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Upon Leaving a Firm: Tell the Truth or Hide the Ball

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UPON LEAVING A FIRM: TELL THE TRUTH OR HIDE THE BALL

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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.¹

I. INTRODUCTION

DURING the early fourteenth century, it was not uncommon for masters to physically threaten departing servants so as to prevent them from leaving to work for a competitor. This early counterpart to noncompetition clauses likely served a useful function in medieval times. Today, however, the barbaric nature of such an act would be unreasonable at best.

Over the last fifteen years, two divergent common law views have emerged regarding the enforceability of noncompetition

1. New York County Lawyer's Ass'n, Comm. on Professional Ethics, Op. 109 (1943); see also ABA Comm. on Professional Ethics, Formal Op. 300 (1961) (stating that restrictive covenants in attorney contracts were unethical despite lack of express prohibition in Canons of Ethics). ABA Formal Opinion 300 states:

[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.

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

Disciplinary Rule 2-108(A) (DR 2-108(A)) of the Model Code of Professional Responsibility codified the reasoning of Formal Opinion 300. 58 U.S.L.W. 2379 (Jan. 9, 1990). DR 2-108 states:

A. A lawyer shall not be 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 the payment of retirement benefits.

B. In connection with a settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108 (1969). In 1983, the American Bar Association (ABA) promulgated the Model Rules of Professional Conduct, adopting a similar provision in Model Rule 5.6. Model Rule 5.6 states:

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or,

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 5.6 (1983).

clauses between attorneys. The first view is exemplified by two Oregon appellate court cases² and the landmark New York Court of Appeals' decision, *Cohen v. Lord, Day & Lord*,³ whereby noncompetition clauses between attorneys were found void as against public policy.⁴ The second view adopts a contrary position, questioning

2. See *Hagen v. O'Connell, Goyak & Ball, P.C.*, 683 P.2d 563, 569 (Or. Ct. App. 1984) (characterizing DR 2-108(A) as "[a] flat prohibition against an attorney entering a non-competition agreement if the attorney intends to remain in practice"); *Gray v. Martin*, 663 P.2d 1285, 1290-91 (Or. Ct. App. 1983) (reversing trial court and holding that noncompetition clause violates public policy). In *Gray*, the court invoked DR 2-108 to void a provision in a partnership agreement that withheld benefits from withdrawing partners who continued to practice law within a specified geographical area. *Gray*, 663 P.2d at 1290. The court refused to characterize the agreement as a condition to payment of retirement benefits. *Id.* The court stated: "If retirement has the same meaning as withdrawal in DR 2-108(A), then the disciplinary rule has no meaning. Every termination of a relationship between law partners would be a retirement, and agreements restricting the right to practice would always be allowed." *Id.*; see MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(A) (providing narrow exception for agreements that restrict lawyer's right to practice as condition for payment of retirement benefits).

3. 550 N.E.2d 410 (N.Y. 1989). Parties to a partnership agreement may generally make any agreement they wish concerning the dissolution of the partnership or the withdrawal of a partner. *Id.* at 414. The terms of such agreements, however, must not contravene public policy. *Id.* at 413; cf. *Dwyer v. Jung*, 336 A.2d 498, 501 (N.J. Super. Ct. Ch. Div.) (holding agreement providing for division of clients upon dissolution of partnership void as against public policy), *aff'd*, 348 A.2d 208 (App. Div. 1975).

4. See *Howard v. Babcock*, 863 P.2d 150, 163 (Cal. 1993) (Kennard, J., dissenting) (recognizing that most jurisdictions addressing restrictive covenants and covenants not to compete between lawyers have found them unenforceable as violative of professional codes of ethics); see also *Kelly v. Smith*, 588 N.E.2d 1306, 1313 (Ind. Ct. App. 1992) (recognizing general unenforceability of covenants that restrict lawyer's right to practice), *vacated on other grounds*, 611 N.E.2d 118 (1993); *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg*, 461 N.W.2d 598, 601 (Iowa 1990) ("detriment" clause in partnership agreement was impermissible restriction on lawyer's right to practice); *Meehan v. Shaughnessy*, 535 N.E.2d 1255, 1262 (Mass. 1989) (citing *Hagen* and *Gray* in interpreting provision in partnership agreement as consistent with Canons of Ethics); *Dwyer*, 336 A.2d at 500 (acknowledging that lawyer restrictions injure public and finding commercial standards inapplicable); *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528, 530 (Tenn. 1991) (finding forfeiture-for-competition provision violation of public policy); *Cohen v. Graham*, 722 P.2d 1388, 1390-91 (Wash. Ct. App. 1986) (affirming arbitration agreement that covenant not to compete violated public policy); see Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 111 (1988) (stating that contractual terms attempting to avoid disputes over solicitation of firm clients "would likely run afoul of the ethical standards against non-competition agreements"); see also Gail Diane Cox, *Defect at Your Own Risk*, NAT'L L.J., Oct. 14, 1991, at 1, col. 2 (discussing validity of noncompetition clauses in partnership agreements). *But see Howard*, 863 P.2d at 160 (enforcing agreement that "plac[ed] a reasonable price on competition").

Some commentators have argued for the enforceability of agreements that penalize but do not prohibit competition with a former firm. See Serena L. Kafkaer, *Golden Handcuffs: Enforceability of Noncompetition Clauses in Professional Partnership Agreements of Accountants, Physicians, and Attorneys*, 31 AM. BUS. L.J. 31, 36-42 (1993)

the conventional wisdom that those who seek legal advice must be afforded the broadest possible choice of counsel.⁵ Specifically, these opinions challenge the idea that noncompetition clauses are "relic[s], found to be unenforceable."⁶ This Article analyzes the relevant ethical mandates and the history of postemployment restrictive covenants between lawyers. In so doing, this Article raises and answers questions concerning the traditional position taken by lawyers. First, Part II examines the conflicts that increasingly occur when attorneys depart their firms.⁷ Part III discusses the evolution and ethical rationale underlying the traditional, per se impermissibility of noncompetition clauses between lawyers.⁸ Next, Part IV acknowledges the unique position of lawyers in the public sphere and the judiciary's use of a reasonableness standard, rather than a commercial standard, to evaluate attorney restrictive covenants.⁹ Part V examines the *Cohen* decision, while Part VI analyzes the recent judicial trend in upholding postemployment covenants.¹⁰ Part VII then discusses the balancing test currently used to reject the per se im-

("A reasonable forfeiture clause would not impose an absolute restriction and would protect the dominant interest of the client as well as those of the departing partner and firm."); Glenn S. Draper, Comment, *Enforcing Lawyers' Covenants Not to Compete*, 69 WASH. L. REV. 161, 171 (1994) (arguing for abandonment of per se unenforceable approach to restrictive covenants between lawyers).

5. See, e.g., *Howard v. Babcock*, 863 P.2d 150 (Cal. 1993); *Haight, Brown & Bonesteel v. Fitzgerald*, 285 Cal. Rptr. 845 (Cal. Ct. App. 1991).

6. Cox, *supra* note 4, at 1, col.2. A "reasonable" restrictive covenant that may be enforceable in a commercial setting or between non-lawyers is analyzed differently when between lawyers. This difference stems from the ethical standards prohibiting lawyers from restricting other lawyers' rights to practice law. See *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 147 (N.J. 1992) (recognizing that ABA ethical opinions of 1960s "set stage" for contemporary rules prohibiting restrictive covenants among attorneys); see also *Dwyer*, 336 A.2d at 499 ("A lawyer's clients are neither chattels nor merchandise, and his practice and good will may not be offered for sale.") (citing HENRY S. DRINKER, *LEGAL ETHICS* 189 (1953)); cf. Michael G. Getty, *Enforceability of Noncompetition Covenants in Physician Employment Contracts*, 7 J. LEGAL MED. 235, 250-53 (1986) (discussing public interest in context of postemployment covenants among physicians).

7. For cases and examples of the conflicts that arise when attorneys leave their firms, see *infra* notes 14-28 and accompanying text.

8. For a complete discussion of the evolution of the per se rule against post-employment restrictive covenants among attorneys, see *infra* notes 29-77 and accompanying text. For a discussion of the approach taken by the Model Rules of Professional Responsibility, see *infra* notes 68-77 and accompanying text.

9. For coverage of the unique position occupied by lawyers in society and the resulting standards applied, see *infra* notes 78-98 and accompanying text.

10. For complete coverage of the *Cohen* decision, see *infra* notes 99-115 and accompanying text. For a discussion of the court decisions in the 1990s that upheld the enforceability of postemployment restrictive covenants between attorneys, see *infra* notes 119-63 and accompanying text.

permissibility of noncompetition clauses between lawyers.¹¹ Part VIII discusses the adverse impact resulting from the application of the balancing test.¹² Finally, in Part IX, this Article concludes that the legal profession is inherently different from any other profession, mandating that attorney noncompetition clauses be treated differently in order to protect the best interests of the client.¹³

II. STATE OF THE MARKET

"Partners in law firms have become increasingly 'mobile,' feeling much freer than they formerly did and having much greater opportunity than they formerly did, to shift from one firm to another"¹⁴ These departures, often described as "split-offs,"¹⁵ "break-ups"¹⁶ and "lateral hires,"¹⁷ likely generate disputes between the exiting partner and his or her former law firm.¹⁸ The particu-

11. For an analysis of the application of the balancing test, see *infra* notes 164-82 and accompanying text.

12. For an analysis of the adverse effects resulting from application of the balancing test, see *infra* notes 183-209 and accompanying text.

13. For this Article's conclusion, see *infra* note 210 and accompanying text.

14. William H. Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151, 152 (1986); see also Johnson, *supra* note 4, at 4-6 nn.2-4 (discussing structural changes in legal environment and lawyers' increased mobility); *The Roads Taken*, HARV. LAW SCH. BULL., No. 3, at 15 (1986) ("Law is a very mobile profession The road not taken is not gone forever [T]oday's graduates are likely to revise their choices along the way.").

15. See Doug Lavine, *Who Corrals Clients When Law Firms Split?*, NAT'L L.J., Apr. 30, 1979, at 8 (defining "split-offs"); see also Johnson, *supra* note 4, at 6 n.8 ("The events and reasons giving rise to termination of attorney's employment are myriad.").

16. See *Howard v. Babcock*, 863 P.2d 150, 157 (Cal. 1993) (recognizing sweeping changes in practice of law); Johnson, *supra* note 4, at 6 (labeling attorney departure as "break-up"); see also Eleanor Kerlow, *Messy Breakup Takes Nasty Turn*, LEGAL TIMES, June 13, 1988, at 3, col. 1 (describing departure as "break-up"). See generally Laurle S. Terry, *Ethical Pitfalls and Malpractice Consequences of Law Firm Breakups*, 61 TEMPLE L. REV. 1055, 1117-22 (1988) (examining ethical consequences of law firm "break-ups"). Recently, headlines have chronicled the increasing incidence of lawyers departing their firms to join competing firms or start their own firms. *Id.* at 1056.

17. See ROBERT W. HILLMAN, *LAW FIRM BREAKUPS* (1990).

Law firms are under siege. The traditional view of the law firm as a stable institution with an assured future is now challenged by an awareness that even the largest and most prestigious firms are fragile economic units facing a myriad of risks in their quests to survive and prosper. No longer can the graduate join a major firm with the sanguine assumption that the firm will not experience major upheavals, turnovers in lawyers, or, in extreme cases, receivership.

Id. § 1.1, at 1; see also Johnson, *supra* note 4, at 6 (using term "lateral hire" to describe partnership departures); Rita Henley Jensen, *The Urge to Merge Isn't Gone*, NAT'L L.J., Aug. 15, 1988, at 1, col. 1 (discussing "lateral hiring").

18. Such disputes may precipitate lawsuits filed by departing attorneys against their former firms or remaining partners. *E.g.*, *Howard*, 863 P.2d at 152 (withdraw-

larities of many of these departures make for interesting reading. For example, in one case a departing partner came to his firm on Thanksgiving weekend with a suitcase to remove client files.¹⁹ In another case, a lawyer physically assaulted a departing partner and threw him out of the office.²⁰ Similar examples abound: Attorneys tortiously interfered with their former firm's contractual obligations and falsely represented to clients that the firm had split up;²¹ a lawyer falsely told his clients he was still associated with his former firm;²² a personality conflict between a partner's son and the remaining partners resulted in the breakup of a nationally known law firm;²³ a lawyer intentionally changed the filing cabinet locks to prevent other partners from accessing the files;²⁴ lawyers carted away over 2000 client files late at night;²⁵ and a partner informed

ing partner brought action against remaining partners for accounting, damages and declaration of rights); *Miller v. Foulston, Siefkin, Powers & Eberhardt*, 790 P.2d 404, 404 (Kan. 1990) (involving former partner suing firm for wrongful discharge and fraud); *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 144 (N.J. 1992) (concerning former partner's lawsuit for compensation due under service termination agreement). Law firms have also resorted to litigation in an attempt to enforce partnership agreements or otherwise protect the firm's interests. *E.g.*, *Williams & Montgomery, Ltd. v. Stellato*, 552 N.E.2d 1100, 1101 (Ill. App. Ct. 1990) (attempting to enjoin former partners from soliciting clients of the firm); *Gray v. Martin*, 663 P.2d 1285, 1286 (Or. Ct. App. 1983) (seeking accounting of withdrawing attorney's fees collected after departure); *see also Johnson, supra* note 4, at 7 (discussing bitter disputes over clients by existing partner and former firm); *Lavine, supra* note 15, at 1, col. 4 (describing ex-partner's struggle with former firm over clients). Many of the most bitter litigation fights today involve clients, funds and even office space claimed by both the firm and the departing attorney. Tamar Lewin, *When Law Partners Split Up*, N.Y. TIMES, Nov. 26, 1984, at D12, col. 3.

19. Rita Henley Jensen, *Scenes from a Breakup*, NAT'L L.J., Feb. 8, 1988, at 46 (discussing Finley, Kimble breakup). *See generally* Terry, *supra* note 16, at 1058-61 (discussing "soap opera" type breakup stories).

20. Mary Ann Galante, *Lawsuit Flurry Follows Dissolution of Belli Firm; Whose Cases Were They?*, NAT'L L.J., Dec. 12, 1983, at 4, col. 3 (describing physical altercation between partner and Belli). *See generally* Terry, *supra* note 16, at 1058-61 (citing variety of law firm break-up cases).

