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Attorneys Must Not Enter Partnership Agreements Prohibiting Themselves from Representing Former Clients Upon Termination of Partnership. Dwyer v. Jung, 133 N.J. Super. 343, 336 A.2d 498 (Ch. 1975), appeal docketed, No. 3378-74, App. Div., June 18, 1975.

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ATTORNEYS—Professional Responsibility—Restrictive Covenants—Attorneys Must Not Enter Into Partnership Agreements Prohibiting Themselves from Representing Former Clients Upon Termination of the Partnership. *Dwyer v. Jung*, 133 N.J. Super. 343, 336 A.2d 498 (Ch. 1975), *appeal docketed*, No. 3378-74, App. Div., June 18, 1975.

Three attorneys entered into a partnership agreement for the practice of law.[1] Their agreement included a provision that assigned the partnership's insurance carrier clients to individual partners upon the termination of the partnership and restricted the partners from doing business with a client designated as that of another partner for a period of five years.[2] Of these insurance carrier clients, 154 were assigned to the defendant while five were allotted to the plaintiffs.[3]

After the partnership was dissolved, the plaintiffs sought a judicial accounting.[4] The defendant counterclaimed, contending that the plaintiffs violated the restrictive covenant of the original partnership agreement by attempting to do business with clients designated as his.[5] Plaintiffs denied the charge and argued that the covenant apportioning clients to individual partners had the effect of prohibiting the other partners from dealing with those clients and was therefore void as against public policy.[6] The plaintiffs also contended that they had entered into the agreement at the insistence of the defendant, even though all parties regarded the provision as unenforceable.[7]

The Superior Court of New Jersey, Chancery Division, held that the covenant in the partnership agreement restricted the partnership's clients in their choice of counsel and was thus void for public

1. Dwyer v. Jung, 133 N.J. Super. 343, 345, 336 A.2d 498, 499 (Ch. 1975), *appeal docketed*, No. 3378-74, App. Div., June 18, 1975.

2. *Id.* at 345, 336 A.2d at 499. The agreement provided that each partner would contribute a stated amount for capital, cooperate in the business of the partnership, share in the partnership net profits and be entitled to a repayment of capital and a distributive share of the profits and assets upon dissolution. *Id.*

3. *Id.*

4. *Id.* at 345-46, 336 A.2d at 499. Partners have a right to an accounting after the dissolution of the partnership. N.J. STAT. ANN. § 42:1-43 (1940).

5. 133 N.J. Super. at 346, 336 A.2d at 499.

6. *Id.*

7. *Id.*

policy reasons.[8] The court refused to apply the standards usually used in evaluating restrictive covenants.[9]

Restrictive covenants are generally appurtenant[10] to either contracts involving employment or those involving the sale of business. In employment contracts, the covenants are used to prevent an employee from competing with his employer after his term of employment expires.[11] As early as the Middle Ages,[12] masters used these covenants in their contracts with apprentices to prolong their apprentices' periods of servitude, impede their entry into the guilds and thus limit competition.[13] Early English courts struck down such covenants, finding them to be a restriction of economic freedom and violative of guild customs.[14]

The advent of the Industrial Revolution and greater mechanization resulted in more specialization and a pronounced need for businessmen to provide workers with special training.[15] As a result, businessmen found an increasing need for restrictive covenants to discourage such employees from leaving and to prevent business secrets from being given to competitors by ex-employees.[16] With the changing economic system, 18th century courts began to accept these restrictive covenants as being necessary to protect businessmen.[17]

The Queens Bench in the celebrated case of *Mitchel v. Reynolds*[18]

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8. *Id.* at 346-47, 336 A.2d at 500.

9. *Id.* Those standards are delineated in Solari Indus., Inc. v. Malady, 55 N.J. 571, 576, 264 A.2d 53, 58 (1971). The *Dwyer* court aslo relied on ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 2-108(A) in reaching its holding. 133 N.J. Super. at 347, 336 A.2d at 500.

10. Restrictive covenants must be ancillary to legal contracts. A restrictive covenant cannot stand by itself. *See, e.g.*, Irving Inv. Corp. v. Gordon, 3 N.J. 217, 69 A.2d 725 (1949). The covenant must also be made for a consideration. *See, e.g.*, Cleaver v. Lenhart, 182 Pa. 285, 37 A. 811 (1897).

11. Restrictive covenants limiting an employee from accepting other employment while working for his current employer have always been legal. 54 AM. JUR. 2d *Monopolies, Restraint of Trade and Unfair Trade Practices* § 513 (1971).

12. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 632 (1960) [hereinafter cited as Blake.]

13. *Id.* at 632-34.

14. For the first reported case of a restrictive covenant being held illegal, see Dyer's Case, Y.B. Mich. 2 Hen. 5, f. 5, pl. 26 (C.P. 1414).

15. Blake 638.

16. *Id.*

17. There were several 17th century cases in which covenants ancillary to a contract involving the sale of a business were upheld. *See, e.g.* Rogers v. Parrey, 80 Eng. Rep. 1012 (K.B. 1613).

