the opinion concluded that a “former employee of a lawyer or law firm would be bound by these canons to refrain from any effort to secure the work of clients of his former employer.”²⁵ The statement offers a very revealing insight into the culture of the profession as of the early 1960s, when competition was unsavory and, therefore, protections such as restrictive covenants were unnecessary to protect the interests of law firms.

Thus, under the standards of 1961 as outlined in Formal Opinion 300, restrictive covenants are improper because they are not needed; clients cannot be bartered between a firm and its attorneys because the Canons presume that they belong to the firm.²⁶ Grabbing and leaving, in short, is unethical, a point the Committee reaffirmed the following year in an informal decision that termed unethical a restrictive covenant preventing a departing associate from working for his former firm’s clients.²⁷

Although Formal Opinion 300 concerned restrictive covenants applicable to associates, the Committee’s later informal decision hinted

22. ABA Comm. on Prof’l Ethics, Formal Op. 300 (1961).

23. *See id.*

24. *Id.*

25. *Id.* A single member of the Committee dissented. He reasoned that under circumstances in which it would be unethical for the associate to take clients from the firm, a restrictive covenant is an effective means of protecting the firm and clients against such improper conduct. *Id.*

26. *Id.*

27. *See* ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 521 (1962).

that restrictive covenants may be permissible in partnership agreements, because partners stand “on an equal footing and we believe restrictive covenants within reasonable and legal limits as between the partners do not involve any questions of ethics.”²⁸ Just a few years later, however, the Committee repudiated this suggestion in Informal Opinion 1072, which concluded that restrictive covenants involving partners are also improper.²⁹ Even though this opinion’s conclusion has important implications for grabbing and leaving, its underlying reasoning may have even greater significance. After stating that Formal Opinion 300 had “like application to partnerships,”³⁰ the Committee went on to quote the earlier opinion’s condemnation of attempts to barter in clients, but failed to note the opinion’s express assumption that the Canons prohibit a law firm member from withdrawing and competing for the firm’s clients. The opinion concluded that “attorneys should not engage in an attempt to barter in clients, nor should their practice be restricted. *The attorney must remain free to practice when and where he will and to be available to prospective clients who might desire to engage his services.*”³¹

This represents a momentous shift in reasoning over a seven-year period (1961-1968). Formal Opinion 300 assumes that taking clients from a firm is unethical, while Informal Opinion 1072 emphasizes the client’s freedom of choice. The later opinion is thus much less critical, and perhaps even supports, competition for clients.³² This coincided with the beginning of a period of change for the legal profession, and by the end of the decade firms had good reason to be concerned about a future in which they would face real competition from present members of their firms.³³ The profession’s culture was changing, and views of “unethical” conduct were adapting to the evolution of a more competitive environment for the practice of law.

28. *Id.*

29. See ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1072 (1968).

30. *Id.*

31. *Id.* (emphasis added).

32. See *id.*

33. By the 1980s, the threat was real and immediate. A new era of lawyer mobility and competition was signaled by the emergence of the firm Finley, Kumble, Wagner, Underberg, Manley, Myerson & Casey, which sought to become a national firm largely on the basis of lateral hiring and mergers with smaller firms. The rise of the firm, and its subsequent collapse, spectacular for its suddenness, were closely chronicled in the legal press. See, e.g., Rita Henley Jensen, *Scenes From a Breakup*, NAT’L L.J., Feb. 8, 1988, at 1; see generally Michael Lewis, *Lawyer’s Poker*, WASH. MONTHLY, Jan.-Feb. 1991, at 49 (reviewing STEVEN J. KUMBLE & KEVIN J. LAHART, CONDUCT UNBECOMING: THE RISE AND RUIN OF FINLEY, KUMBLE (1990)) (criticizing Kumble’s own portrayal of the downfall of Finley, Kumble).

With little fanfare, both the Model Code and the Model Rules have adopted the ban on restrictive covenants,³⁴ and case law further supports this position.³⁵ Thus, the proscription against restrictive covenants, a doctrine that originated entirely from within the opaque process that culminates in ethics opinions, which in turn were rendered at a time when the profession was far less competitive than it is today, is now a basic tenet of legal ethics reinforcing the strength of the client choice norm and eliminating a private ordering device that might otherwise have become a standard provision in law firm partnership agreements.

