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Enforcing Lawyer Non-Competition Agreements While Maintaining the Profession: The Role of Conflict of Interest Principles

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I. INTRODUCTION

Lawyers reasonably may expect today that the membership of their law firm will change over time.[1] Members of the firm, therefore, may attempt by contract[2] to protect the law firm from the adverse economic consequences that can accompany a lawyer's departure from the firm and subsequent competition for a portion of the firm's clientele.[3] Contractual efforts to limit or discourage competition between lawyers, however, are deemed unethical by the Model Rules of Professional Conduct[4] and face close

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1. *See generally* Howard v. Babcock, 863 P.2d 150 (Cal. 1993); ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS § 1.1 (2d ed. 1998); Leslie D. Corwin, *Response to Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms*, 55 WASH. & LEE L. REV. 1055 (1998); William H. Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151 (1986).

2. These agreements typically impose either a direct or indirect restriction upon competition by the departing lawyer. A direct restriction prohibits the practice of law by a former member of the firm within a specified sector of the market, defined typically by factors such as time, geography, clientele, and type of practice. *See* cases cited *infra* note 5. An indirect restriction does not prohibit the practice of law, but discourages competition by creating a significant economic disincentive to engage in certain types of practice. *See* cases cited *infra* note 6.

3. *See Howard*, 863 P.2d at 157. *See generally* Kirstan Penasack, Comment, *Abandoning the Per Se Rule Against Law Firm Competition: Comment on* Haight, Brown & Bonesteel v. Superior Court of Los Angeles County, 5 GEO. J. LEGAL ETHICS 889 (1992).

4. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1983). Model Rules of Professional Conduct (RPC) Rule 5.6 prohibits a lawyer from entering into any partnership or employment agreement "that restricts the rights of a

and usually unfavorable scrutiny from the courts. Courts typically refuse to enforce competition restraints against lawyers on the ground that the restraints violate public policy.[5] Even indirect restraints, such as economic disincentives to competition, are said to limit impermissibly the interests of the lawyer or, more commonly, the ability of a potential client to select the lawyer of its choice.[6]

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lawyer to practice after termination of the relationship." *Id.*; *see infra* note 16 for the complete text of Rule 5.6. A similar provision is in the Model Code of Professional Responsibility (CPR). MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(a) (1969).

5. *See, e.g.*, Dowd & Dowd Ltd. v. Gleason, 693 N.E.2d 369 (Ill. 1998) (refusing to enforce a clause in an employment agreement with departing members of a professional corporation that prohibited any solicitation of firm clients by a departing lawyer, without consent of the firm, within two years after termination of the employment agreement); White v. Medical Review Consultants, Inc., 831 S.W.2d 662, 665 (Mo. Ct. App. 1992) (holding that a lawyer's covenant not to compete contained in an employment agreement is void); Dwyer v. Jung, 336 A.2d 498, 501 (N.J. Super. Ct. Ch. Div. 1975) (holding unenforceable a provision in a partnership agreement designating clients of each lawyer and barring any lawyer from representing another lawyer's designated clients for a time after termination of the partnership); *In re* Silverberg, 427 N.Y.S.2d 480, 482-83 (App. Div. 1980) (refusing to allow enforcement of a partnership agreement that allocated clients between the partners and prohibited each partner from representing the other's clients for a period of time after dissolution of the firm); Law Offices of Windle Turley v. Giunta, No. 05-91-00776-CV, 1992 WL 57464, at *2-3 (Tex. App. Mar. 23, 1992) (refusing to enforce a clause in an associate's employment contract that barred the lawyer from entering into a professional relationship with any other former employee of the firm for a period of time after leaving the firm); Cohen v. Graham, 722 P.2d 1388, 1391 (Wash. Ct. App. 1986) (distinguishing permissible covenant by departing lawyer not to contact clients of firm from an impermissible covenant not to represent clients of firm); *see also* Supreme Ct. of Ohio Bd. of Comm'rs on Grievances and Discipline Op. 98-5 (1998) (stating that a "lawyer and a law firm may not... participate in a partnership or employment agreement that interferes with the client's choice of counsel by placing financial or geographical restrictions on a departing lawyer's right to practice").

In *Williams & Montgomery, Ltd. v. Stellato*, 552 N.E.2d 1100 (Ill. App. Ct. 1990), the court did not base its refusal to enforce a non-competition agreement among partners upon public policy grounds, but rather upon the conclusion that the firm had failed to demonstrate a protectable interest in maintaining its client relationships. *See id.* at 1106-07; *infra* Part IV. In *People v. Wilson*, 953 P.2d 1292 (Colo. 1998), the court censured a lawyer who had attempted to enforce an agreement with a former associate of the firm that allocated to the firm 75% of any fee earned by the departing lawyer from a client who had fired the firm or 100% of any fee earned from a former client of the firm who had been solicited by the departing lawyer. *See id.* at 1293-94. The censure, however, was based upon an improper division of legal fees disproportionate to the work performed. *See id.* at 1294.

6. *See, e.g.*, Peroff v. Liddy, Sullivan, Galway, Begler & Peroff, P.C., 852 F. Supp. 239, 243 (S.D.N.Y. 1994) (invalidating a provision of a shareholder agree-

ment that conditioned payment of a portion of the firm's value upon the lawyer not continuing to represent firm clients, but holding that the valuation of the firm should not take into account the firm's goodwill); Pierce v. Hand, Arendall, Bedsole, Greaves & Johnston, 678 So. 2d 765, 769-70 (Ala. 1996) (finding that a clause in a partnership agreement that conditioned a deferred compensation payment to a retiring lawyer upon the lawyer not practicing within a certain geographical area "creates a significant economic disincentive that impermissibly restrains" the lawyer's right to practice law); Blackburn v. Sweeney, 637 N.E.2d 1340, 1344 (Ind. Ct. App. 1994) (finding that a termination of a partnership agreement that allocated areas in which each lawyer could not advertise is an impermissible restraint on practice); Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598, 602-03 (Iowa 1990) (finding that the choice by clients to follow a departing lawyer is not sufficiently detrimental to the law firm to justify a reduced compensation for the departing lawyer's partnership interest); Minge v. Weeks, 629 So. 2d 545, 547 (La. Ct. App. 1994) (refusing to enforce a provision of the employment agreement that required a departing associate to pay to the firm 80% of any fee earned from work done for a firm client); Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 154 (N.J. 1992) (refusing to enforce conditions of a law firm service termination agreement that denied termination compensation to departing members who subsequently competed with the firm); Weiss v. Carpenter, Bennett & Morrissey, 646 A.2d 473, 480-81 (N.J. Super. Ct. App. Div. 1994), *aff'd*, 672 A.2d 1132 (N.J. 1996) (invalidating a partnership agreement provision that reduced the payment upon withdrawal if the lawyer left the firm before age 65 for a reason other than death, disability, or judicial appointment); Katchen v. Wolff & Samson, 610 A.2d 415, 419-20 (N.J. Super. Ct. App. Div. 1992) (refusing to enforce a provision in a stockholder agreement under which any withdrawing stockholder forfeited any equitable interest in the firm); Denburg v. Parker Chapin Flattau & Klimpl, 624 N.E.2d 995, 1001 (N.Y. 1993) (invalidating provision of a partnership agreement that required a payment by the departing lawyer to his former law firm if the lawyer practiced within five years of departure); Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 412-413 (N.Y. 1989) (refusing to enforce a provision in a partnership agreement that conditioned the deferred payment of earned fees to a departing lawyer upon the lawyer not continuing to practice law); Judge v. Bartlett, Pontiff, Stewart & Rhodes P.C., 610 N.Y.S.2d 412, 414 (App. Div. 1994) (voiding a provision in an employment agreement that conditioned payment of most of a termination benefit upon the departing lawyer not practicing law within a specified geographic area for a five year period after departure); Hagen v. O'Connell, Goyak & Ball, P.C., 683 P.2d 563, 565 (Or. Ct. App. 1984) (refusing to enforce a provision of a shareholder agreement that imposed a 40% penalty upon the value of the lawyer's interest in the professional corporation unless the lawyer entered into a binding non-competition agreement); Gray v. Martin, 663 P.2d 1285, 1290 (Or. Ct. App. 1983) (invalidating a provision in a partnership agreement that reduced the amount paid for a departing partner's interest if the departing lawyer continued to practice in the local area); Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528, 530-31 (Tenn. 1991) (voiding a condition in a stockholder agreement where the deferred compensation would be paid only if the departing lawyer did not continue to practice law); Whiteside v. Griffis & Griffis, P.C., 902 S.W.2d 739, 744-45 (Tex. App. 1995) (finding a provision of a professional corporation shareholder agreement void to the extent that a payment for a firm's goodwill was conditioned upon the departing lawyer not competing within a certain time and area). *But see* Kelly v. Smith, 588 N.E.2d 1306, 1313-14 (Ind. Ct. App. 1992) (upholding a provision requiring a departing

Competition restrictions have been enforced, however, in professions other than the law. In particular, a number of states evaluate restraints on competition among medical doctors under a reasonability test.[7] The enforcement of reasonable contractual restraints on competition in the medical profession contrasts sharply with the rejection of similar agreements among lawyers. Since 1975, the courts have carved out a separate treatment of restrictions on the practice of law, eschewing the traditional balancing test of reasonability and imposing, effectively, a per se rule against enforcement of non-competition agreements among

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lawyer to pay the old firm 80% of fees earned on removed matters); Feldman v. Minars, 658 N.Y.S.2d 614, 616-17 (App. Div. 1997) (suggesting that a restriction included in a settlement agreement limiting a lawyer's future practice may be enforced even if prohibited by disciplinary rule).

In *Hagen*, the court, while rejecting a penalty clause, allowed the firm to adjust the value of its stock to account for "the effect created when a withdrawing shareholder takes clients from the firm." 683 P.2d at 565; *see infra* text accompanying notes 138-39.

The deferred compensation in *Pierce* was not a true retirement benefit that can be accompanied by a restriction on practice under ethics rules. *See Pierce*, 678 So. 2d at 770; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108 (1969); MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1983). Even though the restriction on practice could not be enforced, the lawyer was entitled to payment of the deferred compensation. *See Pierce*, 678 So. 2d at 770. The impermissible restriction did not void the entire agreement. *See id.* Similarly, in *Jacob*, the court allowed the departing lawyers to receive their termination compensation, even though the portion of the agreement tying that compensation to a non-competition agreement was not enforceable. *See Jacob*, 607 A.2d at 155. In *Whiteside*, the void condition was deemed not to be severable from the payment for goodwill, thus allowing the firm to avoid any payment for goodwill. *See Whiteside*, 902 S.W.2d at 747.