21. Martin Fox, *4 Lawyers Who Left L.I. Firm Barred From Seeking Its Clients*, N.Y.L.J., June 20, 1986, at 1, col. 3. The attorneys were involved in the "systematic solicitation" of their ex-firm's clients. *Id.*

22. *See Paul L. Pratt, P.C. v. Blunt*, 488 N.E.2d 1062, 1065 (Ill. App. Ct. 1986) (concerning lawyer who induced client to sign contingent fee contract by falsely representing that he was still associated with former law firm).

23. Norman Oder, *Firm Enmeshed in Litigation Over Split*, NAT'L L.J., Mar. 30, 1987, at 32, col. 3 (discussing restructuring of nationally known firm of Preiser & Wilson).

24. Ellen J. Pollack, *Partner Charges Firm Conspired To Oust Him*, AM. LAW., Sept. 1980, at 14. Internal disputes between lawyers can lead to verbal disputes in front of clients, the breakdown of professional and friendly relationships, and "absolute war" before they are settled. *Id.*

25. Ellen J. Pollack, *Withdrawal Today: Big News Becomes Old News*, LEGAL ECON., May/June 1987, at 58.

clients that his colleague was "not competent," "senile" and "a crook and a cheat."²⁶ Although these departure-based conflicts take their toll on the participating lawyers,²⁷ the innocent client remains the ultimate loser.²⁸ Unfortunately, in an era where such events are commonplace, law firms will increasingly try to enforce postemployment restrictive covenants.

III. THE TRADITIONAL VIEW

A covenant not to compete in a partnership agreement usually requires a departing partner to refrain from associating with a competitor or establishing a competing business for a specific period of time in a particular geographical area.²⁹ Problems concerning cov-

26. Galante, *supra* note 20, at 10, col. 3.

27. See Mary Ann Galante, *For Firms, Breaking Up is Hard To Do*, NAT'L L.J., Aug. 26, 1985, at 44 (analogizing departure to divorce proceeding); Pollack, *supra* note 25, at 59. Pollack observed:

The comparison of partnership withdrawals, voluntary or involuntary, to divorce may be a cliché, but it is still an apt description of what lawyers endure when a colleague leaves a firm. Friends for decades no longer speak; nobody can agree on money. When the resulting feuds get out of control, fortunes are spent on litigation and thousands of precious hours frittered away.

Pollack, *supra* note 25, at 59. See generally Meeting of the Business Bankruptcy Committee of the Section of Business Law, Held at the Conference of Bankruptcy Judges, Oct. 3, 1988, reprinted in ROBERT W. HILLMAN, *LAW FIRM BREAKUPS* 241 app. E (1990) (discussing complexities inherent in dissolution or reorganization of law firm).

28. Law firm break-ups usually spawn petty disputes that end up hurting the client. See *Vollgraff v. Block*, 458 N.Y.S.2d 437, 438 (N.Y. 1982) (involving clients' lawsuit for malpractice because case was allegedly neglected during break-up); see also Terry, *supra* note 16, at 1060 (noting judicial recognition that "the main loser is the innocent client"). Because a break-up is likely to command a great deal of the lawyer's attention, the client's affairs can easily be overlooked. *Id.* at 1061. Malpractice actions have often followed law firm break-ups. *Id.* at 1060.

29. Harlan M. Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625 (1960). In many contexts, covenants not to compete serve to protect legitimate interests of vendors, lessors and employers. Nevertheless, they have traditionally been treated as "restraints of trade," and, as such, have been subject to much judicial scrutiny. See *id.* at 626 n.3 (noting that covenants not to compete have presented problems for courts for over 500 years); Timothy D. Scramont & Cherie L. Wilson, *Postemployment Covenants Not To Compete in South Carolina: Wizards and Dragons in the Kingdom*, 42 S.C. L. REV. 657, 660-63 (1991) (tracing historical development of case law regarding employee covenants not to compete). For an examination of the current law regarding covenants not to compete between physicians, see Getty, *supra* note 6, at 235. To be held unenforceable as an impermissible restriction on a lawyer's right to practice, an agreement need not be drafted or intended as a covenant not to compete. See, e.g., *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg*, 461 N.W.2d 598, 601-02 (Iowa 1990) (finding clause that provided for forfeiture of departure benefits upon departing attorney's committing acts detrimental to partnership was, in effect, covenant not to compete); *Denburg v. Parker Chapin Flattau & Klimpl*, 624 N.E.2d 995, 999 (N.Y. 1993) (holding agreement unenforceable, notwithstanding benign intent of partners).

enants not to compete have been before the courts for more than 500 years.³⁰ Nevertheless, the emergence of similar covenants in postemployment agreements between attorneys is a relatively recent phenomena whose genesis can be traced to the early twentieth century.³¹

A. *The Canons and the Pre-1960s "Balancing Test"*³²

The Alabama State Bar Association promulgated the first code

30. See Blake, *supra* note 29, at 626 (stating that "restraints of trade" agreements have been before courts for more than 500 years); see also Broad v. Jollyfe, 79 Eng. Rep. 509 (K.B. 1620) (dealing with late medieval apprentice system and transfers of property associated therewith). The classic common law trade restraints were divided into two distinct categories:

- 1) restraints "ancillary" to valid underlying contracts, including, in addition to employment agreements . . . assignment of patent rights, leases of property for business purpose, and more recently employee-retirement agreements;
- 2) restraints not "ancillary" to valid underlying contracts, but typically undertaken to divide territory or markets, limit production, pool profits, fix prices, or buy out potential competitors. "Nonancillary" arrangements did not come to be commonly regarded as subject to the traditional "restraint of trade" doctrines either in the United States or England until the nineteenth century.

Blake, *supra* note 29, at 626 n.3. In 1798, the first direct restraint case was decided. *Id.* (citing Smith v. Scot, 4 Paton 17 (H.L. 1798) (Scot.)). The first American case dealing with a restraint of trade is Pierce v. Fuller, 8 Mass. 223 (1811). See generally Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 707-12 (1985) (tracing development of common law governing postemployment restrictive covenants).

31. See Heinz v. Roberts, 110 N.W. 1034, 1036 (Iowa 1907) (enforcing non-competition clause in conjunction with sale of law practice). In *Heinz*, the covenant stated:

It is further agreed on the part of said J.S. Roberts that he will not open a law office in the town of Ackley, Iowa, or in the vicinity thereof, or practice in his profession in said town or vicinity for the period of ten years from and after this date; except to close the business now in his hands; and should the said John S. Roberts in any manner violate the terms of this agreement, he shall forfeit and pay to the said John R. Heinz the sum of \$600, the same being the agreed and stipulated damages for said breach. And the said J.S. Roberts further agrees to give his time and attention to the business now as established, and to secure new additional and other business for said office from this date to the 10th day of June, 1904.

Id. at 1035; see also Thorn v. Kinsmoor, 178 P. 445, 445 (Kan. 1919) (upholding noncompetition clause). See generally Stephen E. Kalish, *Covenants Not To Compete and the Legal Profession*, 29 ST. LOUIS U. L.J. 423 (1985) (discussing history of covenants not to compete in attorney contracts).

32. Professor Stephen E. Kalish asserts that prior to the promulgation of the Model Code of Professional Responsibility, the enforceability of noncompetition clauses in attorney contracts was governed by a "balancing test" approach. Kalish, *supra* note 31, at 427-28.

of professional ethics in 1887.³³ The Alabama Code of Professional Ethics required a lawyer to guard against the "rough tongue,"³⁴ extol the morality of a minister,³⁵ and avoid the display of a special concern for the jurors' uncomfortable situation.³⁶ The Alabama Code, however, had no explicit provision dealing with postemployment restrictive covenants between lawyers.³⁷ Moreover, the 1908 Canons of Professional Ethics, the first attempt by the American Bar Association (ABA) to codify a uniform body of ethical rules, lacked such a provision.³⁸

Prior to the 1960s, courts rarely distinguished between restrictive covenants among attorneys and restrictive covenants in other professions.³⁹ Following the First Restatement of Contracts, published in 1932, courts frequently enforced covenants that were not overbroad or did not create undue hardship.⁴⁰ Reasonable cove-

33. Alabama State Bar Ass'n Code of Ethics (1887), *reprinted in* HENRY S. DRINKER, LEGAL ETHICS 352 (1953).

34. *Id.* "It is not a desirable professional reputation to live and die with-that of a rough tongue, which makes a man to be sought out and retained to gratify the malevolent feeling of a suitor, in hearing the other side well lashed and vilified." *Id.* at 358.

35. *Id.* at 352. The Alabama Code of Ethics stated: "There is, perhaps no profession after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law." *Id.*

36. *Id.* at 362-63. The Alabama Code stated:

It is the duty of the court and its officers to provide for the comfort of jurors. Displaying special concern for their comfort, and volunteering to ask favors for them, while they are present—such as frequent motions to adjourn trials, or take recess, solely on the ground of the jury's fatigue, or hunger, and uncomfortableness of their seats, or the court-room, and the like—should be avoided.

Id.

37. *See* Alabama State Bar Ass'n Code of Ethics (1887) (lacking provision governing restrictive covenants between attorneys), *reprinted in* DRINKER, *supra* note 34.

38. *See* CANONS OF PROFESSIONAL ETHICS (1908) (lacking provision governing noncompetition agreements between attorneys).

39. *See e.g.*, *Hicklin v. O'Brien*, 138 N.E.2d 47, 52 (Ill. App. Ct. 1956) (enforcing reasonable covenant not to compete); *Heinz v. Roberts*, 110 N.W. 1034, 1036 (Iowa 1907) (enforcing reasonable covenant not to compete); *Smalley v. Greene*, 3 N.W. 78, 80 (Iowa 1879) (holding reasonable covenant not to compete valid); *Thorn v. Dinsmoor*, 178 P. 445, 445 (Kan. 1919) (enforcing noncompetition clause between attorneys). *See generally* Blake, *supra* note 29, at 659-62 (discussing restrictive covenants). "Restraints upon professional employees, such as associates or professional assistants of lawyers, doctors, architects, accountants, and dentists, are also generally upheld when the customer relationships are substantial." Blake, *supra* note 29 at 662. *But see* *Dwyer v. Jung*, 336 A.2d 498, 499-500 (N.J. Super. Ct. Ch. Div. 1975) (distinguishing restrictive covenants between lawyers from "general category of agreements restricting post-employment competition").

40. RESTATEMENT (FIRST) OF CONTRACTS § 515 (Proposed Final Draft No. 11, 1932); *see e.g.*, *Hicklin*, 138 N.E.2d at 48 (acknowledging that reasonable restrictive covenant valid); *Toulmin v. Becker*, 124 N.E.2d 778, 784 (Ohio Ct. App. 1954) (upholding restrictive employment agreement based upon standard of reasonable-

nants were upheld as valid.⁴¹ The courts defined reasonableness by balancing the competing interests.⁴²

Unsatisfied with this balancing approach, the ABA stated in a 1945 ethics opinion that an attempt to "barter in clients [is] inconsistent with the best concepts of our professional status" and violates the Canons of Ethics.⁴³ Despite this adoption of the barter rationale, common law courts enforced the noncompetition clauses without discussing the possible ethical considerations.⁴⁴

ness); see also Blake, *supra* note 29, at 662 n.112 (noting general enforceability of covenants involving solicitors). Section 515 of the Restatement (First) of Contracts articulates the factors to be used in determining whether a covenant is reasonable. The Restatement employs the following illustration:

A, a lawyer, employs B, a young lawyer, as his clerk, who as part of the bargain covenants not to engage in the practice of law within the State after the termination of the employment. Although A's practice extends throughout the State, the covenant is illegal since it imposes undue hardship upon B.

RESTATEMENT (FIRST) OF CONTRACTS § 515 Illus. 5; see also Kalish, *supra* note 31, at 428 (utilizing Restatement illustration). *But cf.* Milton Handler & Daniel E. Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. REV. 669, 719 n.247 (1982) (arguing that illustration does not demonstrate that covenant constituting restriction was reasonable).

41. See *Toulmin*, 124 N.E.2d at 783 (balancing interests to determine whether covenant was reasonable). For a list of sources stating the proposition that reasonable covenants are to be upheld, see *supra* note 39 and accompanying text.

42. *Toulmin*, 124 N.E.2d at 784. The court in *Toulmin* stated:

In giving consideration to these facts it would appear that the restrictions applicable to the states of Ohio and Michigan for a period of five years is reasonably necessary for the protection of the plaintiff's business and is not unreasonably restrictive upon the rights of the defendant. He still has the remaining states and territories of the United States as well as the remainder of the world for the practice of his profession. This would constitute only a limited restraint of trade and would not be in contravention of public policy.

Id. The court concluded that the restrictions were not unreasonable as to time and space. *Id.*; see also Kalish, *supra* note 32, at 427-29 (noting that prior to 1960s, courts balanced competing interests to determine if noncompetition clauses were reasonable, valid and enforceable). *But cf.* *Dwyer*, 336 A.2d at 501 (criticizing *Hicklin*). According to the *Dwyer* court, *Hicklin* "incorrectly proceeded upon the theory that the restrictive covenant imposed no undue burden upon the attorney and completely ignored the effect the covenant might have upon potential clients." *Id.*

43. ABA Comm. on Professional Ethics and Grievances, Formal Op. 266 (1945). The wording was taken from the New York County Lawyers' Ass'n, Comm. on Professional Ethics, Op. 109 (Oct. 6, 1943). See *Dwyer*, 336 A.2d at 499-500 (recognizing negative public policy implications for treating lawyers' clients like chattels). See generally Kalish, *supra* note 31, at 427 (discussing opinion of Committee on Professional Ethics).

44. See *Hicklin v. O'Brien*, 138 N.E.2d 47, 52 (Ill. App. Ct. 1956) (finding it unnecessary to determine whether non-competition clause violated Canons of Professional Ethics); see also Kalish, *supra* note 31, at 427 (discussing early cases rejecting barter rationale).

B. *Pre-Code Ethic's Opinions: The Evolution of a Jurisprudential Change in Legal Ethics*

The 1908 Canons of Professional Responsibility made no express reference to restrictive covenants between attorneys and the issue was not addressed in a formal ethics opinion until 1961.⁴⁵ In its Formal Opinion 300, the ABA Committee on Professional Ethics considered whether an attorney and an employer may enter into an agreement that contains a restrictive covenant preventing the employee from practicing law for a specified period of time after the employment terminates.⁴⁶ Relying heavily on the language of Canon 7, which stated that “[e]fforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the Bar,” the Committee concluded that the agreement constituted a per se violation of professional ethics.⁴⁷

Surprisingly, most of the Committee’s reasoning focused on the participating lawyers rather than on the public or the clients involved.⁴⁸ According to the Committee, such agreements were not consistent with the professional status of lawyers and fostered an impermissible bartering in clients. Such restrictive agreements further created an “unwarranted restriction on the right of a lawyer to choose where he will practice.”⁴⁹ Thus, the Committee extolled the rights of lawyers while failing to consider the lawyers’ obligations to their clients and to the public. In addition, the Committee recognized the interests of an employer-law firm in the continued pa-

45. See ABA Comm. on Professional Ethics, Formal Op. 300 (1961) (presenting restrictive covenants as question of first impression); see also Blake, *supra* note 29, at 662 n.112 (discussing restrictive covenants among professional employees). In his review of restrictive covenants, Professor Blake noted that “[a]merican lawyers apparently do not use such covenants extensively, or at least do not take them to court.” Blake, *supra* note 29, at 662 n.112.