As will be developed more fully later,³⁶ the prohibition against anticompetition clauses sets lawyers apart from members of other professions, most notably medicine. Accountants and physicians, for example, regularly enter into covenants not to compete.³⁷ The reasons for distinguishing lawyering from other professional activity are unclear, and it is questionable whether the availability of choice for the client is any less critical when the professional engaged is a physician, for example, rather than a lawyer.³⁸ In any event, the demise of the contract as a means of restricting competition marked the destruction of what would have proven a potent weapon in a firm's battle against partners who grab and leave.

34. See MODEL CODE OF PROF'L RESPONSIBILITY DR 2-108(A) (1986); MODEL RULES OF PROF'L CONDUCT R. 5.6 (2003). Each provides a limited exception for conditioning retirement benefits on noncompetition. Linking retirement benefits to noncompetition was the subject of a recent ABA ethics opinion, which suggests the exception should be narrowly construed. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-444 (2006); see generally Robert W. Hillman, *Ties that Bind and Restraints on Lawyer Competition: Restrictive Covenants as Conditions to the Payments of Retirement Benefits*, 39 IND. L. REV. 1 (2005) (discussing exemption of retirement benefits from anticompetition bans).

35. See, e.g., *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 411-13 (N.Y. 1989) (voiding a partnership agreement provision imposing an economic penalty on partners who withdrew and competed with the firm). On case law treatment of restrictive covenants and economic disincentives, see generally HILLMAN, *LAWYER MOBILITY*, *supra* note 2, at § 2.3.4.

36. See *infra* Part IV.

37. See, e.g., *Riordan v. Barbosa*, No. 395945, 1999 Conn. Super. LEXIS 446, at *21, *25 (Conn. Super. Ct. Feb. 26, 1999) (enforcing a restrictive covenant against an accountant and noting "[t]here is no per se distinction between so-called professional people and other members of the work force with respect to the reasonableness of a noncompetition covenant"); *BDO Seidman v. Hirshberg*, 712 N.E.2d 1220, 1225-26 (N.Y. 1999) (portions of accounting firm's restrictive covenant enforced against former employee). For a discussion of the medical profession, see *infra* Part IV.

38. Cf. *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*, 138 P.3d 723, 729 (Ariz. 2006) ("We are unable to conclude that the interests of a lawyer's clients are so superior to those of a doctor's patients (whose choice of a physician may literally be a life-or-death decision) as to require a unique rule applicable only to attorneys.").

III. RESTRICTIONS ON THE OPERATION OF CLIENT CHOICE

The discussion above has emphasized the foundations and strength of the principle of client choice as a standard underlying the relationship between lawyer and client. In practice, however, client choice may be restricted by a number of opposing legal principles and ethics norms, the more important of which are discussed below.

A. Indirect Contractual Restraints

Although restrictive covenants in agreements among lawyers are banned by ethics norms,³⁹ less direct contractual restraints may effectively restrict the ability of clients to choose lawyers. Prominent among these are agreements that impose economic disincentives on post-withdrawal competition by lawyers in a firm. In contrast with outright prohibitions on competition, such indirect restraints merely impose economic penalties on lawyers who compete with their former firms. An example of such an indirect restraint is a partnership agreement that provides higher payouts in settling the account of a withdrawing partner if the attorney does not compete with the firm following departure.

Most courts considering the issue have concluded the policy reasons for banning restrictive covenants extend to indirect restraints in the form of economic disincentives.⁴⁰ A significant and growing minority of courts, however, have drawn a distinction allowing in some circumstances a price to be exacted for post-withdrawal competition. The most important of these cases is the 1993 decision of the California Supreme Court in *Howard v. Babcock*,⁴¹ where the court spoke of a “revolution” in the practice of law “requiring economic interests of the law firm to be protected as they are in other business enterprises.”⁴² Along this line, the Supreme Judicial Court of Massachusetts has declined to adopt a per se rule against forfeiture provisions and suggested that in an appropriate case a “law firm’s legitimate interest in its survival and well-being might justify a limitation on payments to a withdrawing partner in particular circumstances.”⁴³ More recently, the

39. See *supra* Part II.B.2.

40. The leading case is *Cohen*, 550 N.E.2d at 411. See generally HILLMAN, LAWYER MOBILITY, *supra* note 2, § 2.3.4 (discussing cases in which courts have ruled that imposition of economic disincentives on withdrawing partners constitutes an indirect restraint on fair competition and should thus be prohibited).

41. 863 P.2d 150, 160 (Cal. 1993).

42. *Id.* at 156.

43. *Pettingell v. Morrison, Mahoney & Miller*, 687 N.E.2d 1237, 1240 (Mass. 1997).