7. *See, e.g.*, Phoenix Orthopaedic Surgeons Ltd. v. Peairs, 790 P.2d 752, 757-58 (Ariz. Ct. App. 1989); Duffner v. Alberty, 718 S.W.2d 111 (Ark. App. 1986); Darugar v. Hodges, 471 S.E.2d 33 (Ga. Ct. App. 1996) (evaluating a non-competition clause between physicians under a reasonability test and finding the clause unreasonable because it did not limit restrictions to competition for patients from the former practice); Saxton v. Coastal Dialysis & Med. Clinic, Inc., 470 S.E.2d 252, 255 (Ga. Ct. App. 1996) (applying a reasonability test and enforcing a non-competition clause in an employment agreement between a doctor and a clinic); McAlpin v. Coweta Fayette Surgical Assocs., P.C., 458 S.E.2d 499, 502 (Ga. Ct. App. 1995) (applying a reasonability test to a non-competition agreement among physicians); Dick v. Geist, 693 P.2d 1133, 1135 (Idaho Ct. App. 1983); Weber v. Tillman, 913 P.2d 84, 96-97 (Kan. 1996) (enforcing a non-competition agreement among physicians as a reasonable contractual agreement); Iredell Digestive Disease Clinic, P.A. v. Petrozza, 373 S.E.2d 449 (N.C. Ct. App. 1988), *aff'd* 377 S.E.2d 750 (N.C. 1989); Karlin v. Weinberg, 390 A.2d 1161, 1169 (N.J. 1978) (applying a reasonability test to a non-competition agreement among dermatologists); Holzer Clinic, Inc. v. Simpson, No. 97CA9, 1998 WL 241887, at *6-7 (Ohio App. Apr. 28, 1998) (applying a reasonability test to a non-competition agreement between a physician and former employer).

lawyers.[8] Among the states that have considered the issue, only California has held that reasonable restrictions among lawyers may be enforceable in appropriate situations.[9]

The vast majority of courts have rejected enforcement of all forms of competition restraint among lawyers because of a perceived overriding harm to the departing lawyer[10] or to the public.[11] The public harm attributed to enforcement has been described as an infringement of the client's freedom to select counsel of its choice. The public interest asserted, however, is inadequate justification for a per se rejection of all non-competition agreements. The nature and extent of any public harm resulting from enforcement, as well as the nature of the interest that the law firm may assert to justify the restraint, differ depending upon the type of restraint at issue and the circumstances of the attempted enforcement. The courts have erred in attempting to paint all lawyer non-competition agreements with a broad brush of per se unenforceability on the grounds that harm to the public will always outweigh any benefit of enforcement.

By relying upon the perceived potential harm to a broad, but vaguely defined, public interest in the freedom to choose counsel, the courts have fashioned an overly broad rule that goes beyond what is needed to preserve the fiduciary obligations of the profession. The courts unnecessarily disregard the intentions of the

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8. *See infra* text accompanying notes 22-52. Although most courts do not explicitly describe their analysis as the application of a per se rule, that characterization has been used by a number of commentators. *See, e.g.*, Stephen E. Kalish, *Covenants Not to Compete and the Legal Profession*, 29 ST. LOUIS U. L.J. 423, 425 (1985); Mark W. Bennett, Note, *You Can Take It With You: The Ethics of Lawyer Departure and Solicitation of Firm Clients*, 10 GEO. J. LEGAL ETHICS 395, 417-18 (1996); Penasack, *supra* note 3, at 893. A well-considered law review article that discusses the impact of this approach upon the law firm structure is Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1730 (1998). Other law review commentaries on lawyer non-competition agreements are cited in Joseph M. Perillo, *The Law of Lawyers' Contracts Is Different*, 67 FORDHAM L. REV. 443, 477 n.235 (1998).

9. *See infra* text accompanying notes 53-61.

10. *See* Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d 358, 369 (Ill. 1998) (finding that the bar on non-competition agreements among lawyers "is designed both to afford clients greater freedom in choosing counsel and to protect lawyers from onerous conditions that would unduly limit their mobility").

11. *See, e.g.*, *Jacob*, 607 A.2d at 146 (stating that the ethical bar "is designed to serve the public interest in maximum access to lawyers"); *Cohen*, 550 N.E.2d at 413 ("While a law firm has a legitimate interest in its own survival and economic well-being and in maintaining its clients, it cannot protect those interests by . . . restricting the choices of the clients to retain and continue the withdrawing member as counsel . . . ." (citations omitted)); *see also* cases cited *supra* note 6.

contracting parties and distinguish non-competition agreements among lawyers in a way that cannot be reconciled with the enforcement of similar agreements in other professions such as medicine. Broad reliance upon a perceived harm to the public's freedom to select counsel also has masked a more fundamental underlying concern: that non-competition agreements are inherently inconsistent with the professional nature of a law practice.

The dissent to the California Supreme Court's enforcement of certain non-competition agreements articulated the concern that non-competition agreements would have a detrimental effect upon the professional character of the practice of law. Judge Kennard suggested that any restraint on competition among lawyers places the economic interests of the lawyer above service to clients and is nothing less than a confirmation of the view "that the practice of law has been so altered that it is now irretrievably profit-centered rather than client-centered."[12] Those who would permit at least some reasonable form of restraint acknowledge a change in the legal services marketplace, but argue that the increased mobility of lawyers between law firms marks "a revolution in the practice of law . . . requiring economic interests of the law firm to be protected as they are in other business enterprises."[13]

The analysis of lawyer non-competition agreements must address more directly the tension between business considerations of a law practice and the professional obligations of a lawyer. Courts can preserve the professional obligations of a lawyer without rejecting all forms of non-competition agreements among lawyers. To do so, however, courts must abandon their per se rejection of all non-competition agreements among lawyers and apply, instead, a traditional reasonability test that determines (1) the specific interests of the law firm that would be furthered by enforcement of the agreement, (2) whether the law firm or the restricted lawyer owes a duty to any person that conflicts with enforcement, (3) whether any conflict was effectively waived by the informed consent of the person to whom the duty is owed, and (4) whether the restrictions are reasonably tailored to protect fairly the asserted interests of the law firm. Expression of the potential harm of enforcement in terms of the conflict that such an agreement may create between the interests of the contracting lawyers

12. Howard v. Babcock, 863 P.2d 150, 161 (Cal. 1993) (Kennard, J., dissenting).

13. *Id.* at 156.

and the duties owed by the lawyers to a client or potential client offers a more helpful and appropriate analytical framework than an analysis that focuses on the public's right to select counsel.

Part II of this Article traces the historical evolution of the current judicial rejection of lawyer non-competition agreements, principally upon the grounds that enforcement would harm a public right to select counsel of its choice. In Part III, the Article discusses the deficiencies of articulating the affected public interest in terms of a right to select counsel and the advantages of applying, instead, a conflict of interest analysis to identify more accurately the potential harm that is peculiar to enforcement of a non-competition agreement among lawyers. The Article points out that an impermissible conflict arises only when the agreement affects the interests of existing clients of the law firm that is trying to restrict competition and suggests that a client should be able to waive most conflicts created by a non-competition agreement. In the absence of informed client consent, lawyers should not be permitted to enforce agreements that further the interests of a law firm to the detriment of a client to whom the firm owes a fiduciary duty. If no disqualifying conflict of interest exists, however, this Article suggests that courts should subject lawyer non-competition agreements to the same rule of reason analysis applied to similar agreements in other professions and occupations. Part III concludes with the observation that once the threat of conflicting interests in an attorney-client context is explicitly identified as the critical factor distinguishing non-competition agreements involving lawyers from other non-competition agreements, it is possible to apply a rule of reason analysis and eliminate the disparate analytical treatment of non-competition agreements in the legal and medical professions.

Part IV of the Article finds that the assertion of certain business interests by a law firm as the reasonable basis for a non-competition agreement is not inherently inconsistent with a professional relationship. A strong line of authority recognizes that law firms, despite their professional character, do have legitimate business interests that can be protected under tort law from interference or appropriation by former members or associates of the law firm.[14] Courts, however, have given relatively little consideration to the legitimacy of similar interests when asserted by law firms to justify enforcement of competition restrictions voluntarily entered into by lawyers. This Part of the Article considers

14. *See infra* text accompanying notes 120, 140-46, 152-74.

what types of business interests a law firm may legitimately assert in light of authorities recognizing that professional entities are not insulated from the realities of the competitive marketplace. In particular, it discusses whether a law firm has a legitimate expectation of future legal business that may be protected against unfair competition by former firm lawyers. The relationship between the firm and the client is distinguished from the relationships that clients may have with individual members of the firm. In making the case for enforceability, the Article compares throughout the interests of law firms with those of medical practices, which traditionally have had greater success in enforcing non-competition agreements.

The Article examines in Part V the circumstances in which a law firm may legitimately claim that competition by the departing lawyer would be sufficiently unfair to the former law firm so as to justify a non-competition agreement and considers the limitations of existing tort law protection of the firm's interests in those circumstances.

Finally, the Article recognizes in Part VI that if enforcement of a non-competition agreement would create a scarcity of legal services, a sufficient public harm may exist in that special circumstance to preclude enforcement of the agreement under the traditional rule of reason, outweighing any legitimate law firm interests that may exist.

Enforcement of a competition restraint, if it is limited to prevent only unfair competition and is accompanied by sufficient client waivers of any conflicts of interest, does not improperly place a lawyer's financial interests above the interests of a client, nor impose an undue burden upon the client or the departing lawyer. The recent practice of rejecting non-competition agreements among lawyers on essentially a per se basis is inappropriate and should give way to a more traditional rule of reason analysis that considers adequately the nature of the law firm's asserted interests, whether those interests would be compromised unfairly by competition from a departing lawyer, and whether the firm, by entering into a non-competition agreement, has improperly put its interests before those of any person to whom it owes a fiduciary duty.

II. THE EVOLUTION OF CURRENT JUDICIAL ATTITUDES TOWARD NON-COMPETITION AGREEMENTS AMONG LAWYERS

The Model Code of Professional Responsibility, adopted in 1969, deemed all non-competition agreements among lawyers to be ethically impermissible.[15] The courts have since typically based their per se refusal to enforce all types of non-competition agreements upon DR 2-108(A) of the Model Code or its successor, Model Rule of Professional Conduct (RPC) 5.6,[16] suggesting that enforcement of an agreement barred by ethics rules must presumptively violate public policy.[17] While it is important to recognize that "the ethical principles governing lawyers plainly restrict practices that may be commonplace and entirely appropriate in other business contexts,"[18] it is inadequate to treat RPC Rule 5.6 as both the starting and the ending point of analysis.[19] The cur-

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15. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(A) (1969).

16. Model Rule 5.6 provides as follows:

> A lawyer shall not participate in offering or making:
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> (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 CONDUCT Rule 5.6 (1983). DR 2-108(a) in the earlier CPR is similar. The *Restatement of the Law Governing Lawyers* § 14 adopts language nearly identical to that of RPC Rule 5.6. *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 14 (Proposed Draft 1998). For a recent discussion of whether a provision falls within the retirement benefit exception, see Neuman v. Akman, 715 A.2d 127, 136-38 (D.C. 1998).