46. ABA Comm. on Professional Ethics, Formal Op. 300. The restrictive covenant at issue would have prevented the employee from practicing in the same city and county as the employer attorney for two years after termination of the agreement. *Id.*

47. *Id.* In the opinion, the Committee also referred to Canons 35, 27, 6 and 37. *Id.* Canon 35 described the attorney-client relationship as personal and individual, such that the practice of law was not a business to be bought and sold. *Id.* Likewise, Canon 27 prohibited attorneys from soliciting clients, while Canons 6 and 37 required attorneys to uphold client confidences and not to reveal secrets. *Id.*

48. Kalish, *supra* note 31, at 429-30 (analyzing Committee’s reasoning in Formal Opinion 300). Compare ABA Comm. on Professional Ethics, Formal Op. 300 (focusing on protecting lawyers’ professional autonomy) with *Dwyer v. Jung*, 336 A.2d 498 (N.J. Super. Ct. Ch. Div.) (focusing on clients’ right to choose counsel), *aff’d*, 348 A.2d 208 (App. Div. 1975).

49. ABA Comm. on Professional Ethics, Formal Op. 300.

tronage of its clients, as well as its desire to protect client confidences.⁵⁰ As such, the Committee considered lawyers to be ethically prohibited from soliciting clients of a former employer, and from disclosing the confidences of former clients.⁵¹ Because the Committee believed these professional and ethical considerations to be sufficient to control lawyers' postemployment behavior, restrictive covenants in employment contracts were deemed unnecessary and improper.⁵²

Seven years later, in an Informal Opinion, the Committee extended this reasoning to partnership agreements between lawyers.⁵³ The Committee discussed the rationale of Formal Opinion 300 but also asserted additional reasons for adopting a per se rule.⁵⁴ Unlike Formal Opinion 300, which only guarded the interests of attorneys, Informal Opinion 1072 focused on the interests of clients and the public.⁵⁵ The Committee stated that restrictive covenants "by their very expression tend to derogate from the trust and confidence necessarily inherent in [attorney-client] relations."⁵⁶ Moreover, the Committee believed that the covenants infringed upon a client's freedom to choose a lawyer and "treat[ed] the practice of law as a commercial business rather than as a profession."⁵⁷ Finally, the Committee reasoned that a private agreement, such as an employment covenant, could not usurp the state's sole authority to certify an individual to practice law.⁵⁸

50. *Id.* In recognizing a law firm's interests, the Committee relied on the ethical restraints against revealing clients' confidences found in Canons 6 and 37. *Id.*

51. *Id.* The Committee considered Canon 27's prohibition of the solicitation of clients to reach this conclusion. *Id.*

52. *Id.*

53. ABA Comm. on Professional Ethics, Informal Op. 1072 (1968). Specifically, the Committee considered whether a restrictive covenant, contained in a partnership agreement among five attorneys, was proper. *Id.*

54. *Id.* The Committee was concerned with the lawyer's right to practice law, the prohibition against bartering in clients and the client's desire to retain a particular attorney. *Id.*; see also Kalish, *supra* note 32, at 430-31 (discussing rationale of Informal Opinion 1072).

55. ABA Comm. on Professional Ethics, Informal Op. 1072 (1968). The Committee highlighted the client's right to choose his or her own attorney. *Id.*; see also Kalish, *supra* note 31, at 430-31 (discussing rationale of Informal Opinion 1072).

56. ABA Comm. on Professional Ethics, Informal Op. 1072 (quoting Association of the Bar of the City of New York Comm. on Professional Ethics, Op. 688 (1945)).

57. ABA Comm. on Professional Ethics, Informal Op. 1072.

58. *Id.*; see also Kalish, *supra* note 31, at 430-31 (discussing rationale of Informal Opinion 1072).

C. *Adopting the Model Code*

By 1969, the ABA Committee on Professional Ethics' stance on postemployment restrictive covenants was entrenched in the jurisprudence of professional ethics.⁵⁹ The Committee believed that the mandates of the Canons of Professional Ethics adequately protected the legitimate interests of law firms, attorneys, clients and the public.⁶⁰ Subsequently, however, the ABA adopted the Model Code of Professional Responsibility.⁶¹ The Model Code included a section that expressly addressed postemployment covenants restricting a lawyer's right to practice. Disciplinary Rule 2-108 (hereinafter DR 2-108) stated:

- (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.
- (B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.⁶²

The ABA cited Formal Opinion 300 in a footnote to DR 2-

59. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(A) (1969) (discussing agreements restricting practice of lawyer); Kalish, *supra* note 31, at 431 (discussing Committee's firm stand on noncompetition clauses). See generally Draper, *supra* note 4, at 163-65 (discussing impact of DR 2-108(A)).

60. Kalish, *supra* note 31, at 431. For a discussion of Ethics Committee opinions, see *supra* notes 46-58 and accompanying text. An antisolicitation provision appeared in the 1908 Canons of Professional Ethics. Canon of Professional Ethics No. 28 prohibits a lawyer from "stirring up strife and litigation," which constitutes a ban on solicitation. CANONS OF PROFESSIONAL ETHICS (1908). The ban evolved from the common law actions of maintenance, champerty, and barratry, which prevented a lawyer from creating litigation. See *id.* Barratry is the "offense of frequently exciting and stirring up quarrels and suits, either at law or otherwise." BLACKS LAW DICTIONARY 150 (6th ed. 1990) (citing *State v. Batson*, 17 S.E.2d 511, 512-13 (N.C. 1941)). Champerty, in old English law, was a share or division of land. Blacks Law Dictionary defines champerty as a "bargain between a stranger and a party . . . by which the stranger pursues the party's claim in consideration of receiving part of any judgment proceeds." *Id.* at 231. Maintenance is "[a]n officious intermeddling in a lawsuit by a non-party by maintaining, supporting or assisting either party, with money or otherwise, to prosecute or defend the litigation." *Id.* at 954; see also *Schnabel v. Taft Broadcasting Co.*, 525 S.W.2d 819, 823 (Mo. Ct. App. 1975) (stating maintenance was developed to prevent officious intermeddling and the stirring up of strife and contention by vexatious and speculative litigation).

61. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).

62. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(A) (1969).

108.⁶³ It is therefore likely that the ABA intended to adopt the per se approach in its promulgation of the disciplinary rule.⁶⁴ One notable exception applies, however. The per se rule is inapplicable if the restrictive covenant is contingent on the payment of retirement benefits.⁶⁵ This retirement provision is entirely consistent with the rationale behind DR 2-108(A) and Formal Opinion 300, because retirement, by definition, requires the attorney to cease practicing.⁶⁶ Recognizing the policy arguments promulgated in ABA Formal Opinion 300 and Informal Opinion 1072, jurisdictions adopting ethical codes based on the Model Code of Professional Responsibility have found postemployment restrictive covenants to be unenforceable.⁶⁷

63. See *id.* at n.93. Footnote 93 reads, in part:

[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.

Id.; see also *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 411-12 (N.Y. 1989) (discussing ABA Formal Opinion 300 and DR 2-108(A)). In *Cohen*, the New York Court of Appeals stated that “[w]hen the Code of Professional Responsibility was adopted, DR 2-108(A) codified the ruling, and the rationale of Opinion No. 300 has been applied to bar restrictive covenants among law firm partners.” *Cohen*, 550 N.E.2d at 411.

64. Kalish, *supra* note 31, at 432.

65. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(A).

66. See Kalish, *supra* note 31, at 432 (discussing retirement exception to DR 2-108(A)); see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 327 (1971) (discussing retirement benefits). Formal Opinion 327 states that “it would appear to be equally permissible to make payments to a retired partner or for a fixed period to the estate of a deceased partner in accordance with a pre-existing retirement plan, the amount of those payments being measured by subsequent earnings of the firm.” *Id.* But cf. *Miller v. Foulston, Siefkin, Powers & Eberhardt*, 790 P.2d 404, 411-13 (Kan. 1990) (upholding provision in partnership agreement that provided benefits for expelled partners who qualify for retirement only if expelled partner quits practicing law). See generally Roger B. Howard, *Drafting Restrictive Covenants Between Lawyers*, 64 FLA. B.J. June 1991, at 12 (explaining how to draft “enforceable” withdrawal and retirement covenants).

67. Whether expressly based on state rules derived from DR 2-108(A) or on other rules governing relationships between attorneys, or relationships between attorneys and their clients, states have invalidated covenants that restrict or prohibit a lawyer’s right to practice law. See e.g., District of Columbia Legal Ethics Comm., Op. 181 (1987) (finding agreement oppressive and unenforceable as violating DR 2-108(A) because attorney “covenant[ed] not to disrupt, impair or interfere with the business of the Firm in any way, whether by way of interfering with or raiding its employees, or disrupting or interfering with the Firm’s relationship with its clients, agents, representatives . . . or otherwise”); District of Columbia Legal Ethics Comm., Op. 122 (1983) (finding partnership agreement forbidding departing partner from serving firm clients for 18 months unethical under DR 2-108(A)); Idaho State Bar Comm. on Ethics and Professional Responsibility, Formal Op. 108

D. *Time for a Change: Adoption of the Model Rules*

In 1977, the ABA created the Commission on Evaluation of Professional Standards to evaluate the existing standards of professional conduct.⁶⁸ Instead of amending the Model Code, the Commission drafted the Model Rules of Professional Responsibility, intended to replace the Model Code.⁶⁹ The Model Rules were adopted in 1983 and currently embody the ABA's official position.⁷⁰

Similar to the pre-existing Model Code, the present Model Rules contain a prohibition against restrictions on the right to practice

(1981) (relying on DR 2-108(A) to hold geographical restrictions on lawyer's practice invalid); Illinois State Bar Ass'n Comm. on Professional Responsibility, Op. 84-15 (1985) (finding employment agreement to be improper because it required departing lawyers to compensate former employer with 25% of all new fees collected from clients who previously did business with that corporation); State Bar of Mich. Comm. on Professional and Judicial Ethics, Op. C-1145 (1986) (holding as unethical liquidated damage provisions that penalize departing partners who serve former firm's clients); New Jersey Advisory Comm. on Professional Ethics, Op. 147 (1969) (relying on proposed draft of Model Code as basis for determining that agreement prohibiting withdrawing partner from competing within county for five years was unethical); New York County Lawyers' Ass'n, Op. 621 (1974) (concluding that DR 2-108(A) prohibits lawyers from entering restrictive covenants concerning practice of law); Texas State Bar Professional Ethics Comm., Op. 459 (1988) (explaining that DRs 2-107(A) and 2-108(A) prohibit lawyers from entering into restrictive covenants); Texas State Bar Professional Ethics Comm., Op. 422 (1984) (finding agreements attempting to prohibit departing attorneys from soliciting former firm's clients unnecessary because of ethical prohibitions against solicitation); Virginia State Bar Standing Comm. on Legal Ethics, Op. 428 (1981) (holding that firm may not restrict departing partner's right to practice law by withholding termination compensation from departing partners who compete with firm).

68. See MODEL RULES OF PROFESSIONAL CONDUCT (1983) (Chairman's Introduction) (describing evolution of Model Rules of Professional Conduct).

69. See *id.* (discussing creation of Model Rules); see also Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 279-80 (1985) (discussing adoption of Model Rules). For a discussion of model ethical codes in the context of covenants not to compete between attorneys, see Draper, *supra* note 4, at 162-66. Draper pointed out that "[e]thical codes . . . are not law. Both the [Model Code of Professional Responsibility] and the [Model Rules of Professional Conduct] disclaim any attempt to govern civil actions." Draper, *supra* note 4, at 164. For example, the Model Rules state:

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

MODEL RULES OF PROFESSIONAL CONDUCT, Scope (1983). Notwithstanding the careful language of the Model Rules, many jurisdictions have been influenced by the public policies embodied in the rules and, in effect, have given the rules the full force of law. For a collection of these jurisdictions, see *supra* note 67 and accompanying text.

70. Gross, *supra* note 69, at 279-80.

law.⁷¹ Model Rule 5.6 provides:

A lawyer shall not participate in offering or making:

- (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
- (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.⁷²

Using language substantially similar to DR 2-108, the rule seems to restate the conventional wisdom of the past.⁷³ As the legal landscape has changed, however, so too has the rationale behind the rule. Once attacked as being "unseemly," "unprofessional" or even "ungentlemanly," the Model Rules condemn restrictive covenants as unethical attempts to limit the client's right to freely choose counsel.⁷⁴

While expressing the policy concerns voiced in ABA Formal Opinion 300 and Informal Opinion 1072, the comment to Model Rule 5.6 indicates that the rule is intended to rearticulate the language and spirit of DR 2-108.⁷⁵ The comment states that "[a]n agreement restricting the right of partners or associates to practice

71. Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108 (1969) with MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1983).

72. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6.

73. See GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 822 (2d ed. Supp. 1992) (discussing Rule 5.6).

74. *Id.*; see also *Dwyer v. Jung*, 336 A.2d 498, 500-01 (N.J. Super. Ct. Ch. Div.) (invalidating restrictive covenant that burdened client's choice of counsel), *aff'd*, 348 A.2d 208 (App. Div. 1975); *Hagen v. O'Connell, Goyak & Ball, P.C.*, 683 P.2d 563, 565 (Or. Ct. App. 1984) (discussing public protection policy in prohibition against lawyers' restrictive covenants); *cf. Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg*, 461 N.W.2d 598, 600-01 (Iowa 1990) (refusing to enforce financial detriment clause that operated as covenant not to compete); *Denburg v. Parker Chapin Flattau & Klimpl*, 624 N.E.2d 995, 998-99 (N.Y. 1993) (reaffirming position against restrictions on lawyers' right to practice law because "they interfere with the client's choice of counsel").