Arizona Supreme Court has embraced the reasoning of *Howard* and concluded as a matter of policy that reasonable financial disincentives should be enforceable.⁴⁴

The more permissive minority view allowing some economic disincentives to competition may be gaining traction, and to the extent that a contractually-based cost is imposed on lawyers who compete, the ability of clients to choose their lawyers may be restricted. Of course, not all economic disincentives will have their intended effect, and a cost imposed on a lawyer for taking a firm's clients in practice may not dissuade the lawyer from competing aggressively.⁴⁵

B. *Disqualification Arising from Conflicts*

For reasons of confidentiality and loyalty, lawyers are barred from representation of parties with interests that conflict significantly. Similarly, lawyers may not represent parties with interests adverse to those of former clients if the present and previous subjects of representation are substantially related.⁴⁶

The basic prohibition against representing clients with conflicting interests has been given enormous reach through the doctrine of imputed disqualification, which extends the disqualification of a single member of a firm to all members of the firm.⁴⁷ Various approaches developed to mitigate the effects of imputed disqualification have enjoyed only spotty successes. Perhaps the most effective of these devices is commonly referred to as a screen, which operates to isolate the conflict by restricting the flow of information between the newly-hired lawyer who brings potentially disqualifying conflicts and other members of the firm.

44. See *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*, 138 P.3d 723, 728-29 (Ariz. 2006).

45. See, e.g., *Hoffman v. Levstik*, 860 N.E.2d 551, 555 (Ill. App. Ct. 2006) (testimony by lawyer that clients had no difficulty transferring their business to his new firm rebuts argument that the disincentives should not be enforced).

46. See, e.g., Charles W. Wolfram, *Former-Client Conflicts*, 10 GEO. J. LEGAL ETHICS 677, 677 (1997) (“[T]he so-called ‘substantial relationship’ standard, or something very much like it, is used by every jurisdiction in the United States . . .”).

47. See generally WOLFRAM, *supra* note 1, § 7.6.3, at 396-401 (discussing the imputed disqualification doctrine). An important early case demonstrates the breadth of the doctrine. In *Laskey Bros. of West Virginia v. Warner Bros. Pictures*, 224 F.2d 824 (2d Cir. 1955), Isacson obtained confidential information about Warner Brothers. *Id.* at 825. Later, he left his firm and formed a law partnership with Malkan, and their new firm was retained to pursue an action against the motion picture industry in which Warner Brothers would be a defendant. *Id.* Although Isacson left the Malkan firm, the taint of his association disqualified the firm and each of its attorneys because of an irrebuttable presumption that Isacson shared the previously-acquired confidential information with every member of the firm. *Id.* at 825-27.

Although screens attempt to reconcile a culture of lawyer mobility goals with traditional approaches that impute conflicts of interest,⁴⁸ their acceptance varies among jurisdictions. Moreover, the ABA's refusal in 2001 to adopt an Ethics 2000 Commission recommendation that the Model Rules be amended to include screening provisions to mitigate imputed disqualification severely limits the usefulness of this technique.⁴⁹

One of the effects of the conflicts and imputed disqualification norms is to impede client choice, especially when lawyers change firms. In some cases, firms effectively discharge select existing clients as a means of addressing conflicts issues created by lawyers they are hiring. In other cases, the lawyers changing firms discharge their existing clients as a means of advancing their mobility objectives. In still other cases, conflicts norms may operate retroactively to deny the benefits of past representation, as can be seen in a recent case in which a client was denied the right to show good faith reliance on a legal opinion because the opinion was tainted by the law firm's concurrent representation of another client with conflicting interests.⁵⁰

C. Retaining Liens

A retaining lien is a possessory lien that attaches to all papers, books, documents, securities, moneys, and property of the client that come into the possession of the firm in the course of its professional employment.⁵¹ The lien is a device for securing payment of fees and funds in advance, and it enables a firm to retain items that may be essential to representation of a client. The practical effect of such retention may be to render it impossible for a client to direct that ongoing representation will be provided by a lawyer who is withdrawing from a firm.⁵²

Notwithstanding protestations to the contrary, there exists a clear tension between the retaining lien and the principle of client choice.

48. See generally WOLFRAM, *supra* note 1, § 7.6.4, at 401 (discussing practice of placing a "Chinese Wall" around a lawyer to prevent the rest of the firm from being disqualified).

49. The screening provision was removed by action of the ABA's House of Delegates. See ABA, Center for Professional Responsibility, Summary of House of Delegates Action on Ethics 2000 Commission Report, http://www.abanet.org/cpr/e2k/e2k-summary_2002.html (last visited Oct. 20, 2007).

