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ETHICAL ISSUES ARISING WHEN A LAWYER LEAVES A FIRM: RESTRICTIONS ON PRACTICE

Committee on Professional Responsibility, Association of the Bar of the City of New York †

I. Introduction

It has long been the rule that covenants not to compete do not have an appropriate place in the practice of law.[1] For over three decades, the ethical prohibition against restrictive covenants has been justified on public policy grounds as preventing interference with the right of clients to an attorney of their choice. However, as discussed below, the client choice basis of the rule is overstated, as in most cases a client will be able to retain a lawyer of his or her choice whether or not the lawyer is subject to a partnership agreement restricting her movement to another firm. Instead, the primary effect of the rule is the preservation of the attorney's autonomy by allowing her the freedom to move from one place of employment to another. In particular, the rule serves the salutary purpose of protecting attorneys, particularly newer members of the bar, from bargaining away their right to open their own office or move to another firm after they end an association with a legal employer. The exception to this rule occurs where the firm imposes a condition that restricts the right of a lawyer to practice law as a prerequisite to the payment of retirement benefits.[2]

The modern growth of large law firms with shifting compositions of partners and associates, the portable nature of law practices and client lists, and the widespread professional acceptability of attorney transfers between competing law firms in the same geographic area, have

† April 1993. The members of the Committee at the time this report was written are listed in Appendix A.

1. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-108(A) provides:

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

N.Y. COMP. CODES R. & REGS. tit. 22, § 1200 (1992) [hereinafter N.Y. CODE OF PROFESSIONAL RESPONSIBILITY]. Rule 5.6(a) of the MODEL RULES OF PROFESSIONAL CONDUCT (1983) has adopted the same rule in substantially the same terms.

2. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6(a) (1983); N.Y. CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 1, DR 2-108(A).

all focused attention on the ethical issues arising out of covenants not to compete. In addition, recent economic downturns have caused some firms to take advantage of contractual provisions providing for reduced payments to withdrawing partners who continue to practice law in the geographic area where their firm is located. Other issues are created by the rule's explicit approval of practice restrictions in the context of retirement (the so-called "retirement benefits exception") and the difficulties created when an attorney elects to end his retirement and return to the practice of law. The courts and the ethical rules are faced with the daunting prospect of resolving the central tension between the interest of the law firm in survival and the interest of the departing lawyer in mobility.

This Report will discuss the various issues arising out of covenants not to compete, and will analyze how the courts and ethics rules have sought to resolve these conflicting interests.

II. The *Cohen* Case

Covenants restricting an attorney from practicing in a specific geographic area for a fixed period of years after leaving his employment have uniformly been deemed improper. The ABA Committee on Ethics and Professional Responsibility has stated:

> [A] general covenant restricting an employed lawyer, after leaving the employment, from practicing in the community for a stated period, appears to this Committee to be an unwarranted restriction on the right of a lawyer to choose where he will practice and inconsistent with our professional status. Accordingly, the Committee is of the opinion it would be improper for the employing lawyer to require the covenant and likewise for the employed lawyer to agree to it.[3]

New York ethical opinions are in accord.[4]

In *Cohen v. Lord, Day & Lord*,[5] the New York Court of Appeals considered the propriety of a provision in a law firm partnership agreement that imposed an economic penalty on a departing partner who "continues to practice law in any state or other jurisdiction in

3. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 300 (1961) [hereinafter ABA Opinion 300]. Unlike most recent pronouncements of the public policy underlying restrictions against covenants not to compete, ABA Opinion 300 candidly based its opposition to such covenants on the need to preserve the professional autonomy of the lawyer.

4. *See* N.Y. State B. Ass'n, Op. 129 (1970); N.Y. County Lawyers' Ass'n Comm. on Professional Ethics, Op. 622 (1973); N.Y. County Lawyers' Ass'n Comm. on Professional Ethics, Op. 611 (1972).