In *Anderson*, the Supreme Court of Iowa noted that:

[A]n economic disincentive for the lawyer may operate to the detriment of the client. Faced with a choice of taking a share of the firm's profits or some of its clients, a partner may well choose the former if it yields a net economic benefit. In that case, the clients' freedom of choice has been bargained away just as effectively as if the partnership agreement contained a bald restrictive covenant.

Anderson, 461 N.W.2d at 602 (quoting ROBERT W. HILLMAN, LAW FIRM BREAKUPS 32 (1990)).

75. See *Kalish*, *supra* note 31, at 433 (discussing comments to Model Rule 5.6).

after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer."⁷⁶ States following the Model Rules have therefore reached the same conclusion as jurisdictions adopting the Model Code of Professional Responsibility; postemployment restrictive covenants are per se unenforceable.⁷⁷

IV. ARE LAWYERS DIFFERENT?

Upon admission to the bar, the neophyte lawyer is no longer cloaked in the garb of the commonplace man.⁷⁸ Instead, he or she has entered into a new life, accompanied by greater responsibilities and additional duties.⁷⁹ Admission to the bar places the attorney "in a new relation to his fellow [man or woman]."⁸⁰ The rules of the game have changed; the attorney has become an officer of the courts and a representative of the public. It becomes his or her duty to aid in carrying out justice between individuals of the public, should any of them seek assistance.⁸¹

The prohibition against postemployment restrictive covenants embodied in the Model Rules distinguishes lawyering from other businesses and professions.⁸² For example, businesspersons, ac-

76. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6 cmt. (1983).

77. Texas has adopted a modified version of the Model Rules of Professional Responsibility. The Texas equivalent to Model Rule 5.6, Texas State Bar Rule 5.06, contains an exception that permits a restrictive covenant that is part of a settlement of a disciplinary proceeding against a lawyer. Texas Rule 5.06 states:

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a suit or controversy, except that as part of the settlement of a disciplinary proceeding against a lawyer an agreement may be made placing restrictions on the right of that lawyer to practice.

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 5.06 (Supp. 1995); see *Musslewhite v. State Bar of Tex.*, 786 S.W.2d 437, 443-44 (Tex. Ct. App.) ("A clear reading . . . reveals that the supreme court intended the prohibition on settlement agreements to apply to settlements on a client's behalf, not settlements of disciplinary proceedings."), *cert. denied*, 501 U.S. 1251 (1991); see also Texas State Bar Professional Ethics Comm., Op. 459 (1988) (stating that postemployment restrictive covenant violates rules based on Model Code); cf. Texas State Bar Professional Ethics Comm., Op. 466 (1990) (upholding retirement exception to rule based on Model Code).

78. See LEONARD G. ARCHER, *ETHICAL OBLIGATIONS OF A LAWYER* 35 (1910) (discussing how lawyers differ socially).

79. *Id.*

80. *Id.* at 36.

81. *Id.*

82. See HILLMAN, *supra* note 17, at 29 (discussing unique nature of prohibition on lawyer's restrictive covenants).

countants and physicians frequently sign noncompetition agreements.⁸³ Some commentators assert that the policy arguments for setting lawyers apart from other professions are tenuous, and question whether the clients' freedom to choose their desired professional is any less crucial when the professional is a physician, rather than a lawyer.⁸⁴

Nevertheless, contemporary courts have closed their ears to such arguments. For example, in *Dwyer v. Jung*,⁸⁵ a New Jersey Superior Court recognized that lawyers' restrictive covenants should be distinguished from those of other professions.⁸⁶ The court in *Dwyer* emphasized a client's unimpeded right to choose an attorney, and contended that "[c]ommercial standards may not be used to evaluate the reasonableness of lawyer restrictive covenants."⁸⁷ The

83. See, e.g., *Fuller v. Brough*, 411 P.2d 18, 21 (Colo. 1966) (upholding reasonable restrictive covenant between accountants); *Rash v. Toccoa Clinic Medical Assocs.*, 320 S.E.2d 170, 172-74 (Ga. 1984) (enforcing covenant not to compete found in partnership agreement among physicians); *Rhoads v. Clifton, Gunderson & Co.*, 411 N.E.2d 1380, 1383 (Ill. App. Ct. 1980) (holding that reasonable non-competition clause in accountant's employment contract was valid); *Gelder Medical Group v. Webber*, 363 N.E.2d 573, 577 (N.Y. 1977) (enforcing restrictive covenant against physician expelled from group medical practice).

Many commentators have discussed judicial treatment of covenants not to compete and related restrictions between accountants and doctors. See, e.g., HILLMAN, *supra* note 17, at 29 (noting that accountants and physicians frequently agree to restrictive covenants); Paula Berg, *Judicial Enforcement of Covenants Not To Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense*, 45 RUTGERS L. REV. 1, 1-48 (1992) (discussing covenants not to compete among physicians); Getty, *supra* note 6, at 244-53 (discussing various interests implicated by covenants not to compete among doctors); Stuart L. Pachman, *Accountants and Restrictive Covenants: The Client Commodity*, 13 SETON HALL L. REV. 312, 316-19 (1983) (comparing enforcement of accountants' noncompetition clauses); Jill M. Mayo, Comment, *The Antitrust Ramifications of Noncompetition Clauses in the Partnership and Employment Agreements of Doctors*, 30 LOY. L. REV. 307, 322-32 (1984) (presenting interests considered when courts examine noncompetition clauses between doctors); Ferdinand S. Tinio, Annotation, *Validity and Construction of Contractual Restrictions on Right of Medical Practitioner to Practice, Incident to Partnership Agreement*, 62 A.L.R.3D 970, 974-1005 (1975) (providing discussion of legitimacy of anticompetitive agreements between doctors).

For a general discussion of postemployment restrictive covenants within a broader context, which provides an extensive discussion on the historical development and enforcement of restrictive covenants in employment agreements, see Blake, *supra* note 29, at 629-51. For a discussion of South Carolina case law on post employment covenants not to compete, which calls on courts to reexamine competition law so as to make it more reasonable and reliable for practicing attorneys, see *Scrantom & Wilson*, *supra* note 29, at 663-82.

84. HILLMAN, *supra* note 17, at 29; Kafker, *supra* note 4, at 52-57.

85. 336 A.2d 498 (N.J. Super. Ct. Ch. Div.), *aff'd*, 348 A.2d 208 (App. Div. 1975).

86. *Id.* at 499. The restrictive covenant at issue in *Dwyer* sought to allocate a partnership's clients between the various partner attorneys when the partnership terminated. *Id.*

87. *Id.* at 500. According to the court, the application of commercial stan-

Dwyer court was persuaded by the policy arguments supporting the adoption of DR 2-108(A) of the Model Code of Professional Responsibility.⁸⁸ Consequently, the *Dwyer* court held the restrictive covenant to be "void as against public policy."⁸⁹

In *Karlin v. Weinberg*,⁹⁰ the trial court attempted to apply the *Dwyer* standard to physicians, holding a restrictive covenant between medical doctors was unenforceable.⁹¹ The trial court concluded that "the covenant would prevent defendant's services from being 'reasonably accessible' by virtue of the distance a former patient would have to travel, and, therefore, the 'public right' was violated."⁹² On appeal, the New Jersey Superior Court disagreed, stating that *Dwyer* was grounded in the language of DR 2-108(A) and the medical profession did not have an analogous ethical provision.⁹³ Consequently, the court held that the lawyer exception to the "reasonableness" standard did not apply to the medical profession.⁹⁴

The New Jersey Superior Court has also refused to extend the *Dwyer* rationale to accountants.⁹⁵ Relying on the reasonableness

dards to lawyers' restrictive covenants is precluded by strong policy considerations. *Id.* Because the attorney-client relationship is consensual and "highly fiduciary on the part of counsel," an attorney may do nothing that restricts the clients right to freely choose counsel. *Id.* "No concept of the law is more deeply rooted." *Id.*; see also Kalish, *supra* note 31, at 434-38 (discussing *Dwyer* decision).

88. *Dwyer*, 336 A.2d at 500-01. For a discussion of DR 2-108, see *supra* notes 62-67 and accompanying text.

89. *Dwyer*, 336 A.2d at 501. The court's reasoning was founded upon the principles underlying DR 2-108(A). See *id.* at 501. Specifically the court stated:

We recognize in the legal profession the existence of a "client market" which is divided among lawyers within a particular locality. But the division of that "market" can be ethically achieved only through individual performance and the "establishment of a well-merited reputation for professional capacity and fidelity to trust."

Id. (quoting New Jersey Advisory Comm. on Professional Ethics, Op. 147 (1969)).

90. 372 A.2d 616 (N.J. Super. Ct. App. Div. 1977), *aff'd*, 390 A.2d 1161 (1978).

91. *Id.* at 618.

92. *Id.*

93. *Id.* at 618. *But cf.* Ladd v. Hikes, 639 P.2d 1307, 1311 (Or. Ct. App. 1982) (Buttler, P.J., dissenting). In *Ladd*, Judge Buttler noted that the public need for doctors exceeds the need for lawyers. Judge Buttler wrote, "I think it is safe to say that the public need and demand for doctors is, generally, greater than the need and demand for lawyers; *a fortiori*, such covenants between doctors should be held to contravene public policy and not be enforced." *Id.* (footnote omitted).

94. *Karlin*, 372 A.2d at 618 (stating that "there is no comparable provision of law which makes it illegal for a doctor voluntarily to agree to restrict his practice of medicine from a given area").

95. See Mailman, Ross, Toyes & Shapiro v. Edelson, 444 A.2d 75, 78-80 (N.J. Super. Ct. Ch. Div. 1982) (applying reasonableness test to non-compete clause in accountant's contract).

test, the court in *Mailman, Ross, Toyes & Shapiro v. Edelson*⁹⁶ was uncertain as to whether the potential injurious effect on the public, which justified the reasonableness standard, warranted the adoption of a per se approach.⁹⁷ Although the *Edelson* court came close to extending the *Dwyer* rationale to accountants, such a per se rule was rejected.⁹⁸

V. THE CORNERSTONE: *COHEN V. LORD, DAY & LORD*

In 1985, Richard G. Cohen, partner and head of the tax department at the law firm of Lord, Day & Lord, resigned from the firm to become a partner in a rival New York City law firm.⁹⁹ Cohen's partnership agreement with Lord, Day & Lord entitled withdrawing partners to their proportionate share of the profits from unpaid fees for services they had rendered prior to their departure.¹⁰⁰ Upon requesting this "departure compensation," Cohen was informed that he had surrendered his right to such compensation by accepting employment with a rival firm.¹⁰¹ The firm relied on a forfeiture-for-competition clause contained in the partnership

96. 444 A.2d 75 (N.J. Super. Ct. Ch. Div. 1982).

97. *Id.* at 80 (demonstrating propriety of reasonableness standard). The court stated:

Accountants are not commercial business people like the salespersons restricted by noncompetition agreements in [other cases]. Accountants, like doctors and lawyers, are engaged in a profession which necessarily requires clients to reveal personal and confidential information to them in the course of the professional relationship. Like the lawyer-client relationship characterized in *Dwyer*, the accountant-client relationship is also consensual and fiduciary, and the right of the client to repose confidence in the accountant of his or her choice should not readily be circumscribed. It is this distinction between restrictive covenants in a commercial or business setting, where primarily economic interests are at stake, and those binding professionals who depend largely on unconditional confidential relationships to serve their clients satisfactorily, which underscores the greater degree of injury to the public that may occur in the latter instance.

Id. (footnote omitted); see also Kalish, *supra* note 31, at 436-37 (discussing *Edelson* decision and noting court's uncertainty with decision to apply New Jersey reasonableness test).

98. *Edelson*, 444 A.2d at 78.

99. *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 410 (N.Y. 1989). Cohen had been a partner at Lord, Day & Lord for almost twenty years. *Id.*

100. *Id.* The clause was inserted in the partnership agreement to protect against the possibility of automatic dissolution. *Id.*; see also UNIF. PARTNERSHIP AGREEMENT § 29 (1993) ("The dissolution of a partnership is the change in the relation of the parties caused by any partner ceasing to be associated in the carrying on . . . of the business."); REV. UNIF. PARTNERSHIP ACT §§ 601-603 (1994) (discussing partner's dissociation generally).

101. *Cohen*, 550 N.E.2d at 411. Lord, Day & Lord also complained that Cohen took an associate attorney and several clients with him to his new firm. *Id.*

agreement to support its position that Cohen had relinquished his right to the fees.¹⁰² In response, Cohen brought suit against the law firm to recover the amount due under the partnership agreement.¹⁰³

The New York Supreme Court granted summary judgment in favor of Cohen.¹⁰⁴ On appeal, the New York Supreme Court Appellate Division reversed the trial court's grant of summary judgment.¹⁰⁵ The New York Court of Appeals, however, ruled in Cohen's favor, deeming the agreement unenforceable as against public policy.¹⁰⁶ The court held that the partnership agreement unlawfully restrained the practice of law by conditioning payment of earned fees upon noncompetition by the withdrawing partner.¹⁰⁷

102. *Id.* The clause provided:

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 other 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, where 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.

Id. at 410-11. A forfeiture-for-competition clause is an indirect restriction on the right to practice. Direct restrictions are those that attempt to prohibit, rather than just penalize, postemployment competition. See Draper, *supra* note 4, at 162-71 (discussing agreements that attempt to "discourage competition"). For an excellent general discussion of employee covenants not to compete, see Blake, *supra* note 29. See generally Kafker, *supra* note 4, at 31 (advocating enforcement of reasonable restrictions rather than absolute restrictions on accountants', physicians' and attorneys' right to practice).

103. *Cohen*, 550 N.E.2d at 410. In its entirety, the contested article Tenth (B)(a)(i) provided:

(i) If at the time of his withdrawal he shall have been a member of the Partnership for ten (10) years, there shall be paid, within forty-five (45) days following the close of each of the three twelve month periods following his withdrawal . . . a share of the profits for each such period determined by multiplying the total net profits of the Partnership for each such period by one-third of the average of the percentages which his shares of the net profits as distributed to him for each of the three (3) fiscal years prior to his withdrawal bore to the total net profits of the Partnership in each of such three (3) prior years.

Cohen v. Lord, Day & Lord, 534 N.Y.S.2d 161, 162 (N.Y. App. Div. 1988), *rev'd*, 550 N.E.2d 410 (1989).

104. *Cohen*, 534 N.Y.S.2d at 161.

105. *Id.* at 163. The Appellate Division found that the covenant merely operated as a financial disincentive rather than a restrictive covenant and, consequently, upheld the partnership agreement. *Id.*

106. *Cohen*, 550 N.E.2d at 410.