18. 24 Eng. Rep. 347 (Q.B. 1711).

held that restrictive covenants attempting to discourage employees from terminating their employment and competing with their ex-employers were presumptively illegal.[19] However, the court classified such covenants as either "limited" or "general" and said that "limited" covenants which restricted a covenantee from accepting employment in a limited area could be legal.[20] Hence, the decision in *Mitchel* gave rise to the "reasonableness" test to determine the legality of restrictive covenants.[21] That test is still followed by most courts in England and the United States.[22] Restrictive covenants that are not limited to a reasonable period of time and a reasonable area or scope of activity are still unenforceable, while those covenants that are so limited may be enforced.[23]

In New Jersey, as in many other jurisdictions,[24] a restrictive covenant is reasonable if it "protects the legitimate interest of the employer, imposes no undue hardship on the employee and is not injurious to the public."[25] However, when a covenant restricts an em-

19. *Id.* at 348-49.

20. *Id.* at 347, 349, 352. In *Mitchel*, as in many of its predecessors, a restrictive covenant ancillary to a sale of business was upheld. The court was well ahead of its time when it indicated that it would consider upholding a restrictive covenant incidental to an employment contract. Blake 630-31.

21. Blake 639.

22. *Id.* at 643-44. The Supreme Court adopted the *Mitchel* reasoning in Oregon Steam Navigation Co. v. Winsor, 87 U.S. (20 Wall.) 64 (1873).

23. Blake 643. The Sherman Act § 1, 15 U.S.C. § 1 (1970), which declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ." has rarely been used to find such restrictive covenants illegal, although the legislative history and subsequent judicial discussion seem to indicate that the Sherman Act was intended to prohibit those restraints unenforceable at the common law. Blake 628. A similar provision in the New Jersey antitrust law, N.J. STAT. ANN. § 56:9-3 (Supp. 1975), has been cited as a standard for judging the legality of restrictive covenants. *See* Whitmyer v. Doyle, 58 N.J. 25, 274 A.2d 577 (1971) (restrictive covenant found to be reasonable). The New Jersey antitrust law has yet to be used to strike down any employment restrictive covenants.

Oklahoma has an antitrust statute similar to that of New Jersey that has been interpreted to prohibit all restrictive covenants. OKLA. STAT. tit. 15, § 217 (1966); E.S. Miller Labs, Inc. v. Griffin, 200 Okla. 398, 194 P.2d 877 (1948). Other states prohibit some restrictive covenants. *See, e.g.*, CAL. BUS. & PROF. CODE § 16600 (1964); N.D. CENT. CODE § 9-08-06 (1975).

24. *See, e.g.*, McMurray v. Bateman, 221 Ga. 240, 144 S.E.2d 345 (1965); Marshall v. Covington, 81 Idaho 199, 339 P.2d 504 (1959); Solari Indus., Inc. v. Malady, 55 N.J. 571, 264 A.2d 53 (1971); Hayes v. Altman, 424 Pa. 23, 225 A.2d 670 (1967).

25. Solari Indus., Inc. v. Malady, 55 N.J. 571, 576, 264 A.2d 53, 56 (1971). In determining reasonableness, courts today generally balance the employer's need to protect himself from competition with the employee's need to have free economic mobility and with the potential injury inflicted upon the public by the covenant. Earlier courts weighed each of the three

ployee from taking employment over a larger scope of economic activity[26] or geographic area[27] or for an unlimited or longer period of time[28] than necessary to protect the employer, it is considered overbroad and unenforceable.

With respect to restrictive covenants appurtenant to contracts for the purchase of businesses, vendees frequently insist upon clauses prohibiting the vendor from competing with the vendee for a specified period of time in a specific area after the vendee purchases the business.[29] These covenants are designed to protect the good will of the business for the benefit of the buyer.[30]

Courts are generally more reluctant to enforce covenants appurtenant to employment contracts than covenants incidental to contracts involving the sale of a business[31] for several reasons. First, contracts involving the sale of a business are generally between parties of approximately equal bargaining power. Employment contracts, on the other hand, are usually made between parties of unequal bargaining power, often forcing the employee to accept such

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elements against an extrinsic standard to determine "reasonableness." The test stated in the RESTATEMENT OF CONTRACTS §§ 513-15 (1932), and followed by some courts, simply considers whether the restrictions are no greater than required for the protection of the employer and does not examine the legitimacy of the employer's interest. Blake 649-50.

26. In Little Rock Towel & Linen Supply Co. v. Independent Linen Serv. Co., 237 Ark. 877, 377 S.W.2d 34 (1964), the court held unreasonable a covenant which prohibited a linen service manager from managing either a laundry or a linen service after the termination of his employment because the manager had never been in the laundry business.