5. 75 N.Y.2d 95 (1989).

which the Partnership maintains an office or any contiguous jurisdiction."[6] The partnership agreement contained a common provision protecting against automatic dissolution upon the withdrawal of a partner and provided a formula pay-out over a three-year period to a withdrawing partner, representing a share of unpaid fees and fees for services not yet billed at the time of departure.

The partnership agreement further contained a forfeiture-for-competition clause, which stated as follows:

> Notwithstanding anything in this Article . . . to the contrary, if a Partner withdraws from the Partnership and without the prior written consent of the Executive Committee continues to practice law in any state or other jurisdiction in which the Partnership maintains an office or any contiguous jurisdiction, either as a lawyer in private practice or as a counsel employed by a business firm, he shall have no further interest in and there shall be paid to him no proportion of the net profits of the Partnership collected thereafter, whether for services rendered before or after his withdrawal. There shall be paid to him only his withdrawable credit balance on the books of the Partnership at the date of his withdrawal, together with the amount of his capital account, and the Partnership shall have no further obligation to him.[7]

In *Cohen*, the law firm argued that Cohen had forfeited his departure compensation when he withdrew from Lord, Day & Lord ("LD&L") to become a partner in another large New York City law firm and therefore refused to pay him his share of current earnings. Cohen sued LD&L to recover his departure compensation, and LD&L asserted the forfeiture-for-competition clause as a defense.

The trial court, on cross-motions for summary judgment, held the clause unenforceable as violative of DR 2-108(A). The Appellate Division, First Department reversed, stating that the clause was valid as a "financial disincentive" to competition that did not prevent, and had not prevented Cohen from practicing law in New York or in any other jurisdiction.[8]

The Court of Appeals reversed, stating:

> We hold that while the provision in question does not expressly or completely prohibit a withdrawing partner from engaging in the practice of law, the significant monetary penalty it exacts, if the withdrawing partner practices competitively with the former firm,

6. *Id.* at 97.

7. *Id.*

8. Cohen v. Lord, Day & Lord, 534 N.Y.S.2d 161, 163 (App. Div. 1988), *rev'd*, 75 N.Y.2d 95 (1989).

> constitutes an impermissible restriction on the practice of law. The forfeiture-for-competition provision would functionally and realistically discourage and foreclose a withdrawing partner from serving clients who might wish to continue to be represented by the withdrawing lawyer and would thus interfere with the client's choice of counsel.[9]

In reaching this conclusion, the court cited with approval the prior ethical opinions of the American Bar Association and the New York County Lawyers Association that were codified by DR 2-108(A).

The Court of Appeals rejected LD&L's contentions that DR 2-108(A) condemns only blanket prohibitions on a lawyer's practice of law in a community and that a mere economic disincentive, such as its forfeiture-for-competition clause, would not prevent Cohen or anyone else from practicing law. In support of its holding, the court cited *Gray v. Martin*,[10] in which the Oregon Court of Appeals invalidated a partnership agreement that required a forfeiture of a percentage of the firm's future profits if the withdrawing attorney practiced in a designated three-county area. In *Gray*, the law firm had argued unsuccessfully that the covenant did not "restrict" the withdrawing lawyer's right to practice because that lawyer could still practice in the area by accepting the consequences—i.e., by forfeiting benefits.

The *Cohen* court also rejected LD&L's contention that the retirement benefits exception in DR 2-108(A) authorized a forfeiture of previously earned but uncollected departure compensation. First, the court noted that retirement benefits were set forth in a separate provision of the LD&L partnership agreement, which expressly excluded withdrawing partners and referred them back to the forfeiture-for-competition provision. Second, the court pointed out that, unlike retirement benefits, which extended at least to the death of the retiring partner and even continued to the partner's surviving spouse under certain circumstances, all departure payments were to be made within the three years following withdrawal.

LD&L also raised a public policy argument that firms are justified in enforcing a forfeiture of departure compensation provision because withdrawing partners are likely to hurt a firm's future profits by taking clients of the firm. The court rejected this argument and stated that

> [w]hile a law firm has a legitimate interest in its own survival and economic well-being and in maintaining its clients, it cannot protect those interests by contracting for forfeiture of *earned revenues*

9. *Cohen*, 75 N.Y.2d at 98.
10. 663 P.2d 1285 (Or. Ct. App. 1983).