17. *See, e.g.*, Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d 358, 368-70 (Ill. 1998) ("[T]he foundation for Rule 5.6 rests on considerations of public policy, and it would be inimical to public policy to give effect to the offending provisions."); Weiss v. Carpenter, Bennett, & Morrissey, 646 A.2d 473, 478 (N.J. Super. Ct. App. Div. 1994), *aff'd*, 672 A.2d 1132 (N.J. 1996) (relying on Rule 5.6 as reflecting a determination that non-competition agreements among lawyers violate public policy), Gray v. Martin, 663 P.2d 1285, 1290 (Or. App. 1983) ("The question remains whether the fact that the paragraph violates a disciplinary rule makes it unenforceable. We conclude that it does in this case."). *But see* Feldman v. Minars, 658 N.Y.S.2d 614, 616-17 (App. Div. 1997) (distinguishing restrictions on practice set forth in a settlement agreement and suggesting that those restrictions may be enforceable even if they violate a disciplinary rule).

18. Peroff v. Liddy, Sullivan, Galway, Begler & Peroff, P.C., 852 F. Supp. 239, 242 (S.D.N.Y. 1994).

19. Analysis is advanced little by the circular reasoning that non-competition agreements are barred by disciplinary rules because they are contrary to public policy and that they are contrary to public policy because they are

rent line of precedent, while quite substantial in volume, does not critically examine the policy underlying RPC Rule 5.6 beyond assuming that a non-competition agreement would impermissibly limit a potential client's choice of legal counsel. By concluding summarily that, because a professional disciplinary rule bars non-competition agreements among lawyers, all such agreements must be contrary to public policy and, therefore, are unenforceable under contract law, the courts have not explained adequately why enforcement of non-competition provisions by members of the legal profession is considered to be uniquely inappropriate.

Lawyers have not always been barred ethically from entering into non-competition agreements. A review of the ethics opinions and cases that have led to the modern rejection of non-competition agreements among lawyers illustrates the evolution of thought regarding the policies affected by their enforcement. At one time, the principal concern was whether the parties had sufficiently equal bargaining power to ensure that enforcement was fair to the restricted lawyer.[20] Non-competition agreements fell into broader disfavor only as the stated concern became the negative effect of an agreement upon a potential client's freedom to select counsel.[21]

The prevailing judicial attitude against enforcement of restrictions among lawyers can be traced to a 1975 New Jersey case, *Dwyer v. Jung*,[22] in which the superior court refused to enforce a restrictive covenant included in a partnership agreement among lawyers. The agreement had designated certain clients as the clients of particular partners.[23] For a period of five years after termination of the partnership, each partner was prohibited

barred by disciplinary rules. The New Jersey Supreme Court, however, engaged in reasoning nearly as circuitous in attempting to explain why lawyers may not enter into non-competition agreements, but doctors can. The court found that the adoption of a disciplinary rule prohibiting non-competition agreements among lawyers was based upon a finding that enforcement would injure the public interest. The court reasoned further that, because no such rule had been adopted to govern doctors, a similar agreement among doctors must not violate public policy and could be enforced. *See* Karlin v. Weinberg, 390 A.2d 1161, 1168 (N.J. 1978).

20. *See* ABA Comm. on Professional Ethics, Informal Op. 521 (1962).

21. *See* ABA Comm. on Professional Ethics, Informal Op. 1072 (1968) (overruling Informal Opinion 521).

22. 336 A.2d 498 (N.J. Super. Ct. Ch. Div.), *aff'd*, 348 A.2d 208 (N.J. Super. Ct. App. Div. 1975).

23. *See id.* at 499.

from representing a client designated as the client of another.[24] The court invalidated the restriction as being against public policy, expressing concern that a lawyer should "do nothing which restricts the right of the client to repose confidence in any counsel of his choice."[25]

The movement toward rejecting enforcement of non-competition agreements in the legal profession began at least 14 years earlier with the issuance by the American Bar Association (ABA) Committee on Professional Ethics of Formal Opinion 300, the first of a series of advisory opinions on the subject, which concluded that "it would be improper for the employing lawyer to require the covenant [not to compete] and likewise for the employed lawyer to agree to it."[26] Two aspects of Formal Opinion 300 are particularly important. First, while distinguishing the practice of law as a profession and "not a business which can be bought or sold,"[27] the Committee did not appear to find the professional nature of the relationship inconsistent with the recognition of a law firm's interest in the continued representation of its clients. Rather, the Committee reasoned that a non-competition agreement was unnecessary to protect that interest. Under the ethics rules of that time, all solicitation of clients by lawyers was prohibited.[28] The Committee concluded, therefore, that no additional covenant was required to prevent a lawyer from attempting "to secure the work of clients of his former employer."[29]

Second, the ABA's policy focus in Formal Opinion 300 differed sharply from the eventual policy rationale articulated by the New Jersey court in *Dwyer*. The ABA Committee had reasoned in Formal Opinion 300 that the agreement would impose "an unwarranted restriction *on the right of a lawyer* to choose

24. *See id.*

25. *Id.* at 500.

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

27. *Id.* In 1990, the American Bar Association (ABA) added Rule 1.17 to the RPC authorizing the sale of a law practice if the "seller ceases to engage in the private practice of law" in an area in which the law firm has practiced. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.17 (1998). The Comment to Rule 1.17 reiterates the view, however, that "[t]he practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.17 cmt. (1998).

28. No advertising of any type by lawyers was allowed until after the United States Supreme Court's decision in *Bates v. State Bar*, 433 U.S. 350, 384 (1977).

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

where he will practice and [would be] inconsistent with our professional status."[30]

The emphasis in Formal Opinion 300 upon concern for the right of the lawyer to practice, without any explicit reference to a client's freedom to choose counsel, was reinforced in the ABA's Informal Opinion 521,[31] issued a year later. Formal Opinion 300 had declared restrictive covenants inappropriate in employment agreements among lawyers, and Informal Opinion 521 addressed briefly whether the same analysis would invalidate similar restrictions in partnership agreements. The ABA Committee focused entirely upon the potential unfairness to the lawyer, rather than upon any interests of the clients, declaring that no ethical issue was raised by the inclusion of restrictions in a partnership agreement.[32] In the negotiation of a partnership agreement, "the parties [the lawyers] are dealing on an equal footing and we believe restrictive covenants within reasonable and legal limits as between the partners do not involve any questions of ethics."[33]

The ethical propriety of covenants not to compete, therefore, was viewed in these early advisory opinions as dependent upon the relative bargaining power of the lawyers and issues of fairness among lawyers, rather than upon any articulated potential for harm to the clients. The ABA Committee assumed in 1962 that a restriction entered into by lawyers having equal bargaining power would be analyzed under the same standard of reasonability applied to a restriction in any other profession or occupation.[34]

By 1968, however, when Informal Opinion 1072[35] expressly overruled Informal Opinion 521, the analytical focus had changed within the ABA. With the issuance of Informal Opinion 1072, the ABA focused for the first time on potential harm to a client and embraced the position that restrictions upon competition among former partners were inappropriate because of their adverse impact upon a client's ability to retain a lawyer of choice. "The attorney must remain free to practice when and where he will and

30. *Id.* (emphasis added).

31. ABA Comm. on Professional Ethics, Informal Op. 521 (1962).

32. *See id.*

33. *Id.*

34. Professor Kalish discusses the case law prior to 1960 that supported this assumption. *See* Kalish, *supra* note 8, at 427-29. For a comparable current view of non-competition agreements in the medical profession, see *infra* note 133.

35. ABA Comm. on Professional Ethics, Informal Op. 1072 (1968).

to be available to prospective clients who might desire to engage his services."[36]

Professor Hillman describes the shift in rationale by the ABA Committee over those eight years as significant. "Formal Opinion 300 implies that grabbing is unethical, while Informal Opinion 1072 emphasizes the client's freedom of choice."[37] It is the later emphasis upon harm to the client that most courts have since articulated as the explicit policy basis for rejecting non-competition agreements among lawyers. The case law, at first, however, did not reflect as clear an appreciation for the distinction between the rationales of the earlier and later ABA opinions.

Five years after the New Jersey Appellate Division based *Dwyer* upon a concern for the client's interest in choosing counsel, the first reported decision on the subject in neighboring New York relied heavily upon the language of Formal Opinion 300.[38] The Appellate Division considered only indirectly, at best, the impact that enforcement might have upon any interest of the client in selecting counsel. The court focused primarily upon the lawyer's interests in continuing to represent clients that he or she had attracted to the firm. "Respondent cannot restrict petitioner's practice by precluding him from representing former clients of the partnership that were originally obtained by respondent."[39]

Even the leading 1989 decision of the New York Court of Appeals in *Cohen v. Lord, Day & Lord*[40] did not seem to recognize that any theoretical shift had taken place between 1960 and 1968. Relying heavily upon Formal Opinion 300, the court refused to enforce a partnership agreement provision that imposed a significant financial penalty upon any withdrawing partner who continued to practice law in the same jurisdiction as any office of the law firm. The court drew no distinctions between the policies underlying Formal Opinion 300 and Informal Opinion 1072, stating that "the rationale of Opinion No. 300 has been applied to bar restrictive covenants among law firm partners."[41]

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36. *Id.*

37. HILLMAN, *supra* note 1, § 2.3.3. Professor Hillman defines "grabbing" as the taking of clients from a firm. *See id.* § 1.1 n.13.

38. *See In re* Silverberg, 427 N.Y.S.2d 480, 482 (App. Div. 1980).

39. *Id.*

40. 550 N.E.2d 410 (N.Y. 1989).

41. *Id.* at 411 (citing ABA Comm. on Professional Ethics, Informal Op. 1072 (1968)).

Regardless of whether the court recognized any differences in the rationales underlying the two ABA opinions, the decision in *Cohen* left little doubt that the court considered protection of the public to be the foremost interest at stake. The court struck down the financial disincentive to competition as an "impermissible restriction on the practice of law"[42] that 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."[43] While recognizing a law firm's "legitimate interest in its own survival and economic well-being and in maintaining its clients,"[44] the New York court would not permit the protection of those interests by a contract that would restrict "the choices of the client to retain and continue the withdrawing member as counsel."[45]

The majority rejected the approach of a dissenting judge who focused, in much the same manner as had the ABA Committee in Informal Opinion 521, primarily upon the fairness of the decision to the affected lawyers. The dissent argued unsuccessfully that parties to a voluntary contract should be bound by their agreement, finding that in this case the withdrawing partner could not "in good conscience claim that the agreement is unfair."[46]

Given New Jersey's early pronouncement in *Dwyer* of the need to protect a client's choice of counsel, it should not be surprising that this policy continues to underpin its refusal to enforce restrictions upon competition among lawyers. Even in that state, however, the rationale was not firmly entrenched until a 1992 decision of the New Jersey Supreme Court. In *Jacob v. Norris, McLaughlin & Marcus*,[47] the Appellate Division's primary

42. *Id.*

43. *Id.*

44. *Id.* at 413.

45. *Id.* (citing Post v. Merrill Lynch, Pierce, Fenner & Smith, 48 N.Y.2d 84, 89 (1979)).