50. See *Andrew Corp. v. Beverly Mfg. Co.*, 415 F. Supp. 2d 919, 921-22, 928-29 (N.D. Ill. 2006).

51. HILLMAN, *LAWYER MOBILITY*, *supra* note 2, § 2.3.2.2.

52. See *id.*

Consider along this line the rather unpersuasive attempt by the Connecticut Supreme Court to resolve the conflict:

The right of unfettered discretion to change attorneys is recognized in Connecticut. . . . The attorney also has a right to be paid for services rendered. The attorney's lien is compatible with both rights. Although the client is free to change attorneys at any time, the client cannot compel the initial attorney to return the files unless that client first pays the balance owed . . . or furnishes adequate security This, of course, does not overlook the ethical obligation of the attorney not to exercise the lien to injure the rights of the client. Under current law, the tension between the client's unfettered right to change attorneys and the attorney's right to be compensated for legal services rendered is accommodated appropriately by the self-executing attorney's retaining lien.⁵³

Many but not all jurisdictions recognize retaining liens,⁵⁴ and the liens seemingly fare less well in ethics opinions than in the case law.⁵⁵ Where available, this rather blunt method of enforcing a firm's economic rights may quite effectively limit the ability of clients to direct their work to the lawyers of their choice.

D. Sale of a Law Practice

Since 1990, the ABA's Model Rules of Professional Conduct have allowed lawyers to buy and sell law practices. Representing a significant shift from the legal profession's long standing aversion to lawyers who "barter in clients," Rule 1.17 conditions the sale of a practice on the selling lawyer ceasing practice in the geographic or specialty area relating to the practice sold and requires that clients have the opportunity to make arrangements for alternative counsel.⁵⁶ Although it pays lip service to the principle of client choice, the rule imposes on clients the burden of rejecting their inclusion in the portfolio passing from buyer to

53. *Marsh, Day & Calhoun v. Solomon*, 529 A.2d 702, 707-08 (Conn. 1987) (citations omitted).

54. A LEXIS search conducted in June 2007 produced 683 cases involving retaining liens; New York accounts for 249 of the cases.

55. See HILLMAN, *LAWYER MOBILITY*, *supra* note 2, § 2.3.2, at n.46.

56. See MODEL RULES OF PROF'L CONDUCT R. 1.17 (2007). The ABA's shift in position was preceded by the 1985 decision of the Ohio Supreme Court in *Spayd v. Turner, Granzow & Hollenkamp*, 482 N.E.2d 1232, 1238-39 (Ohio 1985), where the court emphasized the trend of law firms in becoming more business-oriented and concluded it does not violate public policy to treat goodwill as an asset upon dissolution of a law partnership.

seller. At least with respect to clients lacking sophistication, the likelihood of such vetoes is not great.⁵⁷

E. Application of Winding Up Principles

Partnership law regulates the process by which partners bring their relationships to a close in ways that may limit the ability of clients of law partners to choose their lawyers.

Under the Uniform Partnership Act (“UPA”), the withdrawal of a partner dissolves the original partnership and triggers the winding up phase of the partnership’s existence.⁵⁸ Winding up income generated from work in progress at the time of the dissolution is shared among the partners in the same ratios that applied prior to dissolution. Although some partners may bear disproportionate burdens in winding up activities, no partner is entitled to special compensation for winding up the work of a dissolved partnership.⁵⁹

When income must be shared with partners not making corresponding contributions to winding up income, the inadequate compensation that results may discourage partners from providing services to clients. When this occurs, the effect of winding up principles in general and the “no compensation” rule in particular may be to deprive clients of the choice of their counsel. The result may hold even when the clients are prepared to provide appropriate compensation for the services provided because allocation of compensation among partners paid is problematic.

Although the more recent Revised Uniform Partnership Act (“RUPA”) continues the principle of winding up a dissolved partnership, it allows “reasonable compensation” for winding up activities.⁶⁰ Although there has been limited experience with this new standard and specifically how reasonable compensation is to be determined, it should operate to support the principle of client choice by providing the

57. See HILLMAN, *LAWYER MOBILITY*, *supra* note 2, § 2.5.3.

58. UNIF. P’SHIP ACT §§ 29-30 (amended 1949), 7 U.L.A. 165-66 (1949); see generally HILLMAN, *LAWYER MOBILITY*, *supra* note 2, § 4.6 (discussing the problems in applying the winding up principle to law partnerships).