> during the withdrawing partner's active tenure and participation by, in effect, restricting the choices of the clients to retain and continue the withdrawing member as counsel.[11]

Thus, as to previously earned revenues, the interest in law firm survival was found to be outweighed by the departing lawyer's interest in personal autonomy and freedom of movement.

The court in *Cohen* was careful to state that its holding was premised on Cohen's entitlement to earn uncollected fees accrued during his tenure as a partner of the firm, not to fees generated in the future. Thus, the court correctly, in the Committee's view, pointed out that its decision would not result in a windfall to the withdrawing partner. Rather, the court stated, its decision would ensure only that the departing partner did not forfeit earned income.

Recently, the New Jersey Supreme Court elaborated on the limitations expressed in *Cohen* by stating that, in computing the value of a departing lawyer's interest in a firm, the value contributed can be offset "by the decrease in the firm's value their departure causes."[12] Thus, the highest courts of both New York and New Jersey have sought to balance the interest in firm survival and the interest in freedom of movement in the following manner: the partnership may not deprive the departing lawyer of rightfully earned income or the value of their capital accounts, but the firm may offset for loss of good will and may retain future income.

Judge Hancock and Chief Judge Wachtler dissented in *Cohen* in separate opinions. Judge Hancock essentially agreed with the Appellate Division's conclusion that the clause in question constituted a reasonable contractual term covering the withdrawal of a partner within the province of competent contracting parties.[13] Moreover, the dissent argued that even assuming the clause conflicted with DR 2-108(A), such conflict did not require the invalidation of the partnership agreement as contrary to New York public policy.[14] In short, Judge Hancock was unwilling to give a disciplinary rule the force of law in a civil action.[15] Reminding the majority that the Code of Professional Responsibility is characterized as "an inspirational guide to the members of the professions and as a basis for disciplinary action," the Hancock dissent was critical of using DR 2-108(A) in a civil ac-

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11. *Cohen*, 75 N.Y.2d at 101.
12. Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142 (N.J. 1992).
13. *See Cohen*, 75 N.Y.2d at 102-103 (Hancock, J., dissenting).
14. *Id.* at 105.
15. *Id.* at 108.

tion to impose or avoid contractual liability.[16]

Chief Judge Wachtler concurred in the Hancock dissent but also found that the withdrawal clause in question fell squarely within the "retirement benefits" exception to DR 2-108(A).[17] The fact that the plaintiff in the *Cohen* case was not retiring from the practice of law did not, in Chief Judge Wachtler's view, mean that the benefits he claimed could not be considered retirement benefits; it meant instead that, under the agreement, his failure to retire precluded him from receiving the benefits. Otherwise, the retirement benefits exception could be eviscerated simply by the departing partner's refusal to retire.[18]

III. The Rationale of DR 2-108(A)

A. Protecting the Client's Choice of Counsel

The Committee believes that the *Cohen* court correctly interpreted the language of DR 2-108(A). However, the *Cohen* court, in searching for a policy justification for the rule, relied too heavily on the need to protect the client's choice of counsel. In the majority of cases, a partnership agreement that penalizes an attorney's movement from one firm to another does not in fact affect a client's decision to retain a particular lawyer. Assuming that a financial penalty against competition induced a lawyer to remain at his firm, clients could continue to retain that lawyer's services. Alternatively, if the lawyer chose to incur the financial penalty and compete with his former firm, clients could still retain that same lawyer. Thus, under either circumstance, clients will be able to obtain the counsel of their choice—they are ordinarily unaffected by the financial relationship between the lawyer and the firm.