27. In Wyder v. Milhomme, 96 N.J.L. 500, 115 A. 380 (Ct. Err. & App. 1921), the court ruled that a covenant involving a silk-finisher that restricted the employee from accepting employment anywhere in the United States was unreasonable because the company's business took place almost exclusively in the New York metropolitan area. The court, in Allright Auto Parks, Inc. v. Berry, 219 Tenn. 280, 409 S.W.2d 361 (1966), held unreasonable a covenant banning an ex-employee from working in 46 cities because the employee had worked in only three of the 46 cities and consequently would only be able to competently compete with his ex-employer in those three cities.

28. Mandeville v. Harman, 42 N.J. Eq. 185, 7 A. 37 (Ch. 1886) and Schneller v. Hayes, 176 Wash. 115, 28 P.2d 273 (1934) rejected covenants that were restrictive for an unlimited time. *See also* Wyder v. Milhomme, 96 N.J.L. 500, 115 A. 380 (Ct. Err. & App. 1921) (restrictive covenant for ten years unreasonable). *But see* Heuer v. Rubin, 1 N.J. 251, 62 A.2d 812 (1949) (covenant restricting covenantee from working for unlimited time in Rahway, N.J. reasonable).

29. Blake 646-47.

30. Dwyer v. Jung, 133 N.J. 343, 346, 336 A.2d 498, 499 (Ch. 1975). *See also* Blake 646-48.

31. *See, e.g.*, Magic Fingers, Inc. v. Robins, 86 N.J. Super. 236, 206 A.2d 601 (Ch. 1965). For a detailed discussion of the matter, see Kadis v. Britt, 224 N.C. 154, 29 S.E.2d 543 (1944) and Blake 646-48.

covenants on a "take-it-or-leave-it" basis.[32] Second, such covenants compel employees to remain in businesses that they can not easily leave and restrict their economic freedom by preventing them from fully choosing their business activities and the location of such activities.[33] This fact has the additional effect of preventing consumers who desire a particular employee's services from being able to obtain them.[34] Last, the need for such covenants is usually far greater for a purchaser of a business than it is for an employer.[35] A vendee would not receive the full value of his business if his predecessor could compete with him and retain his old customers,[36] while an employer, in most instances, could still receive the full value of his contract with the employee without such an agreement.[37]

As a rule, courts have enforced restrictive covenants against employees entrusted with knowledge of the employer's business methods that would be harmful to the employer if learned by a competitor.[38] Courts have also enforced covenants when the employee had enjoyed close dealings with the employer's customers and could lure those customers from the employer if he entered into competition with the employer.[39]

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32. Blake 647-48. Perhaps treatment of partnership agreements as employment contracts with respect to restrictive covenants is inappropriate. Partnerships are generally formed between parties of equal bargaining strength while employment contracts are usually formed between an employer and a potential employee, parties of unequal bargaining power. *See* ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL DECISIONS, No. 521 (1962).

33. Blake 647-48.

34. *Id.* It also weakens the employees' bargaining power while working for the employer and impedes the communication of ideas. *Id.*

35. Dwyer v. Jung, 133 N.J. Super. 343, 346, 336 A.2d 498, 499 (Ch. 1975).

36. Blake 647-48.

37. *Id.*

38. *See, e.g.*, Orkin Exterminating Co. v. Murrell, 212 Ark. 449, 206 S.W.2d 185 (1947); Donahoe v. Tatum, 242 Miss. 253, 134 So.2d 442 (1961); Irvington Varnish & Insulator Co. v. Van Norde, 138 N.J. Eq. 99, 46 A.2d 201 (Ct. Err. & App. 1946); O. Hommel Co. v. Fink, 115 W. Va. 686, 177 S.E. 619 (1934).

39. *See, e. g.*, Stokes v. Moore, 262 Ala. 59, 77 So.2d 331 (1955); Willis v. Dictograph Sales Corp., 222 Ind. 523, 54 N.E.2d 774 (1944); Silbros, Inc. v. Solomon, 139 N.J. Eq. 528, 52 A.2d 534 (Ch. 1947); Plunkett Chemical Co. v. Reeve, 373 Pa. 513, 95 A.2d 925 (1953).

New York courts will also enforce restrictive covenants when the employer can show that the employee's services are "special, unique or extraordinary." Purchasing Associates, Inc. v. Weitz, 13 N.Y.2d 267, 272, 196 N.E.2d 245, 248, 246 N.Y.S.2d 600, 602 (1963). In this case the New York Court of Appeals looked behind the sale of business language to find an employment contract and then applied the stricter employment contract test to invalidate the restrictive covenant and reverse the court below. Thus an inference arises that the stricter test applied to employment contracts requires a greater showing of irreparable harm to obtain injunctive relief than does the test for sale of business covenants.