46. *Id.* at 415 (Hancock, J., dissenting). Despite Judge Hancock's inability to persuade a majority to this view in *Cohen*, the Appellate Division of the New York Supreme Court more recently set forth a similar argument in dicta discussing a restriction on practice set forth in an earlier settlement agreement to which the lawyer had been a party. The court, in disqualifying the law firm from a subsequent matter because the law firm had solicited the client in violation of the restriction, observed that it would appear inequitable to allow lawyers who had agreed to a restriction on practice to later use "their *own* ethical violations as a basis for avoiding obligations undertaken by them." Feldman v. Minars, 658 N.Y.S.2d 614, 617 (App. Div. 1997).

47. 588 A.2d 1287 (N.J. Super. Ct. App. Div. 1991), *rev'd*, 607 A.2d 142

concern was again whether enforcement would be fair to the lawyers affected. The Appellate Division had concluded that a lawyer who had entered into a partnership agreement that conditioned certain payments upon a departing lawyer not competing for one year should be held to the terms of the agreement.

> Plaintiffs have as much participated in the making of this agreement as has defendant. Yet they seek to have it interpreted as a violation of the RPC [Rules of Professional Conduct] so that they can receive its benefits, even though they have failed to perform its conditions precedent to payment and defendant has received none of its benefits.[48]

The New Jersey Supreme Court, however, reversed the lower appellate court, explicitly declaring that the underlying purpose of the ethical rule against restriction "is to ensure the freedom of clients to select counsel of their choice, despite its wording in terms of the lawyer's right to practice. The RPC is thus designed to serve the public interest in maximum access to lawyers and to preclude commercial arrangements that interfere with that goal."[49] The court added later that "[t]he commercial concerns of the firm and of the departing lawyer are secondary to the need to preserve client choice."[50] A number of states over the past decade have reached similar conclusions, each appearing to base its conclusion upon a policy of protecting the client's choice of counsel.[51] Concern for the interests of the departing lawyer, however, while no longer given primacy, has not disappeared entirely. The Supreme Court of Illinois, in refusing to enforce a non-competition covenant in a law firm's employment agreement, recently concluded that RPC 5.6 "is designed both to afford clients greater freedom in choosing counsel and to protect lawyers from onerous conditions that would unduly limit their mobility."[52]

(N.J. 1992).

48. *Id.* at 1291.

49. Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 146 (N.J. 1992), *rev'g* 588 A.2d 1287 (N.J. Super. Ct. App. Div. 1991)

50. *Id.* at 151.

51. *See* cases cited *supra* notes 5-6.

52. Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d 358, 369 (Ill. 1998); *see also* Commission on Prof'l Resp. of the Ass'n of the Bar of the City of N.Y., *Ethical Issues Arising When a Lawyer Leaves a Firm: Restrictions on Practice*, 20 FORDHAM URB. L.J. 897, 897 (1993) (indicating that the rule barring non-competition agreements among lawyers "serves the salutary purpose of protecting attorneys, particularly newer members of the bar, from bargaining away their right to open their own office or move to another firm"); Neil W. Hamilton, *Are We a Profession or Merely a Business? The Erosion of Rule 5.6 and the Bar Against Restrictions on the Right to Practice*, 22 WM. MITCHELL L. REV. 1409, 1413-14 (1996); Robert W. Hillman, *Loyalty in the Firm: A Statement of General*

Only California has followed a different analytical course and indicated clearly that non-competition agreements among lawyers may be enforced in appropriate circumstances.[53] The California Supreme Court, in *Howard v. Babcock*,[54] recognized a law firm's "financial interest in the continued patronage of its clientele" and the increased mobility of lawyers between firms. "Recognizing these sweeping changes in the practice of law, we can see no legal justification for treating partners in law firms differently in this respect from partners in other businesses and professions."[55] The decision upheld a partnership agreement provision that forfeited monetary withdrawal benefits if the withdrawing partner practiced insurance defense law within a certain geographical area during a one-year period after withdrawal.[56]

Babcock involved a California statute that generally permits non-competition agreements among partners,[57] but that the lower appellate court had held inapplicable to a law firm. Interestingly, the lower court had found that a competition restriction among lawyers violated public policy because it "severely and financially punishes partners who wish to practice" in the prohibited areas.[58] Despite citing the decisions of numerous other states to support its result, the lower appeals court did not focus upon any specific harm to clients that would result from enforcement.

Rejecting the lower court's statutory interpretation that lawyers were excluded from the statute authorizing restrictive covenants, the California Supreme Court considered next whether ethics rules governing lawyer conduct could support a decision not to enforce. The court explicitly recognized two separate policy arguments against enforcement of covenants among lawyers.

> Some courts . . . reason that an attorney should have freedom to

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Principles on the Duties of Partners Withdrawing from Law Firms, 55 WASH. & LEE L. REV. 997, 1014 (1998).

53. Maine also apparently permits non-competition agreements among lawyers because it has no equivalent of RPC Rule 5.6 in the Maine Bar Rules. *See* Board of Overseers of the Bar, Prof'l Ethics Comm'n Op. 126 (1992) (digested in THE BUREAU OF NAT'L AFFAIRS, INC., AMERICAN BAR. ASS'N, ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT § 1001:4203 (1994)).

54. 863 P.2d 150, 157 (Cal. 1993).

55. *Id.*

56. *See id.* at 151.

57. *See* CAL. BUS. & PROF. CODE § 16602 (West 1997).

58. Howard v. Babcock, 7 Cal. Rptr. 2d 687, 690 (Ct. App. 1992), *aff'd in part & rev'd in part*, 863 P.2d 150 (Cal. 1993).

> choose when, where, and for whom to practice law; ... many courts reiterate that the practice of law is not a business, and clients are not commodities. These courts assert as an absolute rule that clients must have free choice of attorneys.[59]

The California Supreme Court determined, however, that neither policy was as absolute in its application as might be suggested by theory.

> [T]he reality is that the attorney, like any other professional, has no right to enter into employment or partnership in any particular firm .... Nor does the attorney have the duty to take any client who proffers employment .... Finally, the client in the civil context, of course, ordinarily has no "right" to any attorney's services, and only receives those services he or she can afford.[60]

Acknowledging that an absolute ban on practice would be per se unreasonable, the *Babcock* court nevertheless concluded that other reasonable restrictions on competition by lawyers, particularly a restriction that is comparable to a liquidated damages provision, may be enforced. Consequently, California law partners may agree that a departing lawyer who competes with the firm will forego "an amount that at the time of the agreement is reasonably calculated to compensate the firm for losses that may be caused by" the competitive activities.[61]

III. A NEW APPROACH IS NEEDED TO EVALUATE THE HARM OF NON-COMPETITION AGREEMENTS AMONG LAWYERS

A. INADEQUACIES OF A PER SE RULE

Partners in non-professional, commercial enterprises may enter into reasonable agreements among themselves and with their employees that restrain competition with the partnership, provided that the partnership does not enjoy a monopolistic market position.[62] To be enforceable, the promise must satisfy a two-part test. First, the restraint must be no greater in scope than is necessary to protect a legitimate interest of the partnership. Second, the "hardship to the promisor and the likely injury to the public" must not outweigh the interest served.[63] By articulating a broad right of a member of the public to have an unfettered

59. *Howard*, 863 P.2d at 158.
60. *Id.* at 158-59.
61. *Id.* at 160.
62. *See* RESTATEMENT (SECOND) OF CONTRACTS § 188, cmt. b (1981).
63. *Id.* § 188(1)(b).

choice of counsel, courts considering lawyer non-competition agreements in states other than California have framed the issue in a manner that leads to the conclusion that the perceived harm to that public interest will always outweigh any benefit of enforcement of these agreements.[64] The enforcement of any restriction on practice will diminish the number of available lawyers and necessarily limit public choice. Thus, all lawyer non-competition agreements have been struck down by these courts. The presumption of an overriding public harm, however, has three major flaws in its premises. First, the interest asserted by a law firm seeking to enforce an agreement is not consistent and will vary depending upon the nature of the competitive activities proscribed by the agreement. Second, the impact of enforcement upon other persons will depend upon whether the affected person had an existing professional relationship with the lawyers who are parties to the agreement. Finally, the public interest described by the courts in these cases suggests an exaggerated right of prospective clients to select counsel of their choice. These related deficiencies in the current approach to evaluating the relative harm from enforcement of non-competition agreements among lawyers are fatal to its utility and have resulted in a per se rule that ignores important variations in the relative interests of those affected by enforcement.

64. As noted above, some mention is made still of a need to protect the restricted lawyer from a poor bargain. This justification, however, also does not withstand scrutiny. *See supra* note 52 and accompanying text. When there is grossly unequal bargaining position, the court may find that the non-competition agreement is not supported by sufficient bargained-for consideration. *See infra* note 132 and accompanying text. In those cases the court may refuse enforcement on simple contract principles. The possibility that some agreements may not be enforceable for lack of consideration, however, does not justify refusing to enforce also those agreements that are the product of bargaining. Courts have enforced non-competition agreements against employees with far less sophisticated bargaining skills than can be expected even of new members of the bar. In considering the enforceability of non-competition agreements between technicians and their employer who supplied the workers to the Tennessee Valley Authority, the Eleventh Circuit noted, in *Consultants & Designers, Inc. v. Butler Service Group, Inc.*, 720 F.2d 1553, 1560 (11th Cir. 1983), that "[w]hat we are dealing with are contracts made between and among consenting adults and corporations. Presumably they will act in such a way as to maximize their individual welfare, and it would be presumptuous and harmful if we were to substitute our ex-post judgment for their ex-ante choice." No case has suggested that lawyers as a group deserve greater relief from the legal ramifications of their own poor choices.

1. The Interests Furthered by Enforcement May Vary

The circumstances that may attend a lawyer's departure from a law firm and any subsequent competition with the firm are not uniform. The departing lawyer may be a partner or an employee. The departing lawyer may want to represent current clients of the firm in the same matters handled by the firm, or in new matters only. The departing lawyer may attempt to represent clients of the firm to whom the lawyer would have had no access if not for the affiliation with the firm, or the lawyer may want to continue to represent only clients brought to the firm by the lawyer. The lawyer may simply be competing for new clients in the same field of practice and geographic area as the law firm.

Various interests may motivate a law firm to use a non-competition agreement.[65] As the nature of the firm interest varies, the forms of competition proscribed by the non-competition agreement will vary also. Contractual provisions designed to restrain competition, either directly or indirectly, by lawyers leaving a law firm typically may take one of four forms: (1) a restraint upon all practice by the departing lawyer within certain parameters, such as a specific field of law, a specified time frame, or a defined geographic area;[66] (2) a restraint upon any subsequent representation within a specified time or area of parties who already are clients of the firm;[67] (3) a restraint on representation of clients of the firm, but only in matters already being handled by the law firm at the time of the lawyer's departure; or (4) a restraint on solicitation or advertisement by the departing lawyer.[68] A firm that wants only to protect expectations of continued client patronage in matters already handled by the firm may bar only competition for current matters, or a law firm wanting to protect

65. See *infra* Part IV for a discussion of law firms' interests in the enforcement of non-competition agreements.

66. *See* Pierce v. Hand, Arendall, Bedsole, Greaves & Johnston, 678 So. 2d 765, 767 (Ala. 1996) (concerning a geographic restriction); Supreme Ct. of Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 98-5 (1998) (discussing recommended practices when lawyers leave a firm and continue to practice in the same geographic area).