Cases may exist where the client is dissatisfied with the *firm*, but not the *lawyer*, and the lawyer's inability to move from the firm could impair the client's right to choose that particular lawyer. However, there may be other cases where the client is satisfied with both the firm and the lawyer, and the client does not want the lawyer to leave the firm. In such cases, the lawyer's withdrawal from the firm would

16. *See id.* (quoting Code of Professional Responsibility Preliminary Statement, 29 N.Y. CONSOL. LAWS app. at 354-55 (McKinney 1992)); *cf.* Comm. on Professional Responsibility, *Suppressing Evidence Obtained in Violation of DR 7-104: If Hammad Is Right, Is the Civil Law Wrong?*, 48 REC. ASS'N B. CITY N.Y. 431 (1992) (noting that courts rarely use suppression as a remedy for an ethical violation because "ethical breaches are properly remedied by professional sanctions against the offending attorney").

17. *Cohen*, 75 N.Y.2d at 111 (Wachtler, J., dissenting).

18. *Id.*

also be damaging to the client's freedom to choose. Yet no one in these situations has argued that a restrictive covenant is *ethical* because it preserves the client's choice to retain the attorney and the firm together. Thus, it is apparent that the ethical status of a restrictive covenant is ordinarily independent of the client's right to counsel of choice. At best this is a subsidiary interest behind DR 2-108(A).

B. Promoting Attorney Mobility

The rule can be defended on a more persuasive ground: absent DR 2-108(A), a lawyer's ability to move between firms would be curtailed because the lawyer would sustain a financial penalty in so doing. The promotion of attorney mobility is the unstated—but real—purpose of the rule. The Committee believes strongly that so long as DR 2-108(A) remains extant, it ought to be enforced.

IV. Post-Cohen Litigation

The holding in *Cohen* was relied on by the Appellate Division, First Department in *Denburg v. Parker Chapin Flattau & Klimpl.*[19] The *Denburg* court invalidated a provision in a partnership agreement that required any partner who withdrew from the firm before a fixed date, and continued to practice law, to pay the firm an amount equal to twelve and one-half percent of the partner's profits during the ten years preceding the departure. This penalty was to be offset against the amounts in the withdrawing partner's capital account. Withdrawing partners who did not continue to practice law were entitled to receive all of their capital account, without interest, five years following their withdrawal.

The firm contended that when it negotiated a $4.5 million loan in 1983 to finance its move into new quarters, the partners agreed to stay together for five years to share the cost of the investment, and that those who left the firm during that period would contribute the foregoing financial penalty to the remaining partners. The Appellate Division, concluding that the explanation was "at best, only a partial account of the provision's purpose," stated:

> [I]t is evident that [the provision's] principal function was to prevent withdrawing partners from competing with their former firm. The provision, after all, exacts a penalty only from those withdrawn partners who continue to practice law privately, and there-

19. 586 N.Y.S.2d 107 (App. Div. 1992). The New York Court of Appeals is scheduled to hear arguments in the *Deburg* case in Octover, 1993. *Cases on State Court of Appeals's Docket*, N.Y. L.J., Oct. 4, 1993, at 2.

> fore, potentially in competition with the firm, and exempts from the penalty only those who . . . do not in their new situations continue to serve their former firm's clients.[20]

In an unsigned memorandum decision, the court reversed the decision of the trial judge and granted plaintiff's motion for summary judgment declaring the penalty portion of the partnership agreement invalid as a violation of DR 2-108. The court stated that the paragraph in question "is no less a forfeiture-for-competition provision than the provision at issue in *Cohen*."[21]

The decision in *Denburg* indicates that New York courts are likely to vigorously enforce DR 2-108(A)'s proscription against covenants not to compete. While that approach is proper in view of the *Cohen* holding, as stated above, the Committee believes that DR 2-108(A) does not fulfill its supposed purpose of allowing clients access to the attorney of their choice. Nonetheless, the Committee believes that the *Cohen* and *Denburg* courts struck an appropriate balance between law firm survival and an individual lawyer's autonomy. Although the Committee recognizes that the withdrawal of one or more partners with substantial business can severely damage a firm or lead to its dissolution, the Committee is equally concerned that law firms may impose draconian restrictive covenants on lawyers who are in an unequal bargaining position vis-a-vis the firm, especially young lawyers. Therefore, the Committee concludes that a departing attorney should be permitted to withdraw his or her rightful share of earnings, while at the same time the law firm should be entitled to all future earnings as well as an adjustment of a withdrawing partner's equity interest to account for the effect of the loss of that partner on the firm's good will. This reflects the balance struck by *Cohen* and its progeny.