107. *Id.* at 411.

Although the agreement did not expressly prohibit a departing partner from practicing law, the monetary penalty for practicing with a competitor imposed a financial disincentive that constituted, in effect, an impermissible restriction on the practice of law.¹⁰⁸ Nevertheless, the *Cohen* court warned that the holding should be construed narrowly and should not be transformed “into something broader than it is.”¹⁰⁹ The court emphasized that it addressed only the particular clause at issue in the context of the particular professional relationship.¹¹⁰

Despite this warning, numerous courts have applied the reasoning in *Cohen* to invalidate noncompetition clauses between attorneys.¹¹¹ For example, in *Denburg v. Parker Chapin Flattau &*

108. *Id.* In invalidating the forfeiture-for-competition provision, the court noted:

[W]hile 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, 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.

Id.; see also NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(A) (mirroring Model Code DR 2-108 in prohibiting a lawyer from “participat[ing] in a[n] . . . 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”).

109. *Cohen*, 550 N.E.2d at 413. The court expressly limited its holding and cautioned against a “categorical interpretation or application.” *Id.*

110. *Id.* In invalidating the agreement, the court carefully evaluated the true “issue and effect” of the forfeiture-for-competition clause. *Id.* The court determined that the clause violated public policy because, in effect, it forced the forfeiture of earned revenues. *Id.* Central to the court's holding was the fact that the forfeiture-for-competition clause purported to deny the departing partner previously earned, yet uncollected, fees. See *id.* (stating that the true effect of the clause was not to deny “future distributions”).

111. See, e.g., *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg*, 461 N.W.2d 598, 601-02 (Iowa 1990) (citing *Cohen* in upholding firm's obligation to pay departing attorney fees earned under contract); *Miller v. Foulston, Siefkin, Powers & Eberhardt*, 790 P.2d 404, 410-11 (Kan. 1990) (upholding retirement agreement); *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 149 (N.J. 1992) (citing *Cohen* for proposition that financial disincentive provisions are unenforceable as against public policy); *Denburg v. Parker Chapin Flattau & Klimpl*, 624 N.E.2d 995, 999 (N.Y. 1993) (relying on *Cohen* to invalidate partnership agreement that required withdrawing partner to pay sum to firm); *Judge v. Bartlett, Pontiff, Stewart & Rhodes, P.C.*, 610 N.Y.S.2d 412, 413-14 (N.Y. App. Div. 1994) (deeming “termination pay” agreement invalid because effect violates public policy announced in *Cohen*); *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528, 531 (Tenn. 1991) (applying *Cohen* rationale to professional corporations); see also *Graubard, Mollen, Horowitz, Pomeranz & Shapiro v. Moskovitz*, 565 N.Y.S.2d 672, 674-76 (N.Y. Sup. Ct. 1990) (distinguishing *Cohen* while refusing to enforce clause

Klimpl,¹¹² the New York Court of Appeals refused to enforce a forfeiture-for-competition clause that was arguably designed to ensure the law firm's continued existence.¹¹³ The court reasoned that the clause, in effect, deterred competition and thus improperly infringed upon clients' free choice of counsel.¹¹⁴ Consequently, the agreement was held to be unenforceable for the same policy reasons suggested in *Cohen*.¹¹⁵

Likewise, in *Judge v. Bartlett, Pontiff, Stewart & Rhodes, P.C.*,¹¹⁶ the New York Superior Court held that a termination pay agreement violated public policy because the agreement restrained the practice of law by imposing financial disincentives against competition.¹¹⁷ Relying on *Cohen* and *Denburg*, the court reasoned that the agreement, in effect, limited clients' choice of counsel and was

in retirement agreement that required withdrawing partner to refer clients to former firm and refrain from anything that would impair firm's relationship with existing clients); cf. *Wolt v. Sherwood*, 828 F. Supp. 1562, 1569 (C.D. Utah 1993) (citing *Cohen* for notion that clients' right to choose counsel cannot be restricted by settlement agreement). *But see* *Howard v. Babcock*, 863 P.2d 150, 158 (Cal. 1993) (rejecting *Cohen* and its progeny and upholding forfeiture-for-competition clause that operates as tax on taking the former firm's clients). *See generally* New York Bar Ass'n Comm. on Professional Responsibility, *Ethical Issues Arising When a Lawyer Leaves a Firm: Restrictions on Practice*, 20 FORDHAM URB. L.J. 897, 903-09 (1993) (discussing ramifications of *Cohen*). "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 exception in DR 2-108(A) should be construed narrowly." *Id.* at 909.

112. 624 N.E.2d 995 (N.Y. 1993).

113. *Id.* at 999. In *Denburg*, an amended partnership agreement required withdrawing partners who continued to practice in the private sector to pay either 12.5% of the firm's profits allocated to the partner over the two previous years, or 12.5% of billings to former Parker Chapin clients made by the partner's new firm over the ensuing two years. *Id.* at 997. The agreement, by its terms, did not apply to partners who took jobs in the public sector or whose previous year's profit allocation did not exceed \$85,000, and whose new firm did no work for Parker Chapin clients during the ensuing two years. *Id.* Parker Chapin asserted that the agreement was designed merely to assure that departing partners share financial responsibility for a \$4.5 million loan taken out by the firm. *Id.* at 998.

114. *Id.* at 999.

115. *Id.* at 998-1000. The court also held that an agreement to settle a dispute concerning a forfeiture-for-competition clause was enforceable even though the clause itself was unenforceable. *Id.* at 1001-02.

116. 610 N.Y.S.2d 412 (N.Y. App. Div. 1994).

117. *Id.* at 414. The agreement at issue in *Judge* included a termination pay provision for payment upon termination of employment. *Id.* at 413. The provision applied to all attorneys employed with the firm for at least ten years. *Id.* The agreement also provided that the terminated employees could not engage in competition within a thirty mile radius of any office of the firm for a period of five years. Doing so would result in the forfeiture of 75% of all future payment of termination benefits. *Id.*

therefore unenforceable.¹¹⁸

VI. THE 1990s: RENEGADE DECISIONS OR STRUCTURAL CHANGE?

As the above discussion illustrates, postemployment restrictive covenants between attorneys generally have been considered unenforceable.¹¹⁹ Such contractual terms were thought to violate the ethical standard against noncompetition agreements.¹²⁰ Modern jurists have broadly defined restrictive covenants to include standard covenants not to compete after termination of employment,¹²¹ covenants included in the sale of a law practice,¹²² liquidated damage clauses,¹²³ noncompetition clauses in partnership

118. *Id.* at 414. The defendants in *Judge* tried to distinguish *Cohen* by the fact that *Cohen* involved a partnership in which each partner had a vested right to full payment of a partnership share, including earned but uncollected revenues. *Id.* at 413. In *Judge*, however, the firm was a professional services corporation where employees contracted for employment and had no rights to profits, fees or assets of the corporation. *Id.* The court rejected this distinction, noting that DR 2-108(A) specifically applies to any employment agreement which "restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement." *Id.* at 414 (quoting DR 2-108)(A)).

119. *See, e.g.*, Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598, 601-02 (Iowa 1990) (refusing to enforce provision providing for forfeiture of partnership interest upon causing "detriment" to former firm); Meehan v. Shaughnessy, 535 N.E.2d 1255, 1261-62 (Mass. 1989) (construing partnership agreement so as not to violate rule against noncompetition agreements); Dwyer v. Jung, 336 A.2d 498, 501 (N.J. Super. Ct. Ch. Div.) (holding clause restricting lawyers from representing certain clients void as against public policy), *aff'd*, 348 A.2d 208 (App. Div. 1975); Denburg, 624 N.E.2d at 997 (holding forfeiture for competition provision unenforceable); Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 413 (N.Y. 1989) (holding clause that had effect of restricting practice of law unenforceable as against public policy); Hagen v. O'Connell, Goyak & Ball, P.C., 683 P.2d 563, 565 (Or. Ct. App. 1984) (holding noncompetition clause unenforceable); Gray v. Martin, 663 P.2d 1285, 1290 (Or. Ct. App. 1983) (holding that restriction violated disciplinary rule and was therefore unenforceable); Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528, 531 (Tenn. 1991) (holding invalid clause that withheld compensation to withdrawing partner who continued to practice); Cohen v. Graham, 722 P.2d 1388, 1390-91 (Wash. Ct. App. 1986) (holding agreement not to represent former firm's clients unenforceable). *See generally* HILLMAN, *supra* note 17, at 26-29 (presenting early rationale to prohibit restrictive covenants between lawyers). *But cf.* Hicklin v. O'Brien, 138 N.E.2d 47, 52 (Ill. App. Ct. 1956) (upholding restrictive covenant ancillary to sale of law practice); Miller v. Foulston, Siefkin, Powers & Eberhardt, 790 P.2d 404, 410-11 (Kan. 1990) (upholding covenant pursuant to retirement benefits exception).

120. Johnson, *supra* note 4, at 111. Professor Johnson believed that any violation of Model Rule 5.6 would subject the attorney to discipline and "render the restrictive covenant unenforceable as against public policy." *Id.* at 111-12.

121. *See, e.g.*, Meehan v. Shaughnessy, 535 N.E.2d 1255 (Mass. 1989).

122. *See, e.g.*, Hicklin v. O'Brien, 138 N.E.2d 47 (Ill. App. Ct. 1956).

123. *See* State Bar of Mich. Comm. on Professional and Judicial Ethics, Op. C-1145 (1986) (stating that lawyer cannot sell or purchase goodwill of law practice or enter employment contract that requires payment of liquidated damages); *see also* Professional Guidance Comm. of the Phila. Bar Ass'n, Op. 87-24 (1988) ("A lawyer

agreements,¹²⁴ restrictive covenants enforced by professional corporations¹²⁵ and forfeiture penalties for withdrawing from employer-law firms.¹²⁶

A. *Ethical Considerations*

Judicial hostility towards such covenants has been ventilated through ethics opinions and case law. These opinions indicate that the unenforceability of restrictive covenants has become cemented in the jurisprudence of legal ethics.¹²⁷ Unenforceability, however, is not universally recognized. For example, in December of 1991, the California Supreme Court left intact an appellate court opinion that enforced a restrictive covenant in a partnership agreement.¹²⁸

In *Haight, Brown & Bonesteel v. Fitzgerald*,¹²⁹ seven partners departed the law firm of Haight, Brown & Bonesteel and established their own firm, Dickson, Carlson & Campillo. The former law firm sued the departing partners for violation of the partnership agreement.¹³⁰ At the time of departure, the partnership agreement provided:

[E]ach Partner agrees that, if he withdraws or voluntarily retires from the Partnership, he will not engage in any

may not agree to an employment contract with a liquidated damages clause so high that it restricts the lawyer's right to practice law by acting as an economic disincentive.").

124. See Ethics Comm. of the Ky. Bar Ass'n, Op. 326 (1987) (stating lawyer shall not enter into partnership agreement where postwithdrawal payments are determined by whether departing attorney competes against former firm).

125. See Virginia State Bar Standing Comm. on Legal Ethics, Op. 985 (1987). This opinion permitted a restrictive covenant that allowed the value of a partner's stock to be reduced if the partner withdrew with other partners or took clients with him. According to the Committee, "[t]he Code only prohibits agreements that restrict the right of a lawyer to practice law after the termination of the relationship; agreements that effect only the termination of the relationship itself are not prohibited." *Id.*

126. See Iowa State Bar Ass'n Comm. on Professional Ethics and Conduct, Op. 89-48 (1990) (holding law firm may not prevent lawyer from soliciting clients for two years). "A law firm may not require a departing associate to encourage clients to complete pending cases with the firm or prevent the departing associate from competing in the same community or soliciting clients for two years." *Id.*

127. For a general discussion of the unenforceability of restrictive covenants, see *supra* notes 45-77 and 99-118 and accompanying text.

128. *Haight, Brown & Bonesteel v. Fitzgerald*, 285 Cal. Rptr. 845 (Cal. Ct. App. 1991), *review denied*, No. SO20824, 1991 Cal. LEXIS 5862 (Dec. 19, 1991) (denying petition for review); see also *Law Firm Sues Two Partners for Conspiring to Defect*, WALL ST. J., Jan. 29, 1992, at B5, col. 2 (discussing lower court ruling and denial of review in *Haight*).

129. 285 Cal. Rptr. 845 (Cal. Ct. App. 1991), *review denied*, No. SO20824, 1991 Cal. LEXIS 5862 (Dec. 19, 1991).

130. *Id.*

area of the practice of law regularly practiced by the law firm and in so doing represent or become associated with any firm that represents any client represented by this law firm within a twelve (12) month period prior to said person leaving the firm, within the Counties of Los Angeles, Ventura, Orange, Riverside or San Bernardino nor within any City in such Counties for a period of three (3) years from the date of withdrawal or retirement, so long as continuing members of this firm engage in practice in the same areas of law.¹³¹

Like the forfeiture penalty in *Cohen v. Lord, Day & Lord*,¹³² one paragraph of the partnership agreement stated: "A Partner . . . may violate this Section . . . [But] by so doing, he forfeits any and all rights and interests, financial and otherwise, to which he would otherwise be thereafter entitled as a departing Partner under the terms of this Agreement."¹³³

The departing attorneys argued that the agreement demanded a substantial monetary penalty and would thus dissuade departing partners from handling cases for clients in competition with the firm or from practicing law in competition with the firm. Consequently, the departing attorneys argued that the partnership agreement constituted an unlawful restriction on the practice of law, which violated the public policy embodiment within rule 1-500.¹³⁴

The California Court of Appeals, however, refused to adopt such a narrow interpretation of Rule 1-500. While de-emphasizing the forfeiture language of the agreement, the appellate court focused its attention on section 16602 of the California Business and Professions Code, which provides:

131. *Id.*

132. For the language of the agreement at issue in *Cohen*, see *supra* note 102 and accompanying text; see also *Howard v. Babcock*, 863 P.2d 150, 151 (Cal. 1993) (discussing forfeiture penalty for competing with former firm).

133. *Haight*, 285 Cal. Rptr. at 846 n.3. The lower court was uncertain as to whether it was ruling on the enforceability of the restrictive covenant. See *id.* at 847 (citing to lower court uncertainty as to whether it was ruling on enforceability of agreement). The lower court stated during a hearing for a motion for judgment on the pleadings:

I never purported to rule on the enforceability of the language which says that a departing partner will not engage in any area of the practice of law regularly practiced by the law firm and so on. What I'm dealing with is the forfeiture for violating that restriction . . . I suppose, in that sense, I'm really ruling on it.