67. *See* Dwyer v. Jung, 336 A.2d 498, 499 (N.J. Super. Ct. Ch. Div.), *aff'd* 348 A.2d 208 (N.J. Super. Ct. App. Div. 1975); *In re* Silverberg, 427 N.Y.S.2d 480, 481-82 (App. Div. 1980).

68. *See* Blackburn v. Sweeney, 637 N.E.2d 1340, 1341-42 (Ind. Ct. App. 1994), *vacated*, 659 N.E.2d 131 (Ind. 1995); Feldman v. Minars, 658 N.Y.S.2d 614, 615 (App. Div. 1997) (involving a non-solicitation clause in agreement settling a client's lawsuit). The restraint only on advertising and solicitation is simply a less restrictive method of protecting the same employer interests as may be asserted to support a more restrictive ban on practice.

also against diversion of new matters involving existing clients may bar any subsequent representation of a firm client. The firm may assert an interest in goodwill, attempting to bar all competition, even for new clients not previously represented by the firm. As discussed later in Part IV and as these few examples illustrate, a variety of firm interests, some possibly stronger than others, may underlie a non-competition agreement. The per se rejection of all non-competition agreements imposes a rule too broad to account for these differing interests of the law firm and for the resulting variation in the nature of the competition restraints.

2. The Impact On Third Persons Is Not Equal

The per se rule also fails to distinguish the differing interests of those who would seek to use the services of the restricted lawyer. The client who is denied the opportunity to continue a close fiduciary relationship with the restricted lawyer not only loses a trusted confidant and counsel, but may also face the cost of educating a new attorney on the subject of the representation, a potential loss through delay in the ultimate resolution of the matter while a new lawyer takes over, and possibly the need to disclose sensitive confidences to yet another individual. The fiduciary and confidential nature of the attorney-client relationship and the expectations of loyalty inherent in that relationship make the client especially vulnerable to harms not experienced by commercial customers when a non-competition agreement is enforced in a non-professional commercial context.

The analysis of non-competition agreements among lawyers must account for the potential impact upon existing clients and may appropriately disallow non-competition agreements that would be enforceable in other non-fiduciary contexts. The expectation of harm to existing clients if a non-competition agreement among lawyers is enforced, however, does not justify a per se rejection of all such agreements. If it is the impact of enforcement upon existing attorney-client relationships that distinguishes non-competition agreements among lawyers from agreements in other business or professional relationships and makes their enforcement less desirable, the analytical model should be sufficiently flexible to account for the fact that the same distinctions may not exist when a restriction affects only the creation of a new attorney-client relationship when none had previously existed. Assuming that legal services are not uniform in value or quality, a potential client who is in need of legal services and is denied the opportunity to hire a particular lawyer, even though they had no

prior professional relationship, may experience some cost because of enforcement of a non-competition agreement, if all other available legal services are of a lesser value or quality. This cost to a potential client, however, is far different from the costs experienced by an existing client and is no different from the cost experienced by potential customers of any service provider who is subject to a non-competition agreement. Courts have consistently enforced non-competition agreements against other types of service providers,[69] and no reason exists to distinguish lawyers on this basis alone.

3. The Public Interest Asserted Is a False Interest

The failure of courts to differentiate the lesser impact of enforcement upon a potential client from the impact upon an existing client, who has already invested heavily in the development of a professional relationship with the restricted lawyer, is directly attributable to the manner in which courts have described the public interest at stake when a non-competition agreement involves the practice of law. Rather than considering the potential harm to the fiduciary relationship, the prevailing approach urges the rather simplistic assumption that both current and prospective clients suffer harm if enforcement causes any diminution in the number of lawyers available for their retention. This view not only ignores the potential harm to fiduciary expectations, but overstates the public's interest in selecting counsel of its own choice. The public does have an interest in maintaining the freedom to select among available counsel and in not being forced to retain a particular lawyer. Courts, however, have not considered whether the non-competition agreement would deny a potential client all choice of counsel. They have, instead, fashioned a broad rule that renders unenforceable any agreement that would limit, to any extent, a client's or potential client's choice of a lawyer.[70] The adopted policy of preserving "maximum

69. *See, e.g.*, Cobb Family Dentistry, P.C. v. Reich, 383 S.E.2d 891, 892 (Ga. 1989) (holding that reasonable non-competition agreements among dentists are enforceable); Holloway v. Faw, Casson & Co., 572 A.2d 510, 517 (Md. 1990) (holding that reasonable non-competition agreements among certified public accountants are enforceable); *see also* cases cited *supra* note 7.

70. A typical expression of the public interest is that used by the New Jersey Superior Court, in *Dwyer*, 336 A.2d at 500, finding that a "client is always entitled to be represented by counsel of his own choosing." Leslie Corwin describes a client's "right to counsel of his own choice" traced to the Bill of Rights and protecting "the right of a client to stay with counsel of his own choice when a partner departs." Corwin, *supra* note 1, at 1060.

access"[71] in the choice of counsel is far different from a policy of ensuring some choice of counsel.[72] Because every non-competition agreement limiting a lawyer's practice will necessarily limit in some manner a potential client's range of potential counsel, thus denying "maximum access" to choice, all non-competition agreements involving a lawyer's practice have been rendered unenforceable by the broader policy formulation.

The finding of impermissible harm whenever a client cannot hire a particular lawyer because of a competition restriction means that a lawyer cannot enter into any agreement that denies a potential client the opportunity to retain that lawyer. This result suggests, in essence, a qualified[73] right of a prospective client to retain the specific lawyer of its choice. A prospective client's actual freedom to select counsel, however, is not an unfettered interest and falls far short of a right to representation by a particular lawyer. Once an attorney-client relationship has been established in a litigation matter, a lawyer's ability to withdraw from the existing relationship may be limited by the court[74] because of the potential cost to the client of withdrawal. The California court in *Howard* understood correctly, however, that a lawyer is rarely required by law or by ethical duty to *undertake* a particular client's representation.[75] The lawyer may decline to represent a client for any number of reasons within the lawyer's discretion, ranging from economic considerations to a desire to limit the areas in which the lawyer practices.[76]

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71. Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 146 (N.J. 1992).

72. See *infra* Part VI for a discussion of situations creating a scarcity of choice.

73. Even if such a right were recognized, it could not be characterized as absolute, because a lawyer's ethical and fiduciary duties preclude the lawyer from accepting a representation that creates an impermissible conflict or is beyond the lawyer's competence.

74. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(c) (1983).

75. *See* Howard v. Babcock, 863 P.2d 150, 158-59 (Cal. 1993). In arguing for repeal of MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6(b), which bars practice restrictions in an agreement settling a client's private dispute, Professor Stephen Gillers rejected the justification that the rule protects client choice of counsel, making a point similar to the one set forth here. "Surely, it cannot be true that the profession's duty to help make counsel available requires individual lawyers to keep themselves free to serve clients. Absent court order, lawyers may reject clients outright and without a reason." Stephen Gillers, *A Rule Without a Reason*, A.B.A. J., Oct. 1993, at 118, 118.

76. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 cmt.; GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 1.2:102 n.2 (2d ed. 1996); Kalish, *supra* note 8, at 450-51; Robert Parker, *Non-Compete Agreements Between Lawyers: An Economic Analysis*, RES GESTAE, Oct.

> Just as the principle of liberty leaves one morally free to choose a profession according to inclination, so within the profession it leaves one free to organize his life according to inclination. The lawyer's liberty—moral liberty—to take up what kind of practice he chooses and to take up or decline what clients he will is an aspect of the moral liberty of self to enter into personal relations freely.[77]

By asserting an overly broad statement of a client's right to select counsel of its choice in order to justify a per se rejection of all non-competition agreements among lawyers, courts have neglected the important distinctions between the duties owed to existing and potential clients of the restricted lawyer. As a result, under current practice, a lawyer may disappoint a prospective client's wishes by voluntarily declining a matter, but may not voluntarily contract not to represent the client. If the public policy were truly to ensure the maximum choice of legal counsel for a prospective client, this distinction could not be justified. In each situation, when the lawyer declines to undertake the representation, the prospective client is disappointed to the extent that it will not have its first choice of counsel.

B. ADVANTAGES OF A RULE OF REASON ANALYSIS FOCUSING UPON CONFLICTS OF INTEREST

Unless legal services are scarce in a particular area,[78] no general public harm would stem from the enforcement of a non-competition agreement among lawyers. The impact of enforcement would fall only upon those particular members of the public who would not be able to retain the restricted lawyer if the agreement were enforced. More specifically, the enforcement of a non-competition agreement among lawyers would impose a unique cost upon existing clients, who already have a fiduciary

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1996, at 12, 15.

77. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1078 (1976). Some argue that even professional obligations to strive toward a goal of reasonable access for all to legal representation do not require a lawyer to undertake a civil representation that the lawyer finds to be morally objectionable, even if the lawyer is the "last lawyer in town." Teresa Stanton Collett, *The Common Good and the Duty to Represent: Must the Last Lawyer in Town Take Any Case?*, 40 S. TEX. L. REV. 137, 178-79 (1999).

78. See *infra* Part VI. It might be argued that if legal services are so scarce that enforcement of a non-competition agreement would deny members of the public any choice of counsel, the existence of an effective monopoly might adversely affect public access to the legal system, creating a harm of broader public concern. Otherwise, enforcement of an agreement affects only those persons specifically seeking the services of the restricted lawyer.

relationship with the restricted lawyer.[79] This potential for a conflict of interest between the fiduciary duties of the contracting lawyers to the client and the lawyers' contractual duties to each other is the principal professional consideration that distinguishes enforcement of non-competition agreements among lawyers from the enforcement of similar agreements in other occupations. The possibility of a conflict and the potential impact upon the fiduciary relationship, therefore, should be considered directly by the courts in considering whether enforcement is appropriate.

The duty of loyalty is an inherent part of the attorney-client relationship and is owed to all existing clients of a law firm.[80] A conflict of interest occurs when there is "a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to . . . a third person."[81] The first step in determining whether a conflict of interest exists is to ascertain to whom a lawyer or law firm owes a fiduciary duty of loyalty. The next step is to identify any other obligations of the lawyer that may compromise that person's expectation of loyalty. A lawyer who enters into a non-competition agreement with a law firm owes both a fiduciary duty of loyalty to the lawyer's clients and a contractual duty to the law firm. These duties would conflict if enforcement of the non-competition agreement forced the lawyer to terminate an attorney-client relationship over the client's objections upon the lawyer's departure from the firm. Similarly, the other lawyers of a law firm owe a duty of loyalty to the firm's clients.[82] A conflict would be created if the law firm sought to protect its own interests by enforcing a non-competition agreement to the detriment of an existing client who wished to continue a fiduciary relationship with the departing lawyer.