V. The Scope of the Retirement Benefits Exception

Although in *Cohen* the defendant law firm's efforts to have its forfeiture-for-competition provision read as a "retirement benefits" provision under DR 2-108(A) did not succeed, the Committee anticipates that such efforts will continue as law firms attempt to draft these clauses to bring them within the "retirement benefits" exception. The Committee believes strongly that so long as DR 2-108(A) remains in

20. *Id.* at 109.

21. *Id.* The court also refused to give effect to the plaintiff's waiver of an accounting "in circumstances such as those at bar in which it has been established that the partnership agreement has been contravened to the plaintiff's detriment and there are, as a result, sums, as yet unascertained, owing from the defendant firm to the plaintiff." *Id.* at 110.

existence it should be respected in the drafting and enforcement of law firm partnership agreements. Thus, the retirement benefits exception should apply only if the benefits are clearly allocated for retirement purposes. If that is the case, the payment of such benefits may properly be made contingent upon retirement by the departing lawyer.

The retirement benefits exception cannot apply where the funds to be paid are those to which a departing lawyer is *entitled*, such as a share of undistributed earned income, or a contribution to capital. Under the plain terms of DR 2-108(A), as well as the explicit holding in *Cohen*, a firm cannot condition such payments on the departing lawyer's agreement not to compete. It also is clear that the retirement benefits exception does not allow the firm to condition payments it would otherwise be required to make pursuant to an employee benefit plan. The payout requirements of employee benefit plans and retirement plans are governed by federal law, which is preemptive.

Rather, the retirement benefits exception applies only if the firm decides to make a pay-out to retiring attorneys, of monies to which they are not otherwise entitled (e.g. future earnings), in order to assist them in their retirement. It is only in this limited situation that it makes sense to allow the firm to condition these payments on the lawyer's decision to remain retired.

The lower court's decision in *Hackett v. Milbank, Tweed, Hadley & McCloy*[22] provides an example of a reasoned application of the retirement benefits exception. One of the clauses in the partnership agreement in *Hackett* contained a substantial monetary penalty if a withdrawing partner failed to retire from the practice of law.[23] The other provision conditioned departure payments on a withdrawing partner not earning more than $100,000 per year after withdrawal, thereby effectively making payments unavailable to withdrawing partners who obtained employment in competing firms.[24] The plaintiff, a former partner of Milbank, Tweed, Hadley & McCloy who left the firm to join a competing firm in New York City, sought a permanent stay of arbitration with respect to the Milbank, Tweed partnership agreement on the ground that provisions of the agreement violated DR 2-108(A).[25]

22. *See* 581 N.Y.S.2d 35 (App. Div.), *aff'd*, 80 N.Y.2d 870 (1992). Justice Lobis, the author of the *Hackett* opinion in the Supreme Court, is a member of the Committee on Professional Responsibility but took no part in the writing of this Report.

23. *Id.*

24. Hackett v. Milbank, Tweed, Hadley & McCloy, No. 10341/91, 1991 WL 292576, at *2 (N.Y. Sup. Ct. Aug. 7, 1991).

25. *Id.* at *1.