Restrictive covenants ancillary to employment contracts can be found in both contracts between businessmen and contracts between professionals,[40] and most jurisdictions, including New Jersey, use the same criteria regardless of which type they are evaluating.[41]

There has been only one prior reported United States case dealing with the reasonableness of a restrictive covenant involving attorneys.[42] In *Hicklin v. O'Brien*,[43] Illinois' highest court used the customary reasonableness test to enforce a covenant ancillary to a contract involving the sale of a law practice that forbade the vendor from practicing law within the county of the practice.[44] The *Hicklin* court reasoned that the restriction did not impose an unreasonable hardship upon the vendor since he could still practice anywhere but in that county.[45] Unlike *Dwyer*, *Hicklin* involved the sale of a law practice and was thus decided according to the less stringent reasonableness standard normally applied to business sales contracts. The restrictive covenant in *Dwyer* was incidental to a partnership agreement,[46] a form of employment contract.

Since the *Hicklin* decision in 1956, the American Bar Association (ABA) Committee on Professional Ethics has several times dealt with the question of whether restrictive covenants incidental to attorney employment contracts are ethical. In Formal Opinion 300,[47]

40. *See, e.g.*, Marvel v. Jonah, 83 N.J. Eq. 295, 90 A. 1004 (Ct. Err. & App. 1914) (professionals); Sonotone Corp. v. Baldwin, 227 N.C. 387, 42 S.E.2d 352 (1974) (businessmen); Hayes v. Altman, 424 Pa. 23, 225 A.2d 670 (1967) (professionals).

41. *Compare* Weiss v. Levine, 134 N.J. Eq. 1, 34 A.2d 237 (Ch. 1943)(covenant between orthodontists) and Hayes v. Altman, 424 Pa. 23, 225 A.2d 670 (1967)(covenant involving optometrist) *with* A. Fink & Sons v. Goldberg, 101 N.J. Eq. 644, 139 A. 408 (Ch. 1927) (covenant between truck owner and routeman) and Plunkett Chemical Co. v. Reeve, 373 Pa. 513, 95 A.2d 925 (1953)(covenant involving salesman). *See generally* Dodd, *Contracts Not to Practice Medicine*, 23 B. U. L. REV. 305 (1943). For the criteria used in determining reasonableness, see notes 25-27 *supra* and accompanying text.

42. Hicklin v. O'Brien, 11 Ill. App. 2d 541, 138 N.E.2d 47 (1956). In contrast, in England many restrictive covenants between lawyers have been brought to court and all but one have been found to be reasonable and legal. The one covenant found illegal was held so because it restricted the attorney for an unlimited period of time and not because it was entered into by lawyers. *See* Blake 662 n.122.

In one case involving a non-lawyer employee of a law firm, the usual reasonableness standard was used by the court. Toulmin v. Becker, 69 Ohio L. Abs. 109, 124 N.E.2d 778 (Ct. App. 1954).

43. 11 Ill. App. 2d 541, 138 N.E.2d 47 (1956).

44. *Id.* at 542-44, 138 N.E.2d at 48-49.

45. *Id.* at 547-50, 138 N.E.2d at 50-52.

46. 133 N.J. Super. at 345, 336 A.2d at 499.

47. ABA COMM. ON PROFESSIONAL ETHICS, FORMAL OPINIONS, No. 300 (1961).

the Committee found unethical a law firm's employment contract with a prospective attorney which restricted the attorney's right to practice in the city and county where the firm was located for a period of two years after he left the firm.[48] The committee relied largely upon Original Canon 27, which stated that the division of the client market can only be achieved by "the establishment of a well-merited reputation for professional capacity and fidelity to trust,"[49] and Original Canon 7 which forbade an attorney from in any way encroaching on the business of another lawyer.[50]

Informal Decision 521[51] extended the holding of Formal Opinion 300 to restrictions against an employee handling the legal work of any established client of the firm after the employee terminated his employment.[52] However, the committee in dictum said that Opinion 300 applied to employment agreements but not to partnership agreements since parties to the latter were of equal bargaining power.[53]

In 1969, the ABA Committee on the Evaluation of Ethical Standards rewrote the ABA canons and added to them new mandatory disciplinary rules.[54] Disciplinary Rule 2-108(A) of the Code of Professional Responsibility deals specifically with the ethicality of restrictive covenants incidental to employment and partnership agreements, stating:[55]

48. *Id.*

49. ABA CANONS OF PROFESSIONAL ETHICS No. 27 (1908). *See also* ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 910 (1966) (associate of law firm allowed to inform his clients of changed status).

50. ABA CANONS OF PROFESSIONAL ETHICS No. 7 (1908).

51. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL DECISIONS, No. 521 (1962). An informal decision differs from a formal opinion in that it is concerned with a narrow area of ethics while a formal opinion deals with more general questions of ethics. The sources for informal decisions are generally questions sent by members of the ABA to the Committee on Professional Ethics. AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 6 (1967).

52. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL DECISIONS, No. 521 (1962).

53. *Id.*

54. ABA CODE OF PROFESSIONAL RESPONSIBILITY was adopted by the ABA on August 12, 1969 and became effective January 1, 1970.

55. ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 2-108(A). Disciplinary rules differ from canons and ethical considerations in that disciplinary rules are mandatory minimum standards that all attorneys must meet. Canons and ethical considerations are simply goals to which attorneys should aspire. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement.

> A lawyer should not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement . . . .

The new disciplinary rule differs from previous opinions in that it treats partnership and employment agreements alike in determining the ethicality of a lawyer restrictive covenant.[56] Both the New Jersey Supreme Court's Advisory Committee on Professional Ethics and the New York County Lawyer's Association Committee on Professional Ethics have used Disciplinary Rule 2-108(A) to find restrictive covenants incidental to partnership agreements unethical.[57] This rule and its attendant considerations were the basis of the *Dwyer* court's decision to refuse to apply common law commercial standards to attorney restrictive covenants, and thus to invalidate all such covenants.[58] Furthermore, in doing so, *Dwyer* departed from the common law to create a new category of restrictive covenants labeled "lawyer restrictive covenants."[59]

Dwyer distinguished this new category of covenants from those incidental to a sale of a business[60] by reasoning that a lawyer's clients are not property that can be offered for sale.[61] The court did not attempt to distinguish restrictive covenants appurtenant to employment contracts from lawyer restrictive covenants, but only noted that they were often upheld as legitimate devices to protect the business and good will of employers against unfair competition.[62]

In concluding that these lawyer restrictive covenants should be judged by "ethical" rather than "commercial" standards,[63] the

56. *See* text accompanying note 53 *supra*. It would seem that the earlier and more accurate observation as to bargaining strength was overlooked when the new ABA CODE OF PROFESSIONAL RESPONSIBILITY was drawn up.

57. N.J. SUP. CT. LAW. ADVISORY COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 147 (1969); N.Y. CO. LAW. ASS'N COMM. ON PROFESSIONAL ETHICS, QUESTIONS, No. 621 (1974). Both the New York County and New Jersey committees are simply advisory committees that deal solely with inquiries from attorneys.

58. 133 N.J. Super. at 347-49, 336 A.2d at 500-01.

59. *Id.* at 346-47, 336 A.2d at 499-500.

60. *Id.*

61. *Id.* at 346, 336 A.2d at 499. The *Dwyer* court relied upon the logic of H. DRINKER, LEGAL ETHICS 161, 189 (1965) for this conclusion.

62. 133 N.J. Super. at 346, 336 A.2d at 499.

63. *Id.* at 348-49, 336 A.2d at 500-01. *Dwyer's* criticism of Hicklin v. O'Brien, 11 Ill. App. 2d 541, 138 N.E.2d 47 (1956) was perhaps unfair. The court in *Dwyer* said that *Hicklin*

Dwyer court reasoned that the consensual and, on the part of the attorney, highly fiduciary nature of the attorney-client relationship entitled clients to be represented by the counsel of their own choosing[64] and held that any attempt on the part of the attorneys to restrict that right would be illegal.[65] Division of the client market, according to *Dwyer*, is to be accomplished through individual performance rather than through active competition.[66] In reaching this conclusion, the court followed the lead[67] of the New Jersey Supreme Court's Advisory Committee on Professional Ethics and the New York County Lawyer's Association Committee on Professional Ethics[68] by interpreting the Disciplinary Rule 2-108(A) phrase "A lawyer should not be a party to or participate in a partnership . . . that restricts the right of a lawyer to practice law after the termination of a relationship"[69] as prohibiting attorneys from including restrictive covenants in their own partnership agreements.[70]

"completely ignored the effect the covenant might have upon potential clients . . . and failed to respect the underlying ethical considerations affecting the practice of law." 133 N.J. Super. at 349, 336 A.2d at 501. However, the court in *Hicklin* said that "[t]he record, in the instant case, fails to disclose that there would be any hardship to the public" and considered but dismissed the ethical and public policy questions reasoning that public policy is a matter of the state constitution, statutes, and decisions of the courts and that there was no public policy contrary to its holding. 11 Ill. App. 2d at 550, 138 N.E.2d at 52.

64. 133 N.J. Super. at 347, 336 A.2d at 500.

65. *Id.*

66. *Id.* at 347-48, 336 A.2d at 500. For this conclusion, *Dwyer* relied upon N.J. SUP. CT. LAW. ADVISORY COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 147 (1969).

67. 133 N.J. Super. at 347-48, 336 A.2d at 500-01. The *Dwyer* court did not distinguish the cases before the New York County and New Jersey committees on professional ethics. These cases dealt with covenants that became effective upon the withdrawal of a partner rather than upon the termination of an agreement. As a partnership can be terminated by a willful breach of the partnership contract as well as by the withdrawal of a partner, one might think that courts would less readily enforce a covenant that would take effect upon the termination of a partnership in order to prevent the possibility of a willfully breaching partner reaping the benefits of a covenant. New Jersey courts have yet to address this issue.

68. N.J. SUP. CT. LAW. ADVISORY COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 147 (1969); N.Y. CO. LAW. ASS'N COMM. ON PROFESSIONAL ETHICS, QUESTIONS, No. 621 (1974).

69. ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 2-108(A).

70. 133 N.J. Super. at 347, 336 A.2d at 500; ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 2-108(A). D.R. 2-108(A) does not have to be interpreted as forbidding all lawyer restrictive covenants. It could also be interpreted narrowly as forbidding only covenants that prevent a lawyer from exercising his right to practice law. The partners in *Dwyer* still have the right to practice law and to represent any clients except those limited by the covenant. The ABA has not yet interpreted this rule as forbidding all lawyer restrictive covenants. The last ABA decision on the subject, ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL DECISIONS, No. 521, permitted lawyer restrictive covenants ancillary to partnership agreements.

Dwyer's treatment of lawyer restrictive covenants is different from the treatment of other restrictive covenants by any previous court. In creating the new category of "lawyer restrictive covenants," *Dwyer*, unlike other decisions, emphasized the principle that clients are not and should not be treated as chattel.[71] However, the *Dwyer* court did not discuss the rationale for its distinction of lawyer restrictive covenants from other covenants on this ground nor explain why the clients of other professionals or businessmen could be more readily considered property than clients of an attorney. Furthermore, in creating the new category and relying upon Disciplinary Rule 2-108(A), *Dwyer* declined to distinguish between lawyer restrictive covenants ancillary to an employment contract and lawyer restrictive covenants incidental to a partnership agreement.[72] While common law courts often consider the relative bargaining strengths of the parties in determining the legality of a covenant,[73] there is no discussion in *Dwyer* as to the parties' bargaining strengths.[74]

Dwyer's adoption of the "ethicality" test and reliance upon Disciplinary Rule 2-108(A) for judging the legality of lawyer restrictive covenants is both unique and questionable. *Dwyer* reasoned that a prohibition of lawyer restrictive covenants would result in the proper division of the client market on the basis of individual performance.[75] Proper division would be impossible if competent lawyers could bind clients to incompetent lawyers or prohibit themselves from dealing with those clients. On the other hand, at least one

71. 133 N.J. Super. at 346, 336 A.2d at 499.

72. *Id.* at 347, 336 A.2d at 500.

73. Blake 647-48; *see* McCallum v. Asbury, 238 Ore. 257, 263, 393 P.2d 774, 776-77 (1964) (an unusually harsh covenant ancillary to a doctors' partnership agreement enforced). Here, the court took note of the fact that the doctor who agreed to the covenant employed a lawyer to help make his decision and accepted the covenant for the great benefits that he would gain from the partnership. *Id. See also* Cogley Clinic v. Martini, 253 Iowa 541, 112 N.W.2d 678 (1962).

74. There are also no indications that the *Dwyer* court considered whether the covenant was arrived at after negotiations between the parties or whether one partner forced the other partner into entering the partnership or agreeing to the covenant. Obviously, the *Dwyer* court determined that the possible injurious effect of a lawyer restrictive covenant on the client market outweighed the lawyer's interest in making such a covenant. In making this calculation, the *Dwyer* court, rejecting the use of the "reasonableness" test in judging lawyer restrictive covenants, has, paradoxically, used a weighing process typical of that used by a court applying a "reasonableness" test to a restrictive covenant.

75. 133 N.J. Super. at 347-48, 336 A.2d at 500.

authority believes that the division of the client market is no longer achieved by individual performance.[76] Disciplinary Rule 2-108(A) also does not assure clients of good representation or even assure clients that the lawyers of their choosing will take their cases. Furthermore, the ABA Disciplinary Rules forbid the advertising of services by lawyers.[77] These advertising prohibitions could likewise be construed as restricting attorneys in their practice and denying clients the broadest possible opportunity to select the lawyer of their choice.[78]

The "ethicality" test adopted by the *Dwyer* court to judge lawyer restrictive covenants differs from the standard used to judge restrictive covenants among other professionals.[79] New Jersey and most other jurisdictions have used the "reasonableness" test rather than the "ethicality" test in judging restrictive covenants of doctors,[80] engineers,[81] and other professionals.[82] The *Dwyer* court justified its

76. *E.g.*, "Perhaps the system of establishing a legal reputation by performance still works in the national commercial—financial and industrial community—which in its totality today is small enough that it might well be compared to the frontier city which was the model for our present practices on lawyer selection by clients. Certainly it does not work that way for the mass of population anymore—even if it once did—because individuals in the mass of megalopolis no longer know about sole practitioners—or small law firms—or even large law firms. Most individual members of the general public would—I believe—suppose today that one lawyer could help him or her as well as another." Address by Chesterfield Smith, former president of the ABA, Fordham Law School Alumni Association, Mar. 1, 1975.

77. ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 2-101(A) prohibits the solicitation of clients and advertising by lawyers.