Id. at 847 n.5. The appellate court, however, made it clear that the forfeiture provision was reasonable and the agreement was "not invalid on its face." *Id.* at 850.

134. *Id.* at 848.

Any partner may, upon or in anticipation of a dissolution of the partnership, agree that he will not carry on a similar business within a specified county or counties, city or cities, or a part thereof, where the partnership business has been transacted, so long as any other member of the partnership, or any person deriving title to the business or its goodwill from such other member of the partnership carries on a like business therein.¹³⁵

Writing on behalf of a unanimous panel, Justice Fukuto stated that the court did not believe that the personal and confidential relationship existing between lawyers and their clients "places lawyers in a class apart from other business and professional partnerships."¹³⁶

135. CAL. BUS. & PROF. CODE § 16602 (Deering 1976). Compare TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon Supp. 1994) with CAL. BUS. & PROF. CODE § 16602. Section 15.50 of the Texas Business and Commercial Code states:

Notwithstanding Section 15.05 of this code, a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is reasonably necessary to protect the goodwill or other business interest of the promisee.

TEX. BUS. & COM. CODE ANN. § 15.50.

136. *Haight*, 285 Cal. Rptr. at 847-48. The California Supreme Court, in *Howard*, gave a similar reading to section 16602, stating: "The *Haight* court's construction [of California State Bar Rules of Professional Conduct Rule 1-500] is consistent with Business and Professions Code section 16602, permitting agreements between partners restricting competition." *Howard v. Babcock*, 863 P.2d 150, 156 (Cal. 1993). The *Howard* court rejected the public policy arguments against forfeiture for competition clauses, relying instead on "a revolution in the practice of law that has occurred requiring economic interests of the law firm to be protected as they are in other business enterprises." *Id. But see, e.g., Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg*, 461 N.W.2d 598, 601 (Iowa 1990). (citing *Cohen* for proposition that restrictions on lawyer's right to practice are detrimental to clients); *Dwyer v. Jung*, 336 A.2d 498, 501 (N.J. Super. Ct. Ch. Div.) (criticizing treatment of issue as business proposition while failing to recognize underlying ethical considerations within legal profession), *aff'd*, 348 A.2d 208 (App. Div. 1975); *Denburg v. Parker Chapin Flattau & Klimpl*, 624 N.E.2d 995, 998-1000 (N.Y. 1993) (recognizing law firm's legitimate economic and survival interests while invalidating a forfeiture-for-competition clause that restricted client's free choice of counsel); *cf. Mailman, Ross, Toyes & Shapiro v. Edelson*, 444 A.2d 75, 80 (N.J. Super. Ct. Ch. Div. 1982) (addressing restrictive covenant as applied to accountant, stating that "[i]t is this distinction between restrictive covenants in a commercial . . . setting, where primary economic interests are at stake, and those binding professionals who depend largely on unconditional confidential relationships . . . which underscores the greater degree of injury to the public that may occur in the latter instance"). Justice Kennard, dissenting in *Howard*, lambasted the majority's analysis for narrowly focusing on the business interests of the law firm. *Howard*, 863 P.2d at 161 (Kennard, J., dissenting). Justice Kennard stated:

Although the law is a business in the sense that an attorney in a law firm earns a living by practicing law, it is also and foremost a profession, with

In reaching its conclusion, the court balanced the competing interests of the departing attorney and the employer-law firm and concluded that the forfeiture penalty did not violate the rules of professional conduct of the State Bar.¹³⁷ In balancing the equities, the court stated that the agreement allows the departing attorney to practice law anywhere and to accept employment from any client "who desires to retain him."¹³⁸ Additionally, the agreement preserved the stability of the law firm by making the withdrawing partner's share of capital and accounts receivable available to replace the lost income from clients taken by the withdrawing partner.¹³⁹ The court reasoned that the monetary penalty could not be interpreted as prohibiting the ex-partners from practicing law, or from representing any client, because the agreement allowed the departing attorney to compete against the employer firm.¹⁴⁰ Only an agreement that required the attorney to completely refrain from practicing law would be an impermissible violation of the Rules of Professional Conduct.¹⁴¹

all the responsibilities that the word implies. The ethical rule that this court is called upon to interpret exists to enforce the traditional and sound view that service to clients, including protection of the clients' ability to employ the attorneys they have come to trust, is more important than safeguarding the economic interests of established attorneys and law firms.

Id. at 161 (Kennard, J., dissenting).

137. *Haight*, 285 Cal. Rptr. at 847-48. It should be noted that unlike the Model Rules or the Model Code, the California Code of Professional Responsibility does not forbid restrictive covenants if the agreement is a section of a partnership agreement, provided the covenant does not survive the partnership relationship. CALIFORNIA STATE BAR RULES OF PROFESSIONAL CONDUCT Rule 1-500 (1985); see *Haight*, 285 Cal. Rptr. at 847 (1991) (discussing Rule 1-500 and its application); see also *Howard*, 863 P.2d at 156 (agreeing with *Haight* court's interpretation of Rule 1-500).

138. *Haight*, 285 Cal. Rptr. at 848. According to the court, "the rule simply provides that an attorney may not enter into an agreement to refrain altogether from the practice of law." *Id.*

139. *Id.* In reaching its conclusion, the court analogized the agreement to a 1956 case, *Farthing v. San Mateo Clinic*, 299 P.2d 977 (Cal. Ct. App. 1956). *Haight*, 285 Cal. Rptr. at 848. *Farthing* upheld a similar liquidated damage clause in an agreement between physicians. *Farthing*, 299 P.2d at 982-83.

140. *Haight*, 285 Cal. Rptr. at 848.

141. *Id.* Many other courts addressing similar "financial disincentive" provisions have rejected the argument that such provisions should be construed differently from absolute prohibitions on the right to practice. See, e.g., *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg*, 461 N.W.2d 598, 601 (Iowa 1990) (stating partnership agreement allowing reduction of former partner's share served solely as penalty for continuing legal practice); *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 150 (N.J. 1992) (stating that agreement creating disincentive to accept representation violates Rules of Professional Conduct); *Denburg v. Parker Chapin Flattau & Klimpl*, 624 N.E.2d 995, 998 (N.Y. 1993) (stating financial disincentives are objectionable because they interfere with client's choice of counsel); *Gray v. Martin*, 663 P.2d 1285, 1290 (Or. Ct. App.) (stating agreement

By refusing to interpret the applicable Rule of Professional Conduct "in such a narrow fashion,"¹⁴² the California Court of Appeals all but rendered Rule 1-500 impotent. In effect, the California court emphasized the business code at the expense of the ethical code. After *Haight*, a law firm employer could include a forfeiture clause that would discourage even the noblest of attorneys.

The *Haight* decision was the first major break from the mainstream, in essence, a "renegade" decision. Nevertheless, the California Supreme Court recently adopted the reasoning of the *Haight* court in *Howard v. Babcock*.¹⁴³ *Howard* involved a forfeiture-for-competition clause in a partnership agreement between attorneys. The agreement provided in part:

Should more than one partner, associate or individual withdraw from the firm prior to age sixty-five (65) and thereafter within a period of one year practice law . . . together or in combination with others including former partners or associates of this firm, in a practice engaged in the handling of liability insurance defense work as aforesaid within the Los Angeles or Orange County Court system, said partner or partners shall be subject, at the sole discretion of the remaining non-withdrawing partners to forfeiture of all their rights to withdrawal benefits other than capital as provided for in Article V herein.¹⁴⁴

The appellate court's decision held the agreement unenforceable as violative of public policy.¹⁴⁵ The California Supreme Court reversed, holding that "an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm . . . is not inconsistent with rule 1-500 and is not void on its face as against public policy."¹⁴⁶

preventing withdrawing attorney from receiving benefits if he or she continued to practice law violated attorney's right to practice), *review denied*, 668 P.2d 384 (Or. 1983); *Spiegel v. Thomas, Mann & Smith*, 811 S.W.2d 528, 529-30 (Tenn. 1991) (stating agreement that denies withdrawing attorney deferred compensation is void because it restricts attorney's right to practice). See generally HILLMAN, *supra* note 17.

142. *Haight*, 285 Cal. Rptr. at 848. Subsequently, in *Howard v. Babcock*, the California Supreme Court reaffirmed this liberal reading of Rule 1-500 of the California Rules of Professional Conduct. 863 P.2d 150, 156 (Cal. 1993). "We do not construe rule 1-500 in such a narrow fashion The rule does not . . . prohibit a withdrawing partner from agreeing to compensate his former partners Such a construction represents a balance between competing interests." *Id.*

143. 863 P.2d 150, 151 (Cal. 1993).

144. *Id.*

145. *Id.*

146. *Id.* at 160.

Like the *Haight* court, the court in *Howard* found it unreasonable to distinguish lawyers from other professionals who also owe a duty of loyalty to their clients.¹⁴⁷ Consequently, the court rejected the per se approach and expressly stated that it was seeking a balance between the client's interest in free choice of counsel and the law firm's interest in a stable business environment.¹⁴⁸ According to the *Howard* court, an absolute ban on competition would be per se impermissible. An agreement that limits competition within a specific geographic area, however, may be reasonable.¹⁴⁹

B. *Equitable Considerations: Unclean Hands*

In *Haight*, the California Court of Appeals refused to consider the principles of "waiver, unclean hands or in pari delicto."¹⁵⁰ However, a New Jersey Superior Court in *Jacob v. Norris, McLaughlin & Marcus*¹⁵¹ applied these basic equitable considerations to a restrictive covenant.¹⁵² The departing lawyers in *Jacob* wished to have the rules of professional conduct interpreted in their favor in order to void the agreement that denied them termination compensation.¹⁵³ Relying on the language of Model Rule 5.6, the court found that the departing attorneys had participated in this agreement as much as the employer-law firm.¹⁵⁴ The court concluded that if the agreement was in fact illegal, both the plaintiffs and the defendants should bear the burden of illegality equally.¹⁵⁵ Enriching the plaintiffs by the amount of the termination benefits would

147. *Id.*

148. *Id.*

149. *Id.*

150. *Haight*, *Brown & Bonesteel v. Fitzgerald*, 285 Cal. Rptr. 845, 847 (Ct. App. 1991), *review denied*, No. SO20824, 1991 Cal. LEXIS 5862 (Dec. 19, 1991). The trial court stated that "as a matter of law . . . estoppel, waiver, unclean hands or *in pari delicto* may not be raised as grounds for enforcement of or to prevent challenge" to the noncompetition clause. *Id.*

151. 588 A.2d 1287 (N.J. Super. Ct. App. Div. 1991), *rev'd*, 607 A.2d 142 (1992).

152. *Id.* at 1291. The court noted that "it seems that plaintiff's claim should be barred on basic equitable considerations." *Id.*

153. *Id.* The plaintiffs in *Jacob* were attorneys who had terminated their membership with the defendant law firm and subsequently brought suit under a service termination agreement. *Id.* at 1289. This agreement provided for compensation only to departing attorneys who rendered no services to clients who were clients of the defendant firm for one year from the date of termination. *Id.* at 1290. The defendant law firm relied on the agreement to deny any termination compensation. *Id.* at 1289. Plaintiffs sought to have the agreement interpreted as a violation of the Rules of Professional Conduct in order to receive the benefit of compensation. *Id.* at 1291.

154. *Id.*

155. *Id.*

be as unjust as "enriching the defendant by allowing it to retain those benefits."¹⁵⁶ On appeal, however, the Supreme Court of New Jersey reversed.¹⁵⁷ The court held the agreement unenforceable as against public policy because it violated Model Rule 5.6 by restricting the practice of law.¹⁵⁸ Consequently, plaintiffs were entitled to the same compensation as departing attorneys whose actions were noncompetitive.¹⁵⁹

Judge Stuart F. Hancock, Jr., author of the dissenting opinion in *Cohen*, echoed the same equitable concerns as the New Jersey Superior Court in *Jacob*.¹⁶⁰ Judge Hancock wrote that the plaintiff in *Cohen* certainly could not in good conscience claim unfairness in an agreement that he knew of for twenty years.¹⁶¹ Moreover, the plaintiff himself enjoyed the benefits of the agreement, watching passively for twenty years as other withdrawing partners lost their benefits.¹⁶²

On its face, the equity argument appeals to one's sense of fairness. Adopting this narrow definition of "fair," however, ignores the client's right to choose an attorney. Beyond the mergers, breakdowns and general upheaval in the practice of law, the client's right to freely choose counsel must remain the foremost consideration.¹⁶³

VII. ANALYSIS

A. *Applying the Balancing Test*

In addition to the California decisions in *Haight* and *Howard*, numerous commentators and several dissenting opinions have rejected the conventional wisdom of the per se approach of unenforceability.¹⁶⁴ Instead, they argue that postemployment restrictive

156. *Id.*

157. *Jacob v. Norris*, McLaughlin & Marcus, 607 A.2d 142, 155 (N.J. 1992).

158. *Id.*

159. *Id.*

160. *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 414 (N.Y. 1989) (Hancock, J., dissenting).

161. *Id.* at 415 (Hancock, J., dissenting). According to Judge Hancock, the majority's invalidation of the agreement constituted "an entirely unwarranted interference with the right of members of a partnership to establish reasonable contractual terms covering the withdrawal of a partner." *Id.* at 414 (Hancock, J., dissenting).

162. *Id.* at 415 (Hancock, J., dissenting). As a result, the plaintiff accepted the benefits of the very agreement he was attempting to invalidate. *Id.* (Hancock, J., dissenting).

163. See Cox, *supra* note 4, at 13, col. 1 (quoting Professor Vincent R. Johnson).

164. See, e.g., *Denburg v. Parker Chapin Flattau & Klimpl*, 624 N.E.2d 995,

covenants between lawyers should be subject to a balancing test similar to that applied to restrictive covenants in other professions.¹⁶⁵ The instigators of this legal ethics revolution contend that a court can determine the reasonableness of a restrictive covenant by application of a simple balancing test.¹⁶⁶ The test for enforceability, critics of the *per se* approach assert, should be reasonableness based on a balancing of the competing interests.¹⁶⁷

Under the balancing approach, a covenant will not be enforced unless it is reasonable. The three prong test articulated in *Solari Industries, Inc. v. Malady*,¹⁶⁸ provides an archetype for evaluating the reasonableness of a postemployment restrictive covenant. A covenant "will generally be found to be reasonable where it simply protects the legitimate interests of the employer, imposes no undue hardship on the employee, and is not injurious to the public."¹⁶⁹ Accordingly, a restrictive covenant may be enforced, provided the employer has a legitimate interest.¹⁷⁰ For an employer law firm, such legitimate interests are defined in terms of client confidences, lost revenue and trade secrets.