59. See HILLMAN, *LAWYER MOBILITY*, *supra* note 2, § 4.6.1; Epstein & Wisoff, *supra* note 10, at 1606-07.

60. See UNIF. P’SHIP ACT § 401(h) (1997), 6 U.L.A. 133 (2001); see also ROBERT W. HILLMAN, ALLAN W. VESTAL & DONALD J. WEIDNER, *THE REVISED UNIFORM PARTNERSHIP ACT 419* (2007). Moreover, RUPA may limit slightly the circumstances under which withdrawal of a partner triggers the winding up of a law firm partnership. See HILLMAN, *LAWYER MOBILITY*, *supra* note 2, § 4.7.

incentive of compensation to lawyers who do the work. To the extent that it so operates, RUPA marks a sharp departure from the UPA.

F. Protection of Firm's Intellectual Property Rights

Firms may seek to restrict client choice indirectly through the assertion of property rights, the enforcement of which may make it especially difficult for clients to follow lawyers who change firms. The intellectual property that firms seek to protect may be defined, loosely, as nonpublic information that has value to the firms. The subjects of the claimed property interests vary widely and range from client lists providing contact information to substantive information reflected in forms and "proprietary" compilations of law and procedure.⁶¹

In recent years, an increasing number of firms have sought to block the use of information by withdrawing lawyers. They have achieved some modest successes in protecting client lists.⁶² It remains to be seen whether law will provide any protection of a firm's interests in more substantive information, including work product derived, developed at least in part from the use of firm resources and not identified with a single client.

Even in the absence of legal protection, firms may be expected to implement policies that render it more difficult for attorneys to transport information from one practice setting to another. Such policies may take a number of forms, including express provisions of partnership agreements restricting post-withdrawal use of information⁶³ and efforts to spread work among attorneys to limit an individual lawyer's access to information derived from work for particular important clients.⁶⁴ Although such efforts may prove unsuccessful, they may over the short term operate to create additional obstacles to clients' exercises of choice.

61. See generally Robert W. Hillman, *The Property Wars of Law Firms: Of Client Lists, Trade Secrets and the Fiduciary Duties of Law Partners*, 30 FLA. ST. U. L. REV. 767 (2003) (examining whether client information is protectable as a trade secret and the extent to which fiduciary norms preclude the use of such information by withdrawing partners).

62. See, e.g., *Reeves v. Hanlon*, 95 P.3d 513, 521-22 (Cal. 2004); *Fred Siegel Co. v. Arter & Hadden*, 707 N.E.2d 853, 861-63 (Ohio 1999). On client lists as trade secrets, see generally Hillman, *supra* note 61.

63. Even if not enforceable, the existence of a restrictive covenant may serve to discourage competition by risk-averse attorneys unwilling to litigate the issue.

64. Firms may attempt to dilute client loyalty to any particular attorney by attempting to force attorneys to "share" their clients with other members of the firm (that is, prevent the "hoarding" of clients). Clients have a say in the matter, however, and more often than not efforts to transfer client loyalties from individual attorneys to firms as a whole have been unsuccessful. Much of the difficulty, of course, stems from the conflict of interest that exists between lawyers and their firms and the absence of incentives for "rainmakers" to surrender control of their clients.

IV. A COMPARATIVE PERSPECTIVE: THE MEDICAL PROFESSION AND PATIENT CHOICE

Is a patient's interest in choosing a physician any less important than that of a client in choosing a lawyer? Although the question would appear to answer itself, law and professional ethics norms have developed in ways that generally accord greater protections to a client in choosing a lawyer than a patient in choosing a physician.

As is discussed above, restrictive covenants enforceable against service providers operate to limit the choices available to the consumers of the services.⁶⁵ Physician restrictive covenants have become increasingly widespread, in part as a response to the increased mobility of physicians.⁶⁶ Indeed, the American Medical Association's website advises that "[m]ost physician contracts include a restrictive covenant,"⁶⁷ and a model employment agreement developed by its General Counsel includes a "Pro Employer" restrictive covenant option.⁶⁸ Given the prevalence of these contractual restraints, it is unsurprising that

65. See *supra* text accompanying notes 34-35.

66. S. Elizabeth Wilborn Malloy, *Physician Restrictive Covenants: The Neglect of Incumbent Patient Interests*, 41 WAKE FOREST L. REV. 189, 190 (2006).

67. AMA, *Restrictive Covenants in Physician Contracts*, <http://www.ama-assn.org/ama/pub/category/12716.html> (last visited Oct. 20, 2007).