78. Address by Chesterfield Smith, former president of the ABA, Fordham Law School Alumni Association, Mar. 1, 1975. There appears to be a conflict between ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 2-101(A), which prohibits lawyers from advertising and advising potential clients of their services, and ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 2-108(A), which, according to *Dwyer*, is aimed at helping the client select the attorney of his own choosing.

79. *Compare* Dwyer v. Jung, 133 N.J. Super. 343, 336 A.2d 498 (Ch. 1975) *with* Marvel v. Jonah, 83 N.J. Eq. 295, 90 A. 1004 (Ct. Err. & App. 1914).

80. *See, e.g.*, Mabray v. Williams, 132 Colo. 523, 291 P.2d 677 (1955); McMurray v. Bateman, 221 Ga. 240, 144 S.E.2d 345 (1965); Marshall v. Covington, 81 Idaho 199, 339 P.2d 504 (1959); Marvel v. Jonah, 83 N.J. Eq. 295, 90 A. 1004 (Ct. Err. & App. 1914).

81. Hulsenbusch v. Davidson Rubber Co., 344 F.2d 730 (8th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966); Zeff, Farrington & Associates, Inc. v. Farrington, 168 Colo. 48, 449 P.2d 813 (1969); Irvington Varnish & Insulator Co. v. Van Norde, 138 N.J. Eq. 99, 46 A.2d 201 (Ct. of Err. & App. 1946).

82. *See, e.g.*, D.B. Clayton & Associates v. McNaughton, 279 Ala. 159, 182 So.2d 890 (1966) (income tax specialists); Weiss v. Levine, 134 N.J. Eq. 1, 34 A.2d 237 (Ch. 1943) (orthodontists); Hayes v. Altman, 424 Pa. 23, 225 A.2d 670 (1967) (optometrists); Worrie v. Boze, 191 Va. 916, 62 S.E.2d 876 (1951) (dance teachers).

decision to invalidate lawyer restrictive covenants by noting the need for clients to be able to select the lawyer of their choice.[83] However, the previous New Jersey decisions that applied the "reasonableness" test did not discuss the need for people to have unlimited freedom to use the doctors, engineers, or other professionals of their choice.[84] To date, it appears that New Jersey courts have held that clients have the unlimited right to select the attorney of their choice but do not have a similar right to select a doctor or engineer.[85] One possible explanation for the different treatment of lawyer restrictive covenants may be that unlike those of other professional organizations,[86] the ABA Code of Professional Responsibility can be interpreted to oppose any agreement that restricts the right of a lawyer to practice law.[87] However, the ABA Code does not expressly support the notion that the client possesses an unlimited right to choose counsel.[88]

The *Dwyer* court rejected the restrictive covenant on ethical grounds and thus protected the rights of the 159 clients. Previous New Jersey decisions, as well as those of other jurisdictions, have

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83. 133 N.J. Super. at 347, 336 A.2d at 500.

84. *See, e.g.*, Irvington Varnish & Insulator Co. v. Van Norde, 138 N.J. Eq. 99, 46 A.2d 201 (Ct. Err. & App. 1946); Marvel v. Jonah, 83 N.J. Eq. 295, 90 A. 1004 (Ct. Err. & App. 1914).

85. However, the most recent case before *Dwyer* in New Jersey involving professionals was Irvington Varnish & Insulator Co. v. Van Norde, 138 N.J. Eq. 99, 46 A.2d 201 (Ct. Err. & App. 1946) which involved an engineer's restrictive covenant. It is conceivable that as a result of *Dwyer*, New Jersey will hear new cases involving professionals' restrictive covenants and may decide them on the reasoning of *Dwyer* rather than on the reasoning of *Irvington Varnish & Insulator Co.*.

86. The American Medical Association (AMA), for example, does not have a disciplinary code that includes a provision similar to ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 2-108(A). *See* AMA PRINCIPLES OF MEDICAL ETHICS (1957). In fact, the AMA tried to form employment restrictive covenants with physicians and hospitals in Washington, D.C. to prevent them from dealing with the patients and physicians of a non-AMA approved health care association. These covenants were found to be unreasonable and illegal. AMA v. United States, 317 U.S. 519 (1943).

87. *See* 133 N.J. Super. at 347, 336 A.2d at 500.

88. According to the ABA code, a lawyer "is under no obligation to act as advisor or advocate for every person who may wish to become his client . . . ." but "shall not lightly decline proffered employment." ABA CODE OF PROFESSIONAL RESPONSIBILITY E.C. 2-26. Besides relying upon the ABA CODE OF PROFESSIONAL RESPONSIBILITY, the *Dwyer* court cited Marshall v. Romano, 10 N.J. Misc. 113, 114, 158 A. 751, 752 (C.P. Essex County 1932) which held that a client is always entitled to be represented by counsel of his own choosing. 133 N.J. Super. at 347, 336 A.2d at 500. In contrast, the AMA codes say expressly that "a physician may choose whom he will serve." AMA PRINCIPLES OF MEDICAL ETHICS § 5 (1957).