1003 (N.Y. 1993) (Bellacosa, J., dissenting) (arguing for more cautious application of principles espoused in *Cohen*); *Cohen*, 550 N.E.2d at 412 (Hancock, J., dissenting) (arguing for balancing approach and looking to reasonableness of clause); HILLMAN, *supra* note 17, at 26-29 (questioning whether lawyers should be distinguished from other professionals); Kalish, *supra* note 31, at 446 (arguing that lawyers should be treated like all other professionals); Draper, *supra* note 4, at 161 (rejecting *per se* approach in favor of reasonableness test); *cf.* Getty, *supra* note 6, at 244-53 (advocating reasonableness approach to financial forfeiture clauses between physicians).

165. For further discussion of this argument, see sources cited *supra* note 164.

166. See *Howard v. Babcock*, 863 P.2d 150, 160 (Cal. 1993) (purporting to balance "interest of clients in having the attorney of choice, and the interest of law firms in a stable business environment"); see also Blake, *supra* note 29, at 653-84 (discussing restrictive covenants); Kalish, *supra* note 31, at 427-38 (discussing balancing test as applied to noncompetition clauses between attorneys); Draper, *supra* note 4, at 171-79 (advocating balancing approach).

167. See, e.g., Kalish, *supra* note 31, at 456 (criticizing *per se* approach); Draper, *supra* note 4, at 180 (arguing for reasonableness test).

168. 264 A.2d 53, 56 (N.J. 1970).

169. *Id.*; see also Mailman, Ross, Toyes & Shapiro v. Edelson, 444 A.2d 75, 77 (N.J. Super. Ct. Ch. Div. 1982) (adopting reasonableness test articulated in *Solari*); Blake, *supra* note 29, at 648 (discussing test for reasonable covenants); Lowry F. Kline, Comment, *Covenants Not to Compete: The Tennessee Cases*, 31 TENN. L. REV. 450, 452-55 (1964) (articulating reasonableness test for covenants not to compete); R. David Lewis, Comment, *Contracts in Restraint of Trade: Employee Covenants Not to Compete*, 21 ARK. L. REV. 214, 215-18 (1967) (stating test for restrictive covenants).

170. See Blake, *supra* note 29, at 627 (outlining viewpoints and interests and balancing these interests).

B. *Protecting the Law Firm's Interests*1. *Client Confidences*

The business aspect of lawyering is very similar to any other service business.¹⁷¹ Unlike many businesses, however, the law firm has an obligation to protect client confidences.¹⁷² The balancing approach assumes that ethical mandates may be inadequate to safeguard these confidences and that a restrictive covenant may, therefore, be necessary.¹⁷³

Model Code of Professional Responsibility DR 4-101 requires "[a] lawyer . . . [to] exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client."¹⁷⁴ The parallel Model Rule 1.6(a), states that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation."¹⁷⁵ Model Rule 5.1(a) extends this obligation to the firm.¹⁷⁶ Formal Opinion 300 of the ABA Committee on Professional Ethics states that such client confidences are protected by additional ethical provisions.¹⁷⁷

Informal Opinion 1301, issued by the ABA Committee on Ethics and Professional Responsibility focused on a restrictive covenant between a lawyer and his employer-client. The Committee was troubled by the agreement, but noted that it was designed to pro-

171. See Kalish, *supra* note 31, at 438 (discussing business aspects of legal profession). See generally HILLMAN, *supra* note 17, at 68-109 (discussing economic concerns of lawyers and law firms).

172. Kalish, *supra* note 31, at 445-46 (discussing client confidences).

173. Kalish, *supra* note 31, at 445-46. Professor Kalish argues that client confidences are highly important and that great effort should be taken to protect them. *Id.* at 445. Professor Kalish further argues that a restrictive covenant may be a "reasonable measure to do so." *Id.* at 446.

174. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1969); see also Johnson, *supra* note 4, at 106-08 (discussing use of confidential information). Johnson notes the fragmented nature of the law of soliciting clients by departing partners and examines the means by which a firm may attempt to protect itself from such conduct. *Id.* at 4-7, 18-110.

175. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983).

176. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1(a) (1983). Model Rule 5.1(a) provides: "A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." *Id.*

177. ABA Comm. on Professional Ethics, Formal Op. 300 (1961). The Model Code and Model Rules contain such provisions. The Model Code of Professional Responsibility Disciplinary Rule 4-101 defines "confidence" and sets forth rules on when use or disclosure of confidential information is or is not appropriate by a lawyer. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1969). See generally Johnson, *supra* note 4, at 106-08 (discussing confidential client information).

protect the law firm's confidential information.¹⁷⁸ Nevertheless, the agreement was held not to violate the Model Code. Although the opinion is unclear, it probably means that agreements, other than restrictive covenants, "might be appropriate if necessary to protect client confidences."¹⁷⁹ Regardless of whether the Committee would tolerate restrictive covenants, it was noteworthy that the debate centered on the best interests of the client.

2. *Lost Revenue and Trade Secrets*

Proponents of the balancing test argue that the economic hardship inflicted on a firm when a partner joins a competitor, justifies forfeiture of the departure compensation.¹⁸⁰ A law firm undoubtedly has a legitimate interest in preserving its own economic security and trade secrets. Nevertheless, a law firm should not be allowed to protect these interests "by contracting for the forfeiture of *earned revenues* during the withdrawing partner's active tenure and participation."¹⁸¹ Contracts requiring forfeiture of earned revenues constitute an offensive use of postemployment restrictive covenants that may economically cripple a former employee and

178. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1301 (1975). For a discussion of Informal Opinion 1301 and client confidences, see Kalish, *supra* note 31, at 445.

179. See Kalish, *supra* note 31, at 445 (interpreting ABA Informal Opinion 1301). The most debatable paragraph of Informal Opinion 1301 reads:

This opinion is limited to the consideration of the propriety of the lawyer-employee signing an agreement containing a covenant restricting future employment. Agreements may be, in some cases, evidence of the intent to protect proprietary information entrusted to a lawyer employee which may be vital to an employer's case where the lawyer's disclosure or threatened disclosure of a former employer's confidential information to a competitor involves him and the competitor in a civil action for an injunction or damages. The existence of an agreement may serve as evidence which will hasten judicial proscription of such injurious conduct and may be warranted on that ground.

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1301 (1975).

180. See, e.g., *Howard v. Babcock*, 863 P.2d 150, 157 (Cal. 1993) ("[W]hen partners with a lucrative practice leave a law firm along with their clients, their departure from and competition with the firm can place a tremendous financial strain on the firm."); *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 145 (N.J. 1992) (finding that financial disincentive clause was not necessary to protect firm's economic interests); *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 412 (N.Y. 1989) (arguing on behalf of defendant that economic hardship justified forfeiture provision). See generally Kafker, *supra* note 4, at 58 (asserting that justification for treating lawyers differently than other professionals becomes less compelling as lawyering becomes more like business).

181. *Cohen*, 550 N.E.2d at 413; see also *Post v. Merrill Lynch, Pierce, Fenner & Smith*, 397 N.E.2d 358, 360-61 (N.Y. 1979) (stating that employer should not be able to use anticompetition clause offensively).

impede the client's freedom to choose counsel.¹⁸²

VIII. RECONCILING THE CONFLICT: AD HOC BALANCING

A. *Public Interest*

In a strictly commercial setting, a restriction on trade is unenforceable if it prejudices the public interest.¹⁸³ The public has an interest in receiving the best products and services at the lowest price. Consequently, any covenant that unnecessarily limits competition or deprives the public of an individual's services is void.¹⁸⁴ In the legal setting, postemployment covenants were once barred as being unprofessional.¹⁸⁵ Today, however, restrictions on such covenants are predicated on the right of the client to freely choose counsel.¹⁸⁶

Despite the current fixation on the client's freedom to choose counsel, the potential injury to the public, the third prong of the balancing test, provides the key to reconciling the "per se" and "balancing" approaches. Prior to the emergence of the balancing test, covenants not to compete were generally deemed reasonable provided they were no broader than necessary and caused no substantial injury to the public.¹⁸⁷ The modern balancing approach rejects this two prong test, supplanting it with a balancing test that weighs

182. See *Cohen*, 550 N.E.2d at 412 (reasoning that client should have freedom of choice); *Post*, 397 N.E.2d at 360-61 (stating that covenant should not be used to "economically cripple" former employee).

183. See *Orkin Exterminating Co. v. Murrell*, 206 S.W.2d 185, 188-89 (Ark. 1947) (stating that restraint of trade is unenforceable if it violates public interest); *Wren v. Pearah*, 249 S.W.2d 985, 987 (Ark. 1952) (finding restriction on trade void as contrary to public interest). See generally *Scrantom & Wilson*, *supra* note 29 (discussing evolution of judicial attitudes toward covenants not to compete and emergence of reasonableness test).

184. *Lewis*, *supra* note 169, at 217.

185. For an examination of the development of the law regarding the unenforceability of restrictive covenants among attorneys, see *supra* notes 45-118 and accompanying text.

186. See *HAZARD & HODES*, *supra* note 73, at 486. Hazard and Hodes note that Model Rule 5.6(a) was designed, in part, "to protect lawyers, particularly young lawyers, from bargaining away their right to open their own offices after they end an association with a firm or a legal employer." *Id.* The authors go on to note, however, that the most important function of Rule 5.6 is in protecting "future clients against having only a restricted pool of attorneys from which to choose." *Id.*

187. See, e.g., *Eureka Laundry Co. v. Long*, 131 N.W. 412 (Wis. 1911). In *Long*, the Supreme Court of Wisconsin addressed an employee's contract that contained a provision not to service the employer's customers during employment and for two years after termination. The court upheld the contract as being reasonably necessary to protect the employer's business while not unduly infringing on the employee's rights. *Id.* See generally *Blake*, *supra* note 30, at 686 (discussing injury to society from restrictive covenants). For a discussion of the general enforceability of reasonable restrictive covenants, see *supra* notes 39-42 and accompanying text.

the employer's interest against the burden on the employee.¹⁸⁸ The third prong of this balancing test, injury to the public, has been largely ignored. Once a court determines that a restrictive covenant is reasonable, the court rarely proceeds to consider potential injury to the public.¹⁸⁹ Commentators argue that this is not surprising because the balancing of competing interests will always maximize the interests of the parties involved.¹⁹⁰

For example, using the California Business and Professions Code to assert lawyers' status as professionals, the court in *Haight*, successfully applied the legitimate business interest and the undue hardship prongs of the balancing test.¹⁹¹ Yet by de-emphasizing the monetary penalty for practicing in violation of the agreement, and broadly interpreting Rule 1-500 of the California Rules of Professional Responsibility, the California Court of Appeal misinterpreted the policy considerations for restricting noncompetition clauses. As a result, the court failed to apply the third prong of the balancing test—injury to the public.¹⁹² Under the reasoning of the California Court of Appeal, only “an agreement to refrain altogether from the practice of law” would render the covenant unenforceable.¹⁹³ Such an interpretation not only violates the spirit of over a half century

188. See, e.g., Blake, *supra* note 29, at 675-76 (discussing noncompetition clauses and “balancing the equities” between employer and employee interests); Kalish, *supra* note 31, at 435 (discussing balancing test); cf. Getty, *supra* note 6, at 244 (stating physicians' covenants not to compete must be examined in light of employers' interests, possibility of undue hardship on employee and likelihood of harmful effect on public); Draper, *supra* note 4, at 180 (advocating flexible balancing test that considers firms' and employees' interests and client choice).

189. Blake, *supra* note 29, at 686.

190. *Id.*; see also Kalish, *supra* note 31, at 456 (suggesting balancing test is best approach).

191. See *Haight, Brown & Bonesteel v. Fitzgerald*, 285 Cal. Rptr. 845, 848 (Ct. App. 1991) (applying balancing test), *review denied*, No. S020824, 1991 Cal. LEXIS 58621 (Dec. 19, 1991).

192. *Id.*

193. *Id.* The court in *Haight* stated that Rule 1-500 of the California Rules of Professional Conduct does not prohibit departing attorneys from agreeing to compensate their former partners should such attorneys elect to represent clients previously represented by their former firm. *Id.* Likewise, in *Howard*, the California Supreme Court argued that a “reasonable” price on competition would not impede the interest of the public in being served by the counsel of their choice. *Howard v. Babcock*, 863 P.2d 150, 160 (Cal. 1993). While conceding as “obvious” that an absolute ban on competition would be per se unreasonable, the court approved of an agreement that “merely assesses a toll on competition within a specified geographic area.” *Id.* This short shrift amounts to no consideration of the public interest at all because a “mere toll” on competition may, in reality, dissuade a withdrawing partner from serving a client as surely as would an absolute covenant not to compete.

of legal ethics jurisprudence, but also fails to recognize the most important factor in the balancing scheme—the client.

B. *Separate But Equal*

The California Court of Appeal purports to be balancing the competing interests, as with a noncompetition agreement in any other profession. This balancing equation, however, contains only two factors: the departing attorney and the employer law firm.¹⁹⁴ By failing to accord proper weight to the third factor, the client or injury to the public resulting from the covenant, the California courts extol the virtues of treating lawyers like all others and then treats them differently.¹⁹⁵ Moreover, “[w]hen an employer, through superior bargaining power, extracts a deliberately unreasonable and oppressive noncompetitive covenant he is in no just position to seek, and should not receive, equitable relief from the courts.”¹⁹⁶ If rulings in the *Howard* and *Haight* vein continue, “it could become routine for big firms to make incoming associates sign lifelong restrictions on their practice,” which would extract significant monetary penalties if violated.¹⁹⁷ This form of involuntary servitude cannot be in the client’s best interest.

C. *Cost-Benefit v. Freedom of Choice*

Proponents of the balancing test assert that in an efficient market, the social cost of keeping an employee from a job in which he or she would be more productive is theoretically equal to the economic loss suffered by the individual.¹⁹⁸ Such a cost-benefit analysis may maximize the marginal utility to society as a whole. The balancing test, however, fails to recognize the intangible factors embodied in the Model Code and Model Rules. For instance, the test

194. See *Haight*, 285 Cal. Rptr. at 848. The *Haight* court balanced only the interest of the law firm in preserving financial stability following the attorney’s departure with that of the departing attorney in being able to practice law anywhere in California and accept employment from any client wishing to hire him. *Id.* at 848. See *Howard*, 863 P.2d at 160 (“We seek to achieve a balance between the interest of clients in having the attorney of choice, and the interest of law firms in a stable business environment.”). But see *id.* at 164-65 (Kennard, J., dissenting) (noting that majority opinion justifies its erosions of client’s rights by treating client’s right to choose counsel as “‘theoretical’ and inconsistent with ‘reality’”).