68. See AMA, ANNOTATED MODEL PHYSICIAN EMPLOYMENT AGREEMENT 31 (2003). The model agreement is designed to inform both physician-employees and employer groups of terms commonly found in physician employment agreements. The commentary cautions that the restrictive covenant is unenforceable in certain states. Clause 9.3 in the suggested agreement provides:

Physician agrees that, for a period of ____ [months *or* years] after this Agreement has been terminated [voluntarily *or* involuntarily] by [Employer *or* Physician] [for cause *or* for any reason] Physician will not, directly or indirectly, solicit or accept employment, with the same or similar duties than under this Agreement, with any person, medical group or any other entity which is a competitor of the Employer, or enter into competition with the Employer, either by himself/herself or through any entity owned or managed, in whole or in part by the Physician, [within a _____ mile radius of Employer's facility where Physician worked *or* within the [county[ies] or city[ies] of _____.] Physician further acknowledges that: In the even [sic] this provision is determined to be unenforceable by a court of competent jurisdiction, the parties agree that this provision shall be deemed to be amended to any lesser area or duration as determined by any court of competent jurisdiction and that the remaining provisions shall be valid and enforceable.

Id. An earlier version of the agreement (with an identical restrictive covenant) is available online at http://www.ama-assn.org/ama/upload/mm/46/model_physician_aug.pdf.

restrictive covenants often are applied to force physicians to limit or relocate their practices.⁶⁹

Not surprisingly, the enforcement of contractual restraints on the provision of medical services has prompted criticism driven by concern over the legal and ethical implications of private ordering that limits consumer choice.⁷⁰ Critics have argued that enforcement of restrictive covenants disrupts the stability of the patient-physician relationship, which can exacerbate the effects of illness by resulting in a diminished quality of care.⁷¹ “Physician employers argue that they are entitled to the enforcement of covenants-not-to-compete based upon protectable interests in their customer base, confidential information, training, and customer goodwill.”⁷²

Because of concerns ranging from anticompetitive effects to negative impacts on the quality of care, a handful of states have enacted statutory bans or limitations on physician restrictive covenants,⁷³ and a few courts have expressed public policy concerns over the restrictions.⁷⁴ In the majority of states, however, the contractual restraints are tested

69. See, e.g., *Cnty. Hosp. Group, Inc. v. More*, 869 A.2d 884, 895-97, 900 (N.J. 2005) (declining to adopt a per se ban on restrictive covenants and after applying a traditional reasonableness test concluding the covenant restricting a neurosurgeon’s practice would be enforceable if the geographic area to which it applied was reduced from thirty to thirteen miles).

70. See Arthur S. Di Dio, *The Legal Implications of Noncompetition Agreements in Physician Contracts*, 20 J. LEGAL MED. 457, 473 (1999) (“The public policy concern with restrictive covenants between attorneys is grounded in the sanctity of the attorney-client relationship. It is curious, . . . that the same concern does not apply as forcefully to the physician-patient relationship and render restrictive covenants between physicians *per se* invalid as well.”); Serena L. Kafker, *Golden Handcuffs: Enforceability of Noncompetition Clauses in Professional Partnership Agreements of Accountants, Physicians, and Attorneys*, 31 AM. BUS. L.J. 31, 56 (1993) (“The special trust patients place in their physicians merits as much if not more protection than that of the lawyer’s client.”); see generally Malloy, *supra* note 66 (discussing the negative impact of physician restrictive covenants on patients).

71. See Malloy, *supra* note 66, at 191.

72. *Id.* at 198.

73. See, e.g., COLO. REV. STAT. ANN. § 8-2-113(3) (West 2003) (voiding restrictive covenants involving physicians but also specifying that provisions relating to damages resulting from competition may be enforced); DEL. CODE ANN. tit. 6, § 2707 (West 2006) (same); MASS. GEN. LAWS ANN. ch 112, § 12X (West 2003) (voiding physician restrictive covenants but providing that the remaining provisions of the contracts may be enforced). In addition, some states reject the traditional reasonableness test in favor of an outright ban on all restrictive covenants, without specifically identifying physicians. See, e.g., CAL. BUS. & PROF. CODE §§ 16600-16602.5 (West 1997) (excepting certain situations involving the sale of a business or dissolution of a firm that may be applicable to dissociation of a partner or member of a limited liability company).