enforced covenants which prohibited employment over a wider geographic area[89] or for a longer period of time[90] than the covenant in *Dwyer*. Such enforced covenants appear to be less ethical than the *Dwyer* covenant as they compelled employees to relocate their business activities and deprived a potentially greater number of people of their services.[91]

The major flaw in the reasoning of the *Dwyer* decision is the court's failure to recognize that the common law "reasonableness" test encompasses *Dwyer's* "ethical" standards. The "ethicality" test inquires whether a covenant would result in any hardship to present and potential clients[92] and, to a lesser extent, whether hardship would be incurred by the employee or partner bound by the covenant.[93] However, a restrictive covenant is judged "reasonable" when it simply "protects the legitimate interests of the employer, imposes no undue hardship on the employee and is not injurious to the public."[94] In effect, the two standards used in the "ethicality" test are included in the "reasonableness" test. The "reasonableness" test has the advantage over the "ethicality" test of weighing the interests of the employer with those of the employee and the public. The "ethicality" test does not consider the legitimate right of the employer to protect himself from unfair competion.

While *Dwyer* purported to use ethical considerations to judge restrictive covenants, the court's adherence to a broad interpretation of Disciplinary Rule 2-108(A) precluded it from determining whether the actual covenant it was judging was ethical. The *Dwyer* court did not examine whether the covenant was injurious to any of

89. Due to the varying natures of different businesses, it is difficult to compare restrictive covenants in determining the relative severity of each. Blake 648. However, this author is judging the severity of restrictive covenants by whether they force an employee to either relocate his business activity or change his mode of employment. In *Dwyer*, the partners were not forced by the covenant to relocate their practices nor to stop practicing law. The restriction in the covenant upheld in Weiss v. Levine, 134 N.J. Eq. 1, 34 A.2d 237 (Ch. 1943) covered a seven-county area and the covenant upheld in Irvington Varnish & Insulator Co. v. Van Norde, 138 N.J. Eq. 99, 46 A.2d 201 (Ct. Err. & App. 1946) covered the entire United States.

90. A covenant restricting the employee for ten years was enforced in Nachamkis v. Goldsmith, 10 N.J.L. 356, 128 A. 238 (Ct. Err. & App. 1925).

91. For example, a covenant that covers the entire United States would deprive the entire country of that person's services and force the employee to either enter a new line of business or move to another country in order to continue doing the same work he had done in the past.

92. *See* 133 N.J. Super. at 347-49, 336 A.2d at 500-01.

93. *See id.*

94. Solari Indus., Inc. v. Malady, 55 N.J. 571, 576, 264 A.2d 53, 56 (1970).

the partners or whether anybody, including the 159 insurance carrier clients, suffered or will actually suffer hardship because of an inability to retain any of the partners due to the covenant. Instead of actually applying the "ethicality" test, the *Dwyer* court assumed that clients are always injured by limitations on their right to select an attorney and that as a result lawyer restrictive covenants could never be ethical. That conclusion ignores the positive aspects of these covenants. Often, young attorneys accept employment contracts from law firms with restrictive covenants in order to gain legal experience.[95] Law firms may be less willing to give potential young competitors a chance to gain experience and to establish personal contacts with clients if they were prohibited from protecting their established interests.[96]

Dwyer's blanket rejection of all lawyer restrictive covenants may also have the effect of discouraging partnerships between willing attorneys involving willing clients. It is possible, for example, that the partner in *Dwyer* who was assigned the 154 carrier clients entered the partnership with those clients and did not want to lose them in the event the partnership dissolved. It is equally possible that such a partner would not have entered into the partnership agreement without a restrictive covenant to protect his established interests.[97]

The *Dwyer* court does not posit any persuasive reasons why lawyers should be treated any differently from other professionals and businessmen[98] and why the "reasonableness" test should not apply to lawyers. If New Jersey courts are intent upon establishing an unlimited right of clients to choose their servants, all restrictive covenants should be prohibited rather than simply those involving lawyers. Doctors, other professionals, and businessmen should take note that future courts of New Jersey and other jurisdictions may turn from the "reasonableness" test to either an "ethicality" test or

95. For a discussion of the benefits of restrictive covenants to employees and employers, see Blake 650-51.

96. *Id.*

97. *Id.*

98. *See* Goldfarb v. Virginia State Bar, 95 S. Ct. 2004, 2012-13 (1975). In *Goldfarb*, the Supreme Court rejected the ABA's argument that lawyers should be treated differently from businessmen in the application of the Sherman Act to the Virginia State Bar's price-fixing scheme. *Id.*

a prohibition of all restrictive covenants, particularly those involving professionals.[99]

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99. *But see id.*. By holding lawyer price-fixing schemes illegal, the Supreme Court in *Goldfarb* was encouraging the development of active competition among lawyers. Unlike the *Dwyer* court which was opposed to active competition and restrictive covenants, the Supreme Court might consider lawyer restrictive covenants as being necessary and legitimate tools to use against unfair competition in a system that would permit active competition among lawyers.