195. See *Haight*, 285 Cal. Rptr. at 850.

196. *Solari Indus., Inc. v. Malady*, 264 A.2d 53, 56 (N.J. 1970); see also 5 WILLIS-TON, CONTRACTS § 1659-1660, at 4682, 4685 (stating that employers possessing superior bargaining power over their employees are precluded from insisting upon unreasonable and excessive restrictions in noncompetitive covenants because such covenants will be deemed invalid as oppressive).

197. Cox, *supra* note 4, at 13, col. 1 (quoting Professor Vincent R. Johnson).

198. Blake, *supra* note 29, at 687.

is blind to the personal idiosyncrasies that make a particular lawyer attractive to a client. Suppose client X prefers lawyer Y simply because he feels comfortable with her. If lawyer Y departs from the employer-firm and is expressly prohibited from serving client X, or dissuaded from doing so through a financial disincentive, then the restrictive agreement has effectively limited X's access to counsel. How much weight should be allocated to a client's freedom of choice?

Merely balancing the interests of the departing attorney and the employer-law firm relegates the client to the unfortunate status of merchandise.¹⁹⁹ Clients, however, 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."²⁰⁰ Public policy, as embodied in the Model Code and Model Rules, requires that the public have its choice of counsel.²⁰¹ Enforcing

199. See *Howard v. Babcock*, 863 P.2d 150, 164 (Cal. 1993) (Kennard, J., dissenting). In *Howard*, Justice Kennard criticized the majority's emphasis upon the reasonableness calculus. Justice Kennard asserted that, "the majority . . . diminishes the rights of clients by treating them as no more important than 'the interest of law firms in a stable business environment.'" *Id.* (Kennard, J., dissenting) (citation omitted). "The majority justifies its erosion of clients' rights . . . by announcing that the clients' right to select their own attorneys is 'theoretical' and inconsistent with 'reality.'" *Id.* at 164-65 (Kennard, J., dissenting); see also *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 410 (N.Y. 1989) (stating that lawyers should not barter in clients); New York County Lawyer's Ass'n, Comm. on Professional Ethics, Op. 109 (1943) (same); ABA Comm. on Professional Ethics, Formal Op. 300 (1961) (finding restrictive covenants in attorney contracts to be unethical despite lack of express prohibition in Canons of Ethics). The Code of Professional Responsibility codified the reasoning of Formal Opinion 300. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(A) (1969). ABA Formal Opinion 300 states:

[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.

ABA Comm. on Professional Ethics, Formal Op. 300. In 1983, the American Bar Association promulgated the Model Rules of Professional Responsibility, which adopted a similar provision in Model Rule 5.6. For the language of Model Rule 5.6, see text accompanying *supra* note 72.

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

201. See, e.g., *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 149 (N.J. 1992) ("Because the client's freedom of choice is the paramount interest to be served by the [Rules of Professional Conduct], a disincentive provision is as detrimental to the public interest as an outright prohibition."); *Denburg v. Parker Chapin Flattau & Klimpl*, 624 N.E.2d 995, 998 (N.Y. 1993) (asserting that restrictions against competition are "objectionable primarily because they interfere with client's choice of counsel"); *Cohen*, 550 N.E.2d at 410 (asserting public must have

restrictive covenants that recognize a guaranteed property right to clients overlooks the most important consideration: the clients' freedom to choose his or her own counsel.²⁰²

The idea that clients are entitled to be represented by the attorney of their choice is firmly rooted in the tradition of our legal system.²⁰³ Lawyers are not commercial business people like accountants and merchants. The practice of law requires clients to reveal personal and confidential information in the context of the professional relationship.²⁰⁴ The lawyer-client relationship is therefore fiduciary as well as confidential. Consequently, the client's right to freely choose counsel must remain paramount and should not be burdened.²⁰⁵ The client has a vested right to place confidence in the lawyer of his or her choice.²⁰⁶ Restrictive covenants binding the legal profession, which involve unconditional confidential relationships, can be distinguished from those in a commercial or business setting, where primarily economic interests are at stake.²⁰⁷ This distinction emphasizes the greater potential for injury to the public when restrictive covenants bind attorneys. Consequently, application of the third prong of the balancing test is even more important in the legal context.

right to choose counsel); see also ABA Comm. on Professional Ethics, Formal Op. 300 (restricting client's choice of counsel is unethical).

202. See Cox, *supra* note 4, at 13, col. 1 (quoting Professor Vincent R. Johnson).

203. See *Marshall v. Romano*, 158 A. 751, 752 (N.J. Essex County Ct. 1932) (discussing propriety of substituting attorneys); see also *Howard*, 863 P.2d at 161-66 (Kennard, J., dissenting) (rejecting majority's argument in favor of protecting client's right to retain counsel of choice).

204. See *Howard*, 863 P.2d at 161 (Kennard, J., dissenting) (arguing that law is first and foremost profession "with all the responsibilities that [the] word implies"). See generally HAZARD & HODES, *supra* note 73.

205. See HAZARD & HODES, *supra* note 73, at 822 (discussing covenants not to compete within legal profession).

206. *Id.*; see also *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 149 (N.J. 1992) (arguing that clients' freedom of choice is paramount interest to be protected by prohibitions against covenants not to compete between lawyers). While a law firm may have a legitimate interest in its own survival, as does any entity, it cannot protect that interest by restricting a client's choice to retain the departing attorney as counsel. *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 413 (N.Y. 1989).

207. *Mailman, Ross, Toyos & Shapiro v. Edelson*, 444 A.2d 75, 80 (N.J. Super. Ct. Ch. Div. 1982). In *Edelson*, an accounting firm sought injunctive enforcement of a restrictive covenant against the defendant, its former employee. *Id.* at 75. The Superior Court of New Jersey addressed the enforceability of restrictive covenants among accountants and found that the accountant-client relationship, like the attorney-client relationship, is consensual and fiduciary. *Id.* at 80. Consequently, the court deemed it inappropriate to prevent the firm's clients from exercising their free choice to leave the firm and seek the accounting services of the defendant. *Id.* The court, however, refused to accept a per se rule of impermissibility. *Id.*

According to ethics opinions, the client market can be ethically divided only through "individual performance and the establishment of a well-merited reputation for professional capacity and fidelity to trust."²⁰⁸ Strong public policy principles articulated in the Code and Rules prohibit the use of restrictive covenants. Because the restrictive covenants injure the public, they fail to satisfy the third prong of the reasonableness test.²⁰⁹ The first two prongs in the reasonableness test, although probative, are not conclusive. The question of reasonableness, when lawyers are involved, necessarily turns on the final prong—injury to the public. If a state chooses to reject the policies embodied in DR 2-108 and Model Rule 5.6, the policy arguments that focus on injury to the public would not exist, leaving just the first two prongs of the balancing test. Unfortunately, in such states the best interests of the client and the public will not be adequately safeguarded.

IX. CONCLUSION

For decades, the ethical mandates of lawyering articulated clear prohibitions against restrictions on the practice of law. In 1910, legal ethics scholar William Archer wrote that "[t]he client has a sort of pride in exhibiting a well-groomed attorney to his friends as 'my lawyer.'"²¹⁰ Although the protocol of lawyering has changed since Archer's era, one constant remains—a client should be able to freely choose counsel.

Prior to the 1990s, it was thought that consideration of the client's right to choose had become entrenched in legal ethics jurisprudence. However, the recent California decisions seem to indicate otherwise. These decisions assert that lawyers should be treated like all others, and that reasonable restrictive covenants among attorneys should be enforced. Lawyers, however, are inherently different. This is illustrated by the fiduciary and confidential implications that arise when the public interest prong of the balancing test is applied to attorneys. Only through a correct application of the balancing test, with full and frank consideration of the client's best interest and potential injury to the public, can the ethical

208. *Dwyer v. Jung*, 336 A.2d 498, 500 (N.J. Super. Ct. Ch. Div.) (citing DR 2-108(A) of Preliminary Draft of Code of Professional Responsibility), *aff'd*, 348 A.2d 208 (App. Div. 1975). For a list of cases invalidating agreements that, in effect, treat clients as chattel, see *supra* note 77.

209. See *Dwyer*, 336 A.2d at 500 (examining injurious effect on public of restricting lawyer's right to practice); see also *Howard v. Babcock*, 863 P.2d 150, 164 (Cal. 1993) (Kennard, J., dissenting) (characterizing enforcement of restrictive covenant as "erosion of client's rights" in choosing attorney of his or her choice).

210. ARCHER, *supra* note 78, at 35.

mandates be reconciled with modern restrictive covenant jurisprudence.

X. APPENDIX

The following appendix contains the relevant restrictive covenant provisions for a selected group of states. Also, the appendix includes an interpretive case and an explanatory ethics opinion.

CALIFORNIA: The California rule governing restrictive covenants among attorneys, differs from the Model Code and the Model Rules.²¹¹ Rule 1-500 of the California Rules of Professional Conduct states in pertinent part:

(A) A member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law, except that this rule shall not prohibit such an agreement which:

- (1) Is a part of an employment, shareholders', or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship; or
- (2) Requires payments to a member upon the member's retirement from the practice of law; or
- (3) Is authorized by Business & Professions Code sections 6092.5, subdivision 1, or 6093.²¹²

In *Haight*, the California Court of Appeal for the Second District examined the Rule of Professional Conduct providing that an attorney licensed to practice in California could not be party to an agreement restricting a member's right to practice law. According to the court, this rule did not prohibit the withdrawing partner from agreeing to compensate former partners in the event he chose to represent clients previously represented by the firm.²¹³

CONNECTICUT: Connecticut adopts the language of Model Rule 5.6.²¹⁴

211. CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 1-500 (1992).

212. *Id.*; see also *Haight, Brown & Bonesteel v. Fitzgerald*, 285 Cal. Rptr. 845, 848 (Ct. App. 1991), *review denied*, No. S020824, 1991 Cal. LEXIS 58621 (Dec. 19, 1991).

213. *Id.*

214. See Connecticut State Bar Comm. on Professional Ethics, Informal Op. 89-26 (1989) (prohibiting postemployment restrictive covenant in partnership agreement).

FLORIDA: Rule 4-5.6 of the Florida Rules of Professional Conduct is identical to Model Rule 5.6.²¹⁵

IOWA: Iowa adopts the language of the Model Code DR 2-108.²¹⁶

MARYLAND: Rule 5.6 of the Maryland Rules of Professional Conduct, which governs restrictions on an attorney's right to practice law, adopts the language of the Model Rule 5.6.²¹⁷ Maryland had allowed agreements between attorneys that

include a provision for dividing fees between the firm and the lawyer in the event that the lawyer would leave the firm and represent a former client of the firm and also a provision that prohibits the lawyer from discussing with the client the circumstances of his termination from the law firm.²¹⁸

NEW YORK: The state of New York has adopted the language of the Model Code.²¹⁹

PENNSYLVANIA: Pennsylvania's Rules of Professional Conduct are based on the Model Rules.²²⁰

TEXAS: Texas has adopted a modified version of the Model Rules of Professional Conduct. The Texas equivalent to Model Rule 5.6, Texas State Bar Rule 5.06, contains an exception that permits a restrictive covenant to be part of a settlement in a disciplinary pro-

215. RULES REGULATING THE FLORIDA BAR Rule 4-5.6 (1993).

216. IOWA CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS DR 2-108 (1993); *see also* Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598, 603 (Iowa 1990) (finding client's choice to follow departing attorney did not justify suspension of contractual agreement to former partner); Iowa State Bar Comm. on Professional Ethics and Conduct, Op. 89-48 (1990) (stating law firm may not prevent lawyer from soliciting clients for two years).

217. MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1991); *see also* Holloway v. Faw, Casson & Co., 572 A.2d 510, 516 (Md. 1990) (citing prohibition in Maryland Rule of Professional Conduct 5.6 against noncompetition agreements between attorneys); Prahinski v. Prahinski, 540 A.2d 833, 844 n.5 (Md. Ct. Spec. App. 1988) (same).

218. Maryland State Bar Committee on Professional Ethics, Op. 89-29 (1989). According to the Committee, such an agreement, does not restrict a client from retaining a departing partner as counsel. *Id.*

219. DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY § 1200.13 (1990) (adopting boiler plate language of Model Code of Professional Responsibility); *see also* Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 410 (N.Y. 1989) (relying on Code of Professional Responsibility and refusing to enforce forfeiture-for-competition clause of partnership agreement).

220. *See* Pennsylvania Bar Ass'n Comm. on Legal Ethics and Professional Responsibility, Op. 88-249 (undated) (stating law firm cannot create employment contract that requires departing attorney to pay law firm 50% of fees received from pirated client).

ceeding against a lawyer.²²¹ Recently, article 10, section 9 of the State Bar Rules (Texas Disciplinary Rules of Professional Conduct) was adopted and former article 10, section 9 of the State Bar Rules (Texas Code of Professional Responsibility) was repealed, effective January 1, 1990.²²²

VIRGINIA: Virginia DR 2-106 traces the language of Model Code DR 2-108.²²³

221. TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 5.06 (1991).

222. See TEX. GOV'T CODE ANN. art. 10, § 9 (West 1991); see also *Musselwhite v. State Bar of Tex.*, 786 S.W.2d 437, 443-44 (Tex. 1990) (stating disciplinary rule prohibiting lawyer from entering into settlement agreement that restricts right to practice law did not apply to judgment in disciplinary action where attorney was prohibited from soliciting new clients for specific amount of time); State Bar of Tex. Professional Ethics Comm., Op. 459 (1988) (stating that postemployment restrictive covenant between associate and law firm employer violates rules based on Model Code); cf. State Bar of Tex. Professional Ethics Comm., Op. 466 (1990) (upholding retirement exception).

223. VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1991); see also Virginia State Bar Ass'n Standing Comm. on Legal Ethics, Op. 1232 (1989) (invalidating employment agreement containing covenant not to compete for three years); Virginia State Bar Ass'n Standing Comm. on Legal Ethics, Op. 880 (1987) ("A professional corporation may implement an unqualified deferred compensation plan which restricts a retiring or withdrawing employee lawyer from practicing law within a reasonable radius from the law firm. The Code prohibits agreements which restrict a lawyer's right to practice law, unless such agreement is a condition to payment of retirement benefits."). See generally Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 265, 267-86 (1985) (discussing Model Code and Model Rules as they apply to law firm associates and law firms).