A lawyer or law firm that has entered into an attorney-client relationship should not be permitted, without client consent, to obtain the benefit of a non-competition agreement if enforcement would be detrimental to the interests of the client to whom a fi-

79. See *supra* text accompanying note 70.

80. RPC Rule 1.7 is the basic disciplinary rule governing conflicts between the interests of a lawyer and a current client. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).

81. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 201 (Proposed Final Draft No. 1, Mar. 1996).

82. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1983) (imputing disqualification of one lawyer to entire firm).

duciary duty is owed. A rule of reason analysis that considers directly the potential harm resulting from conflicts created by enforcement of a non-competition agreement would protect against violations of the lawyer's fiduciary obligations and preserve the professional character of the lawyer-client relationship as effectively as the current per se approach. The potential harm to the fiduciary relationship caused by a conflict of interest[83] ordinarily would be sufficient to preclude the enforcement of a non-competition agreement unless the client had effectively waived the conflict. Unlike the broad per se rule that now denies enforcement of any non-competition agreement among lawyers, however, this approach would deny enforcement on public policy grounds only if enforcement directly infringed upon the interests of a client to whom the law firm owed a fiduciary duty and only if the client had not waived any conflict. It is not unreasonable to place the burden upon the fiduciary to obtain an informed waiver by the client in order to enforce the agreement. A client can be easily identified by the law firm as a third person likely to be affected by the agreement. The duties owed to the client are relatively certain, and the potential harm to the client is foreseeable.

On the other hand, lawyers entering into a non-competition agreement have no conflicting responsibility to persons who are not yet clients of the law firm. Although a lawyer may, on occasion, owe duties to non-clients,[84] no broad duty is owed to members of the public to remain available for their retention. A potential client wanting to ensure the future availability of a particular lawyer's services may enter into a general retainer agreement with the lawyer. Until that occurs, however, no duty of loyalty exists that would conflict with entry into a non-competition agreement.[85] Absent a conflict, a non-competition agreement is not inherently inconsistent with any professional obligations of the contracting lawyers and no special policy justification exists for denying enforcement. Enforcement would not harm the reasonable expectations of any identifiable member of the public and should not be automatically denied. The validity of the non-competition agreement should depend, instead, upon

83. *See supra* text accompanying note 70.

84. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 (Tentative Draft No. 8, Mar. 1997) (regarding duty of care to non-clients).

85. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 27 (Proposed Final Draft No. 1, Mar. 1996). Even after a potential client has contacted a lawyer, the lawyer does not have a duty to decline conflicting representations unless the lawyer received relevant confidential information from the potential client. *See id.*

whether enforcement would be reasonable under traditional contract law principles governing such agreements.

By identifying more precisely the nature of any harm likely to result from enforcement, the conflict of interest analysis of non-competition agreements allows the court to consider better the distinctions in impact among various types of restraints imposed upon departing lawyers. In appropriate circumstances, for example, a law firm may conclude that it is not necessary to limit the practice of a departing lawyer in order to protect adequately the firm's interests. Instead, the law firm may wish to impose only a restraint on advertising or direct solicitation of firm clients by the departing lawyer. Lawyers are free under these agreements to maintain existing relationships with firm clients after departure. Therefore, existing clients suffer no detrimental impact, no conflict of interest exists, and no ethical basis for denying enforcement is evident.

This distinction in impact between advertising restrictions and practice restrictions has been ignored, however, in cases that focus upon only a vaguely defined policy of protecting the client's choice of counsel. Several state courts have considered and refused to enforce even an advertising restraint on the grounds that the agreement was an impermissible form of market allocation. The Indiana Court of Appeals, for example, found an advertising restriction to be contrary to a goal of "protecting potential clients from a diminution of their access to competent counsel."[86] This policy goal is similar to the public interest described in most practice restriction cases. The Indiana court derived its formulation of the public interest, however, from the United States Supreme Court's decision in *Bates v. State Bar*,[87] which struck down as unconstitutional a state ban on all forms of lawyer advertising. That decision, recognizing a First Amendment commercial speech right of lawyers, did suggest that fee advertising by lawyers could improve the accessibility to the public of legal services. The Court, however, did not find any equivalent right of the public to require lawyer advertising.

86. Blackmun v. Sweeney, 637 N.E.2d 1340, 1343 (Ind. Ct. App. 1994), *vacated*, 659 N.E.2d 131 (Ind. 1995); *see also* Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d 358, 369 (Ill. 1998) (finding that a non-solicitation clause violated Rule 5.6, but not addressing directly the distinction between agreements not to practice and agreements not to solicit). *But see* Cohen v. Graham, 722 P.2d 1388 (Wash. App. 1986) (upholding an arbitrator's decision that a restriction on representing firm clients was void, but an agreement not to contact firm clients was enforceable).

87. 433 U.S. 350 (1977).

If a lawyer can voluntarily decline to advertise, the public suffers no greater harm if the lawyer's decision not to advertise is reflected in an agreement with a former employer intended to protect legitimate interests of that employer. No public interest is injured so as to justify rejection of an otherwise appropriate restriction.[88] A conflict of interest analysis verifies that conclusion. Because the client is able to maintain the existing fiduciary relationship with the departing lawyer, enforcement does not conflict with the interests of the client and should not be presumptively rejected. To the extent that advertising restrictions are a possibly impermissible form of market allocation, the enforceability of the advertising restraints should not be analyzed under broad principles of professionalism or legal ethics, but under specifically applicable law of antitrust or unfair trade practices.

By scrutinizing non-competition agreements for conflicts of interest just as they might scrutinize any other potentially conflicting contract by a lawyer, the courts will be able to weigh more effectively the law firm's interest in enforcement against the real impact of enforcement. Reliance upon the conflict of interest analysis, as a part of the traditional reasonability test required by contract law, will adequately protect the public against enforcement of inappropriate competition restraints and preserve the professional obligations of the practicing lawyer.[89] At the same time, it will do so without ignoring the legitimate business interests of the law firm.

C. CLIENT WAIVER OF A CONFLICT

The adoption of a rule of reason approach with a specific consideration of potential conflicts of interest provides a more appropriate theoretical basis for consideration of non-competition agreements among lawyers. The change, however, might have minimal practical impact on the effectiveness of non-competition

88. *See* Feldman v. Minars, 658 N.Y.S.2d 614 (App. Div. 1997) (finding that public policy does not preclude enforcement of a provision in a settlement agreement that bars a lawyer from soliciting other clients to sue the same defendant).

89. Given the conflict of interest analysis, a separate RPC Rule 5.6 is superfluous. Existing conflict of interest rules, particularly RPC Rule 1.7, adequately guide the ethical conduct of a lawyer and protect the legitimate loyalty expectations of clients. An existing client adversely affected by a lawyer's entry into a non-competition agreement would be no less protected if Rule 5.6 did not exist. Instead of pursuing a grievance under Rule 5.6, the client could challenge the lawyer's undertaking on the ground that it created an impermissible conflict of interest under Rule 1.7.

agreements if conflicts of interest could not be waived by clients. Agreements that limit representation of existing firm clients are the most useful to the law firm. Firms concerned by the potential loss of existing clients will want a non-competition agreement that prevents departing lawyers from taking those existing clients to a new practice. Because it is in precisely those situations that a conflict is most likely to exist, firms would have little practical incentive, even under a rule of reason analysis, to use competition restrictions if the mere existence of a conflict were always sufficient to preclude enforcement of a non-competition agreement.

A conflict of interest, however, may be waived by the client in appropriate circumstances, creating the possibility of much broader use of non-competition agreements. Rule of Professional Conduct 1.7 permits a lawyer to represent a client despite conflicting interests of the lawyer, if the lawyer reasonably believes that the representation will not be adversely affected by the conflict and if the client consents after consultation. Section 202 of the Restatement of the Law Governing Lawyers is similar in content, and the Comment to section 202 summarizes when a particular conflict can be waived.

> Decisions holding that a conflict is non-consentable often involve facts suggesting that the client, who is often unsophisticated in retaining lawyers, was not adequately informed or was incapable of adequately appreciating the risks of the conflict.... Decisions involving clients sophisticated in the use of lawyers, particularly when advised by independent counsel... rarely hold that a conflict is non-consentable.[90]

To obtain an informed consent, the lawyer must make the client aware of the possible consequences of a non-competition agreement. The law firm should disclose at the outset of a representation, the existence of any relevant non-competition agreements, explain the potential impact upon the client if a lawyer leaves the firm subject to a non-competition agreement, and seek the client's consent to the conflict created. The possibility that a lawyer handling the client's matter might leave the firm should not preclude the firm from seeking that consent, as long as the client is capable of understanding the risk. When compared to other situations in which client consent to a conflict of interest can be sought, the potential impact from enforcement of a non-competition agreement to which the client is being asked to consent is relatively minimal. A law firm that represents multiple

90. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 202 cmt. g(iv) (Proposed Final Draft No. 1, Mar. 1996).

parties in a single matter, for example, may be forced to withdraw entirely from the representation if a conflict develops between the multiple clients.[91] The possibility of a total break in representation does not preclude a lawyer from seeking informed consent to the multiple representation.[92] By comparison, although enforcement of a non-competition agreement would prevent the individual departing lawyer from continuing the representation of the client, it would not affect the ability of the law firm to continue as counsel, assuming the firm remains competent to handle the matter after the lawyer's departure. Because an individual lawyer within a firm does not contract personally with the client,[93] the lawyer's departure from the firm does not terminate the attorney-client relationship between the law firm and client. The individual lawyer does not have the usual ethical concerns associated with the termination of a representation; nor does the client have any break in representation.

The overall harm to the client caused by enforcement of a non-competition agreement is likely to be less than the potential harm to a client if a conflict arises in a multiple representation case. If the lawyer can reasonably seek consent to a multiple representation conflict, then the possibility at the outset of a representation that the firm's representation might continue without the involvement of a particular lawyer if the lawyer leaves the firm should not be so inherently adverse to the law firm's representation as to preclude seeking a proper consent.

D. BRINGING ANALYTICAL CONSISTENCY TO NON-COMPETITION AGREEMENTS IN THE LEGAL AND MEDICAL PROFESSIONS

Lawyer-client and doctor-patient relationships have many similarities. Both the patient and the client develop a personal trust in the learned advice of a particular professional. Both seek

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91. The Comment to RPC Rule 1.7 points out that once a conflict arises, the ability of the lawyer to continue to represent any of the clients is determined by Rule 1.9, which addresses conflicts between the interests of a current and a former client. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1983). Rule 1.9 may well require complete withdrawal by the conflicted lawyer. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 201 cmt. e (Proposed Final Draft No. 1, Mar. 1996).

92. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b)(2) (1983); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 201 cmt. e(i) (Proposed Final Draft No. 1, Mar. 1996).