The lower court held that the provisions at issue violated DR 2-108(A).[26] Therefore, the court, relying on a public policy exception to arbitration, granted a stay of arbitration.[27] The court reasoned that the first clause at issue penalized a withdrawing partner by making a substantial payment unavailable if he or she engaged in competition with the firm after leaving the partnership, and that although the term "retirement" was used in the provision, "the provision is unrelated to true retirement benefits making the retirement exemption for the rule unavailable."[28]

The lower court further stated that the other clause at issue was a more creative attempt at avoiding DR 2-108(A) by conditioning payments on a withdrawing partner not earning more than a fixed amount per year.[29] However, the court concluded that this clause also had the effect of a forfeiture-for-competition provision, because in reality it would apply against all withdrawing partners. The clause was thereby invalid under *Cohen*.[30] The court granted plaintiffs' motion for a permanent stay of arbitration. The Appellate Division, First Department affirmed.[31]

In a memorandum decision, the Court of Appeals, by a vote of 5-0, reversed, holding that the dispute should be submitted to arbitration in view of "the broad arbitration clause" in the partnership agreement. The court reasoned that Hackett's contention "that an arbitrator's award denying him benefits would be contrary to public policy is insufficient to preemptively stay arbitration and may be addressed subsequently on a motion to vacate or confirm the award, if such an award is in fact made."[32] It must be recognized, however, that the Court of Appeals did not reject the lower court's reasoning on the retirement benefits exception; rather, it decided the case on procedural grounds.

A tension exists between the rationale of DR 2-108(A) and the "retirement benefits" exception. Clearly, any restriction on future practice as a condition of retirement benefits constitutes an impediment on future clients' access to the attorney of their choice and a financial restraint on the attorney who might wish to continue in practice but can only do so by foregoing retirement benefits. On the other hand, if the firm has in fact agreed to pay benefits to retiring partners to which

26. *Id.* at *2.
27. *Id.*
28. *Id.*
29. *Hackett*, 1991 WL 292576, at *2.
30. *Id.*
31. 581 N.Y.S.2d 35 (1992).
32. 80 N.Y.2d at 870, 871 (1992) (citations omitted).

they would not otherwise be entitled, it is not unfair to condition the benefit on actual retirement. Without a retirement benefits exception, unfairness would result where departing partners continue in practice and simultaneously obtain benefits intended for retiring partners. If attorneys could take the money earmarked for retiring partners and then continue in practice, the firm would hardly have an incentive to provide financial assistance to retiring partners.

As Professors Hazard and Hodes state, the retirement benefits exception can be justified so long as it is strictly construed:

> [Under the retirement benefits exception], when a lawyer is retiring or winding up his affairs with a firm he may be required to agree to "stay retired" as a condition of obtaining pay-outs from future earnings of the firm. To the extent that there is an adverse impact on the potential availability of lawyers who retire but then wish to practice again, or lawyers who "retire" from one firm in order to relocate, such agreements would appear to limit the availability of active lawyers and correspondingly reduce client choice. Such conditions should be deemed permissible only where the firm is actually paying retirement benefits to its former partner or associate.[33]

A problem has arisen where a retired partner receiving retirement benefits from his former firm decides to resume the practice of law. For example, in *Graubard Mollen Horowitz Pomeranz & Shapiro v. Moskovitz*,[34] the plaintiff law firm had approved a series of retirement agreements that provided for a "phase-down" of the senior partners. These agreements included the return of capital during the "phase-down" period and the payment of retirement benefits during a subsequent five-year period.[35] The principal defendant, during the second year of the five-year retirement period, joined a competing New York City law firm and brought several important clients to his new firm. When he returned to practice, he notified the firm that he no longer wished to receive retirement benefits.[36] The former law firm sued for breach of contract, among other things, and contended that DR 2-108(A) did not preclude enforcement of the retirement agreements and the restriction of practice provided therein.[37] It was clear, as the court recognized, that the agreements in question concerned retirement and payment of monies to which departing attorneys were not

33. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 5.6:201 (2d ed. 1990).
34. 565 N.Y.S.2d 672 (Sup. Ct. 1990).
35. *Id.* at 673-74.
36. *See id.* at 674-75.
37. *Id.* at 674.

otherwise entitled.[38] Moreover, unlike the partnership agreement in *Cohen*, these agreements did not contain separate retirement and withdrawal provisions. Thus, the retirement benefits exception to DR 2-108(A) was implicated, and the court assumed that the firm could properly condition the payment of benefits on the departing partner's actual retirement.