74. The most notable case is *Valley Medical Specialists v. Farber*, 982 P.2d 1277, 1282-83, 1285-86 (Ariz. 1999), where the court refused to adopt a per se ban on physician restrictive covenants but noted public policy concerns similar to those raised by restrictive covenants limiting attorneys and found the agreement before it unenforceable.

under common law or statutory “rule of reason” standards generally applicable to merchant-customer relationships.⁷⁵

From an ethics perspective, debate on restrictive covenants affecting physician practices appeared a few years after the ABA ethics opinions dealt a fatal blow to contractual restraints on competition affecting lawyers.⁷⁶ Though the clauses are disfavored, restrictive covenants affecting doctors have proven more resilient. Attempts in 1971 and 1972 to have the AMA’s House of Delegates declare the covenants unethical were defeated.⁷⁷ A 2006 recommendation of the Council on Ethical and Judicial Affairs (“CEJA”) that would disallow restrictive covenants that compromise the welfare of patients met a similar fate.⁷⁸ Although the AMA finds that restrictive covenants involving physicians are not in the public interest, it merely “discourages” rather than prohibits agreements restricting practice rights.⁷⁹

The survival of physician restrictive covenants and corresponding restrictions on patient choice is somewhat curious in light of the prominence of a contrary norm emphasizing the importance of maintaining the patient’s ability to choose a physician:

Free choice of physicians is the right of every individual. One may select and change at will one’s physicians, or one may choose a medical care plan such as that provided by a closed panel or group

75. See Di Dio, *supra* note 70, at 458.

76. See *supra* text accompanying notes 22-34.

77. AMA, Proceedings of the House of Delegates, *Resolution Eight: Restrictive Covenants-Declared Unethical*, at 235-36 (Nov. 28-Dec. 1, 1971).

78. At the 2006 Annual Meeting of the AMA House of Delegates, the Council presented a report recommending tightening the standards for restrictive covenants. It was not well received:

The Opinion revisions retained guidelines providing that restrictive covenants are unethical if excessive in geographic scope or duration, or if they fail to make reasonable accommodation of patients’ choice of physicians, but clarified the terms restrictive covenant and covenant-not-to-compete. Additionally, the revisions noted that such agreements must not compromise the welfare of patients and that parties should establish equitable terms of severance, in part to facilitate patient choice of physicians. There was much resistance to the proposed amendments to Opinion E-9.02 and the report was referred back to CEJA for further consideration.

After discussion by CEJA, as well as input from interested constituencies, including representatives from the Advisory Committee on Group Practice Physicians, the Council has decided to withdraw the report. Withdrawal of CEJA Report 5-A-06 does not mean that CEJA will not reconsider Opinion E-9.02 in the future, only that the Opinion will remain unchanged at this time.

AMA, CEJA REPORT 8-A-07, RESTRICTIVE COVENANTS, available at <http://www.ama-assn.org/ama1/pub/upload/mm/467/ceja8a07.doc> (last visited Oct. 20, 2007).

79. See AMA CODE OF MED. ETHICS, Restrictive Covenants and the Practice of Medicine, § E-9.02 (CEJA 1998), available at <http://www.ama-assn.org/ama/pub/category/8519.html>.

practice or health maintenance or service organization. The individual's freedom to select a preferred system of health care and free competition among physicians and alternative systems of care are prerequisites of ethical practice and optimal patient care.⁸⁰

It is difficult to reconcile a ringing endorsement of patient choice with an allowance (albeit grudging) of restrictive covenants that operate to restrict the options available to patients. At least on the issue of choice of service provider, the ethics norms of law offer unequivocal protection to the consumer of services, while the ethics norms of medicine send mixed signals on the issue. Though both professions emphasize the importance of choice of service provider, medicine's greater tolerance of restrictive covenants would suggest the profession's somewhat weaker commitment to the underlying norm.

That said, care should be taken not to exaggerate the differences between relative commitments of the two professions to consumer choice. In recent years, the mechanisms for the delivery of medical and legal services have developed along sharply differing lines. Managed care has spawned the development of health care structures such as Health Maintenance Organizations and Preferred Provider Organizations that require referrals to specialists within the provider network and thereby limit a patient's choice of a specialist physician. To a far greater extent than in law, the pressures of cost containment are changing the structure of the medical profession in ways that call into question the application of traditional ethics norms.⁸¹

Of course, a distinction may be drawn between the patient's relationship with a primary care physician and more fleeting encounters with specialists to whom the patient has been referred. If so, there may be a basis for applying less compromised ethics norms when the choice exercised concerns the physician responsible for overall care.⁸² Indeed, at least by negative implication there is some evidence courts are responsive to the distinction. The Kansas Supreme Court, for example,

80. AMA CODE OF MED. ETHICS, Free Choice, § E-9.06 (CEJA 1977), available at <http://www.ama-assn.org/ama/pub/category/8536.html>.