93. *See, e.g.*, Fred Siegel Co., L.P.A. v. Arter & Hadden, 707 N.E.2d 853 (Ohio 1989) (observing that the firm, not the individual lawyer, contracts with the client).

advice on matters of the utmost importance to their lives. Both provide the professional with confidential information. Both may expect that their interests will be put before the interests of the professional. Yet in the medical profession, reasonable restraints on competition generally have been enforceable,[94] while courts, citing the perceived threat to a client's choice of counsel, have rejected all similar agreements among lawyers. Unfortunately, courts rejecting agreements among lawyers have not justified the distinction in a manner that explains why public policy requires the per se rejection of lawyer non-competition agreements, while a rule of reason analysis provides adequate protection for a medical patient's interests. Indeed, no court has suggested that a client's interest in the selection of legal counsel is any greater than a medical patient's interest in selecting a physician.[95]

The application of a rule of reason to non-competition agreements among lawyers would bring consistency to the analysis of competition restrictions involving professionals. The elimination of a rule of per se rejection certainly would allow enforcement of some non-competition agreements among lawyers when no conflict existed or all appropriate waivers had been obtained. The change might also alter the enforcement of similar agreements among doctors. Physicians, like lawyers, owe fiduciary duties to their patients.[96] Although conflicts of interest may be a more common and pervasive concern in the legal profession than in the medical profession, the explicit attention to the potential harm that can result from a conflict of interest within a professional relationship might lead courts also to evaluate in a new light the reasonability of non-competition agreements among doctors, perhaps finding some agreements to be unreasonable in circumstances that create harmful conflicts between the interests of doctor and patient.

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94. See cases cited *supra* note 7.

95. One reason that has been suggested for the difference in attitudes regarding enforcement, however, is that "the moral legitimacy of doctoring does not depend on universal access to physician services . . . whereas the legitimacy of the legal profession rests on its availability to everyone." William M. Sage, *Physicians as Advocates*, 35 HOUS. L. REV. 1529, 1613 (1999). This argument, however, does not explain why non-competition agreements among lawyers have been rejected even when enforcement would not result in a shortage of available lawyers.

96. *See, e.g.*, Duquette v. Superior Court, 778 P.2d 634 (Ariz. Ct. App. 1989); Cates v. Wilson, 350 S.E.2d 898 (N.C. Ct. App. 1986).

IV. A LAW FIRM HAS A LEGITIMATE INTEREST IN PROTECTING AGAINST COMPETITION BY FORMER FIRM MEMBERS

Consideration of the potential harm to the public resulting from enforcement of a non-competition agreement, while important, is only one aspect of a full rule of reason analysis. The proper balancing of benefit and harm under the reasonability test requires not only a proper identification of the potential harm, but also accurate recognition of the countervailing economic interest of the firm that would be furthered by enforcement.

Non-professional employers have generally been allowed to enforce reasonable contractual restraints on post-employment competition. Enforcement of competition restraints has been "justified on the ground that the employer has a legitimate interest in restraining the employee from appropriating valuable trade information and customer relationships to which he had access in the course of his employment."[97] Although the mere threat of competition is not a sufficient interest to justify enforcement of a restraint on competition, a non-professional enterprise generally may enforce a covenant not to compete if "by the nature of the business, [the employer] plaintiff has a near-permanent relationship with its customers and but for his or her employment, defendant would not have had contact with them."[98] To establish a legitimate interest justifying a restraint on competition, therefore, an employer must show both (i) that the nature of the customer relationship creates a legitimate expectation of future business and (ii) that the departing employee has benefited from the employment in a way that would make subsequent competition by the departing employee unfair.[99]

Judge Kennard's criticism of lawyer non-competition agreements in dissent in *Howard v. Babcock*,[100] suggests that some judges might find that a law firm cannot assert any sufficient legitimate interest, consistent with its professional obligations, in protecting against competition by former lawyers of the firm.

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97. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. b (1979).

98. Rapp Ins. Agency, Inc. v. Baldree, 597 N.E.2d 936, 939 (Ill. App. Ct. 1992). For the covenant to be enforced, this interest must also outweigh any likely hardship to the promisor or public as a result of enforcement. *See id.*

99. *See* Dial Media, Inc. v. Schiff, 612 F. Supp. 1483, 1490 n.5 (D.R.I. 1985); Boisen v. Petersen Flying Serv., Inc., 383 N.W.2d 29, 33 (Neb. 1986).

100. 863 P.2d 150, 161 (Cal. 1993) (Kennard, J., dissenting) (arguing that enforcement is acceptance of the view that "the practice of law has been so altered that it is now irretrievably profit-centered rather than client-centered").

Given their summary rejection of non-competition agreements among lawyers on the grounds that the agreements are so harmful to the public interest as to be contrary to public policy, most courts have failed even to consider whether a law firm has a legitimate countervailing economic interest that could justify a particular form of non-competition agreement. A few courts have recognized specifically that a law firm may have a "legitimate interest... in maintaining its clients,"[101] but even these courts have generally assumed that a client's interest in selecting its counsel of choice will always outweigh any possible countervailing interest of the law firm. Because of that assumption, modern case law rejecting non-competition agreements among lawyers has failed to explore fully the nature of any interest the law firm may have in restricting competition.[102] If the per se rejection of non-competition agreements is replaced by a rule of reason analysis, however, it becomes necessary to identify fully the interests asserted by the law firm in favor of enforcement.

A. RESTRICTIONS ON ANY PRACTICE WITHIN A CERTAIN FIELD OF LAW, TIME FRAME, OR GEOGRAPHIC AREA

The specific nature of the law firm interest served by a non-competition agreement may vary depending upon the form of the agreement used. The broadest form of covenant restrains any practice by a departing lawyer within a particular field of law, a geographic area, a specific time frame, or some combination of limitations. This form of restriction extends well beyond the scope of what is needed to protect a law firm's interest in the continued patronage of an existing client. It is designed to prevent all competition by the departing lawyer for potential clients, including even those with no previous relationship to the law firm.

A line of Georgia cases has enforced similar restrictions upon medical providers as reasonable restraints justified by legitimate business interests. In 1997, the Georgia Court of Appeals in *Chaichimansour v. Pets Are People Too*[103] upheld a restrictive

101. Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 413 (N.Y. 1989); *see also* Williams & Montgomery, Ltd. v. Stellato, 552 N.E.2d 1100, 1106-07 (Ill. App. Ct. 1990) (suggesting that a protectable interest may exist, but concluding that the law firm had failed to prove a protectable interest in maintaining its client relationships).

102. *Stellato*, 552 N.E.2d at 1106, is one of the few cases involving a non-competition agreement among lawyers that clearly applies a reasonability test and specifically identifies the lack of a sufficient employer interest.

103. 485 S.E.2d 248 (Ga. Ct. App. 1997).

covenant that barred a veterinarian from practicing any veterinary medicine within five miles of her previous employer's clinic. The court found that the restriction was appropriately limited to the geographic area in which the former employee had actually worked. It was there that the former employee would be most likely to exploit personal relationships that had been created with the former employer's customers and, thus, the ban on all competition within that geographic area was reasonable.[104]

In upholding the geographic restraint on practice, the court in *Chaichimansour* expressly disapproved of its own language from a 1996 opinion that had suggested no legitimate employer interest could justify a restraint that extended to competition for patients with whom a doctor had not had contact while in the previous employment.[105] In *Darugar v. Hodges*,[106] the Georgia Court of Appeals had declared that a restriction on any practice of medicine by a doctor within a 25-mile radius of her former employer was unreasonable. "[A] restriction against doing business with *any* of an employer's potential customers located in a specific geographical area, without regard to whether the employee ever made contacts with those prospects, is overbroad and unreasonable."[107] The court had tied its finding of overbreadth directly to the absence of any language in the agreement "limiting its application to those patients or prospective patients Hodges [the departing employee] encountered during her employment."[108] The court in *Chaichimansour* expressly rejected the suggestion from *Darugar* that "prohibitions on competition with respect to customers or potential customers beyond those with whom the employee dealt during his employment will always be unreasonable."[109]

Courts that have enforced broad restrictive covenants barring competition by departing physicians, including competition for new patients, have recognized a variety of legitimate interests sufficient to support the restrictions imposed. Examples of these

104. *See id.* at 250.

105. *See id.*

106. 471 S.E.2d 33 (Ga. Ct. App. 1996). The same court, in *McAlpin v. Coweta Fayette Surgical Assocs., P.C.*, 458 S.E.2d 499 (Ga. Ct. App. 1995), had enforced a restriction on any medical practice within a designated area. In that case, however, the court did not identify the particular interest of the employer, other than a general discussion of the employer's interest in building and extending its practice.

107. *Darugar*, 471 S.E.2d at 36 (emphasis in original).

108. *Id.*

109. *Chaichimansour*, 485 S.E.2d at 250.

interests are the protection of business referral relationships with other professionals, the protection of proprietary information, and the protection of an investment in goodwill or training. These interests asserted as justification for enforcement of competition restrictions within the medical profession appear potentially applicable to support competition restrictions among lawyers. The circumstances in which these interests justify a broad restraint on any practice by a lawyer, however, may be very limited.

1. Protection of Business Relations with Other Professionals

In *Keeley v. Cardiovascular Surgical Associates*,[110] the Georgia Court of Appeals upheld a non-competition agreement among cardiovascular surgeons. The departing surgeon was barred from any competing cardiovascular surgery practice within seventy-five miles of the former employer for a two-year period after termination. The court enforced the restriction to protect the former employer's "legitimate business interests" in maintaining its "substantial patient base and network of referring physicians throughout the protected territory."[111] The court found that any reduction in the number of surgical procedures performed by the corporation as a consequence of competition by the former employee would have harmed the corporation by reducing its "patient and referral base as well as its income and reputation."[112]

Physicians frequently provide medical services through specialized practices.[113] A consequence of specialization within the profession is a significant volume of patient referrals between members of the profession having different areas of expertise. The physician group in *Keeley* relied upon an intra-profession network of surgery referrals and was allowed to protect that network with a non-competition agreement. Because the protected interest was the medical practice's referral relationship with other doctors, it justified a broad restriction on competitive practice by the departing doctor even if the patients who would have been served by the doctor had no prior patient relationship with the doctor's former practice.

110. 510 S.E.2d 880 (Ga. Ct. App. 1999).

111. *Id.* at 884.

112. *Id.*

113. *See* LEIYU SHI & DOUGLAS A. SINGH, DELIVERING HEALTH CARE IN AMERICA: A SYSTEMS APPROACH 119 (1998) (citing 1992 study showing that "nearly 70 percent of all patient care physicians" in the United States are specialists).

Law practices generally have remained less specialized than the medical profession.[114] To the extent that a lack of specialization reduces the reliance upon intra-profession referrals, a law firm may be less likely to have a strong, legitimate interest in protecting referral relationships with other law firms. Specialized law firms do exist, however, and, with the practice of law still geographically limited in an era of multi-state clients,[115] even general legal practices may develop important referral relationships with certain law firms in other jurisdictions. A law firm is barred by ethical rules from entering into reciprocal agreements binding firms to refer clients to each other.[116] Even without a binding referral agreement, however, a firm may have a valuable relationship that produces regular referral business. It is inappropriate to assume, therefore, that a law firm never could have a cognizable interest in protecting a referral network of the type recognized and protected in *Keeley*.