However, the departing lawyer in *Graubard* contended that the restriction on practice was applicable only so long as he continued to claim retirement benefits. He argued that once he renounced the benefits, he was no longer restricted from practicing. The firm argued to the contrary that, having accepted retirement benefits, the departing lawyer was barred from leaving the firm to do anything other than retire.[39]

The court held that the lawyer's abandonment of any continued claim to retirement benefits entitled him to properly resume the practice of law and to represent clients of the former firm.[40] Justice Harold Baer, Jr. based his conclusion upon the fact that DR 2-108(A) permits, as a "condition" to the payment of retirement benefits, an otherwise prohibited restriction upon the right to practice. The court stated: "The word 'condition' suggests that the restriction is linked to the benefits; therefore, if the partner abandons his right to these benefits, the restriction ceases to be proper."[41] He concluded that the retirement benefits exception "ought to be narrowly read" and that while a firm may condition retirement benefits on actual retirement, the departing lawyer may decide to forego the benefits and continue in practice.[42]

The court in *Graubard* did not consider the question of whether the departing lawyer should be required to restore the retirement benefits that had been paid to him by the firm during the time in which he had in fact, though temporarily, retired from the practice of law. This Committee believes that the lawyer who retires temporarily should not be required to pay back the retirement benefits received during the time in which the lawyer was actually retired. Retirement benefits are installment payments by a law firm to financially assist the departing attorney who has left the practice of law. The crucial and only relevant point in time at which to evaluate the payments is the time at which the payments are made. The departed lawyer's situation at the

38. *Id.* at 675.
39. *Graubard Mollen Horowitz Pomeranz & Shapiro*, 565 N.Y.S.2d at 675.
40. *Id.*
41. *Id.* at 676.
42. *Id.*

time of payment is not affected by a subsequent decision to return to the practice of law. Also, the Committee believes that a payback requirement would unfairly penalize a lawyer who has legitimate second thoughts about retirement. While the firm can condition retirement benefits on a lawyer's decision to remain retired, it does not follow that the firm can use a payback requirement as a coercive device to all but force an attorney to remain retired.

The Committee agrees with the view of the courts that a narrow construction of the retirement benefits exception reflects a proper balance of the interests of the firm and the departing attorney. Clearly, it makes no sense to promulgate an exception which swallows the rule by allowing a restriction of practice whenever the partnership agreement refers in some way to "retirement." Instead there must be a clear indication that the firm has adopted a plan to *benefit* withdrawing partners because they are retiring, by providing payments to which the attorneys are not otherwise entitled. If that is the case, it is fair, reasonable, and ethical to limit the benefits to those who actually retire. Thus, as set out in *Graubard*, restrictions on an attorney's right to practice should be permissible where the firm is actually paying retirement benefits to its former partner or lawyer-employee.[43]

VI. Conclusion

The Committee believes that *Cohen v. Lord, Day & Lord*, in its interpretation of DR 2-108(A), properly balances the law firm's interest in survival with the individual lawyer's interest in personal autonomy and freedom of movement. The Committee also contends that the retirement benefits exception in DR 2-108(A) should be construed narrowly.

DR 2-108(A) does not generally serve the purpose for which it was supposedly designed—to allow clients unfettered access to attorneys of their choice. To the extent that it serves that purpose, it is at best a subsidiary consideration that is insufficient to justify the threat to law firm survival that DR 2-108(A) can impose. The major justification for the rule is to promote a lawyer's personal autonomy by allowing the lawyer some freedom of movement. The rule serves the important purpose of preventing law firms from imposing covenants not to compete on lawyers who may be in unequal bargaining positions vis-a-vis the firms. This interest is an important one and, thus, often outweighs the law firm's interest in survival. Accordingly, the Committee believes that the balance struck by DR 2-108(A) is sound.

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43. *See* HAZARD & HODES, *supra* note 33, § 5.6:201.

Appendix A
The Committee on Professional Responsibility

Daniel J. Capra, *Chair***
Marianne Fogarty, *Secretary*

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