81. Cf. Walter E. Schuler, *Knock Out? Supreme Court Deals a Blow to Non-competes for Docs, But This Fight Is Not Over*, TENN. B.J., Dec. 2005, at 16, 23 ("[T]he individual patient's right to choose his or her own physician is readily subordinated when other policy considerations to the contrary are understood to promote a greater public good, for example, the perceived benefits of managed care.").

82. See, e.g., James W. Lowry, *Covenants Not to Compete in Physician Contracts: Recent Trends Defining Reasonableness at Common Law*, 24 J. LEGAL MED. 215, 216-17 (2003) (arguing courts are less likely to find a protectable interest when there is not a permanent relationship between a physician and his or her patients).

has upheld application of a restrictive covenant against a surgeon, noting, “the nature of the typical relationship between a patient and a cardiovascular surgeon: it is usually short-term, lasting long enough to accommodate the surgical care and follow-up.”⁸³

Even if the ethics of the medical profession develop in ways that preserve or even improve choice options for primary care services, it is unlikely *the principle* of patient choice will ever approximate the degree to which *the principle* of client choice has become a driving force underlying the norms regulating the delivery of legal services.

V. CONCLUSION

Measured by its antithesis toward contractual restraints on competition, law stands alone among the professions in the extent to which it seeks to advance *the principle* of consumer choice. The reasons for this are not grounded in public policy or reasoned distinctions relating to differences in the nature of services provided by the various professions. To the contrary, the legal profession’s current stance on client choice rests on the slim foundation of a handful of rather tentative and obscure ethics opinions rendered when the market for legal services was far less competitive than it is today. That said, *the principle* of client choice is an established norm of ethics that does distinguish law from other professions and commercial activity.

Although client choice is often presented as an unqualified principle guiding the profession, there are a number of limitations, manifested through both norms and practices, which may operate to restrict the options of clients in choosing their lawyers. This Article has discussed the more important of these limitations. Some care should be taken not to exaggerate the importance of the countervailing norms and practices, however, and concrete limitations on client choice are the exception rather than the rule, at least when clients actually are in a position to exercise choice.

And therein lies a key qualification. The principle of client choice is most clearly manifested at the level of sophisticated, well-heeled clients who are significant and ongoing consumers of legal services as well as clients who control litigation that represents high value work for law firms. These are the clients for whom many firms have built their practices, these are the clients who provided the impetus for recent trends in lawyer mobility, these are clients capable and interested in

83. *Idbeis v. Wichita Surgical Specialists, P.A.*, 112 P.3d 81, 92 (Kan. 2005).

exercising their right to choose their lawyers, and these are the clients who most clearly benefit from the principle of client choice largely implemented through prohibitions on contractual restraints on competition.

The difficulty in assessing the extent to which the legal profession truly is sensitive to the interests of clients in choosing their lawyers lies in the uneven distribution of legal services. The profession's commitment to the norm of choice would be truly impressive if legal services were widely available and those in need of the services were provided with options from which to choose. At least as to civil matters, however, most individuals either cannot afford legal representation or are severely limited in choices available when the cost of legal services is borne by personal liability insurance carriers. An individual who cannot afford a lawyer enjoys no benefit from the principle of client choice. Unfortunately, such individuals comprise a majority of our population.⁸⁴

This Article has discussed the differing approaches of law and medicine on the principle of consumer choice. Even though the approaches of the two professions to consumer choice may seem quite distinct, some care should be taken not to exaggerate the degree of the differences or to applaud the legal profession for the greater sensitivity it displays to the interests of consumers. When the principles meet reality, the differences diminish. Client choice is a vibrant principle advanced by the profession only to a limited segment of our society. Because individuals are more likely to have access to medical services than to legal services, some care should be taken in suggesting that law is more sensitive than medicine to the consumers of professional services.

All of this means that the reality of client choice in law falls short of the ideal expressed in the ethics norms of the profession.

84. The uneven distribution of legal services is well documented. *See, e.g.*, ABA CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE, FINAL REPORT ON THE IMPLICATIONS OF THE COMPREHENSIVE LEGAL NEEDS STUDY (1996), available at www.abanet.org/legalservices/downloads/sclaid/agendaforaccess.pdf (concluding the needs of middle and low-income individuals are not being met by the current system); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 541-43 (1994) (seminal article examining access issues in the justice system, noting that most individuals have very infrequent access to lawyers); George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn From the Medical Profession's Shift to a Corporate Paradigm*, 70 FORDHAM L. REV. 775, 789-92 (2001) (overview of empirical studies concluding that the middle class does not have adequate access to legal services); Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 397-99 (2004) (discussing access to legal services by the middle class).