2. Proprietary Information

Other cases recognize a broad employer interest in restricting competition by a former employee who might enjoy a competitive advantage because of access to an asset, including an intangible asset, of the employer. The Georgia Court of Appeals, in *Saxton v. Coastal Dialysis & Medical Clinic, Inc.*,[117] enforced a broad covenant against post-employment competition by a physician who as an assistant to the chief executive officer had been given access to confidential employer information. The court found that the medical employer had "entrusted all aspects of [its] business [to the physician employee]. Because of that experience, and the information and expertise gained thereby, it was reasonable, in terms of the interests to be protected" to prohibit the employee's competition restriction.[118] This rationale protects

114. Professor Ribstein suggests that a diversified law firm has certain economic advantages over a specialized firm. *See* Ribstein, *supra* note 8, at 1717-18.

115. A recent reminder of the continuing geographic limitations on the practice of law is the decision of the California Supreme Court in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998), *cert denied*, 119 S. Ct. 291 (1998) (indicating in dicta that a lawyer not licensed in California is practicing impermissibly in the state even if never physically present in California, if the lawyer advises a California client on California law about a California matter).

116. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2(c) (1983).

117. 470 S.E.2d 252 (Ga. Ct. App.), *aff'd*, 476 S.E.2d 586 (Ga. 1996).

118. *Id.* at 255 (quoting from the findings of the trial court).

the employer's investment in proprietary information that is within the knowledge of the departing employee.

Again, law firms may have a similar interest.[119] The Ohio Supreme Court recently acknowledged that a law firm can have a legitimate interest in protecting against the misappropriation of trade secrets. In so doing it allowed an action brought by a law firm to proceed on allegations that a former associate had used the firm's client lists to solicit business after leaving its employment.[120]

The protection of a law firm's interest in confidential commercial information is an important recognition of the competitive marketplace in which professional firms practice. A broad restraint on competition by a departing employee may not always be necessary to prevent misuse of specific, discrete information such as a client list. A misappropriation action brought to prevent the use of specific confidential information may be sufficient to protect the law firm. Nevertheless, if a former employee or partner has had broader access to confidential business plans or strategies of the firm, a law firm's legitimate interest in protecting trade secrets could then justify a broader prophylactic measure such as a broad non-competition clause similar to the one enforced against the physician in *Saxton*.

3. Investments in Goodwill and Training

Beyond the protection afforded to specific business relationships, such as the patient referral system in *Keeley*, and to trade secrets, as in *Saxton*, courts also have enforced non-competition agreements in medical practices to counteract more general competitive advantages such as reputational enhancements derived from association with the goodwill of the former employer. For instance, in *Weber v. Tillman*,[121] the Kansas Supreme Court upheld a restriction[122] similar to that enforced in *Keeley*, barring a doctor's practice of dermatology within a 30-mile radius of his former practice. The Kansas court, however, differed slightly from the Georgia court in its analysis of the business interests at

119. *See* Kalish, *supra* note 8, at 443-45.

120. *See* Fred Siegel Co. v. Arter & Hadden, 707 N.E.2d 853 (Ohio 1999), *reh'g denied*, 709 N.E.2d 1216.

121. 913 P.2d 84 (Kan. 1996).

122. Forty to fifty percent of the departing doctor's patients had been patients of the former practice. The competition restriction, however, barred all practice in the designated geographic area and was not limited to only the treatment of former patients of the employer. *See id.* at 92.

stake. In enforcing the restriction, the Kansas court focused more upon the doctors' relative reputations among potential patients than upon the doctors' relationships with other professionals. Finding that the employer's "investment of years, education, and effort in establishing his practice and the value of goodwill developed over 17 years [were] recognized protected interests,"[123] the court held that the broad competition restriction legitimately protected the former employer against any competitive advantage derived by the departing doctor from the employer's goodwill.

Evidence showed that the departing employee-physician "had no connection to the community prior to his employment, and he brought with him no patients.... [He] acknowledged that he benefitted by beginning his career in an established practice rather than starting on his own."[124] The departing doctor's reputation had improved as a result of his association with the former employer. The court cited cases from other states holding that a "physician-employee's identification with the employer's goodwill made him a more formidable competitor, so the competition was unfair."[125] In essence, any competitive benefit realized from the improved reputation was deemed to be an unfair advantage, even when the departing physician sought patients not previously treated by the employer. Enforcement of the restriction, therefore, was justified for "a reasonable period of time to obliterate in the minds of the public" the relationship between the departing doctor and his former employer.[126]

Law firms enjoy a goodwill asset[127] similar to the interest recognized and protected by the non-competition agreement among medical professionals in *Weber*. As the seller of a package of legal services, a law firm develops its own reputation as an entity, whether it be for quality, cost, or attentiveness to clients. That reputation may be strongly influenced by, but extends beyond, the individual reputations of its lawyers. It is reasonable to expect that some prospective clients will know of a firm's reputa-

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*; *cf.* Canfield v. Spear, 254 N.E.2d 433, 434 (Ill. 1969) (placing importance upon fact that departing doctor had been "a newcomer to the community, and it was doubtless through the opportunities provided by this association [with the employer] that he became known in the city").

127. For a more comprehensive consideration of law firm goodwill, see Gary S. Rosin, *The Hard Heart of the Enterprise: Goodwill and the Role of the Law Firm*, 39 S. TEX. L. REV. 315 (1998).

tion as a whole and will develop an opinion as to the quality of an individual lawyer on the basis of that lawyer's affiliation with the firm.

A firm may invest heavily in the development of goodwill. Fees collected from clients are invested in part by the law firm to market the firm's services, thereby attracting new clients, to compensate the lawyers, to provide some uniformity of training, and to support the quality of legal services that the lawyer provides to the client.[128] The firm undertakes all of these expenditures as an entity to improve the quality of its product, thereby enhancing also the reputation of the individual lawyers associated with the firm.[129]

The professional enhancement of a lawyer, gained through association with a quality law firm, is no less of an advantage than the benefit gained by a doctor associated with a quality medical practice. To the extent that a medical practice may have a legitimate interest in protecting against the appropriation in this manner of the benefit of its goodwill by a departing physician, therefore, a law firm would have an identical interest.

Similarly, a law firm may provide experience and training that enhances significantly a lawyer's professional stature. In hiring new associates, a law firm or medical practice often pays a salary exceeding the employee's immediate value to the firm as a means of recruiting exceptional professional potential. If the employee leaves the firm after training, the original employer has incurred recruitment and training costs without receiving the ex-

128. A significant part of firm revenues are used to provide legal assistants and support staff. In addition, of course, the firm provides office space and insurance and invests in the equipment and libraries necessary to provide quality legal services. One commentator argues that a firm which invests a large amount of capital to build a new practice area and then loses that business in a split of the firm "is now in a worse position to deliver quality legal services in its traditional fields, and the clients which remain suffer as a consequence." Parker, *supra* note 76, at 16.

129. See Robert Hillman, *The Impact of Partnership Law on the Legal Profession*, 67 FORDHAM L. REV. 393, 393 (1998) ("Successful firms are more than the sum of their parts and, ideally, survive turnover in their memberships with minimal disruption. They invest heavily in building firm reputations in the hope of building a type of 'brand loyalty' and differentiating themselves from the competition."). The existence and value of the law firm's reputation as an entity is acknowledged implicitly by a provision in the RPC allowing a law firm to operate under a trade name. This rule implicitly contemplates that a law firm will develop goodwill associated with its trade name and acknowledges that use of a trade name is consistent with a law firm's professional obligations. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.5(a) (1983).

pected benefit of the lawyer's services. The former employee arguably now has a competitive cost advantage over the former employer, because of having, in effect, shifted the cost of his or her own training to the former employer. The firm may want to protect against that loss through a non-competition agreement.[130]

It is not clear, however, that the training and experience a professional normally obtains while in a law firm or medical practice, as well as any reputational enhancement stemming from the association with the practice, create an *unfair* competitive advantage sufficient to justify enforcement of a non-competition agreement against the professional who leaves a firm in either profession. A law firm or medical practice asserting this interest should be required to prove, at least, that the employee received extraordinary professional development as a benefit of the employment.[131]

A Georgia court, in considering whether a professional non-competition agreement was supported by adequate bargained-for consideration, acknowledged that a professional employee does not ordinarily receive any special benefit from the mere fact of employment. An employee agrees to restrictions, the court concluded, "in exchange for the opportunity to have the job. He really gets nothing other than the opportunity to work in ex-

130. *See* Ribstein, *supra* note 8, at 1730-41 (suggesting that enforcement of non-competition agreements in certain appropriate circumstances could lower costs for clients by allowing law firms to plan their development in a more orderly manner that benefits clients); Parker, *supra* note 76, at 12 (stating that the cost of "training is borne by the employer in the reasonable expectation that this investment will be recovered"). In some commercial settings, without a non-competition agreement, an employer may have little incentive to train employees beyond minimum levels because of the possibility that the employee will leave immediately, denying the employer the benefit of the training investment. In those situations, a non-competition agreement may encourage a greater investment in training by protecting against such opportunistic behavior of the employee in training. A non-competition agreement is not a necessary incentive to encourage employers of lawyers and doctors to train a new professional employee adequately. Lawyers and doctors already are required by professional regulation and legal duties of care to maintain an adequate level of training and competence. Thus, general experience and training are ordinary expectations of professional employment.

131. This approach is consistent with that taken in a non-professional context by the U.S. District Court for Rhode Island. The Court found that an employer had failed to prove that a former employee had "gained any unfair competitive advantage due to his former employment.... [A]n employee is entitled to use general knowledge and expertise learned during his employment to continue his livelihood...." Dial Media, Inc. v. Schiff, 612 F. Supp. 1483, 1490 n.5 (D.R.I. 1985).

change for giving up this aspect of his freedom."[132] In the absence of the employee receiving some extraordinary experience as a result of the employment, subsequent competition by the employee against the employer would not be unfair so as to justify enforcement of a non-competition agreement. This conclusion should be the same regardless of whether the restricted employee is a doctor or a lawyer.[133]

None of these interests that potentially may be asserted by a law firm as justification for a broad restraint upon all competitive practice by a departing lawyer within a certain geographic area is inherently strong. Thus, enforcement of broad competition restrictions against lawyers may be uncommon even under a traditional rule of reason analysis. The possibility that a legitimate interest exists, however, is better considered under the reasonability standard than by per se rejection of all non-competition agreements.

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132. Rash v. Toccoa Clinic Med. Assocs., 320 S.E.2d 170, 173 (Ga. 1984). The existing practice of paying a premium salary to a relatively inexperienced lawyer who is perceived to have extraordinary potential, without requiring a non-competition agreement, suggests that an even greater premium would be required to support inclusion of a non-competition agreement.

133. In *Keeley v. Cardiovascular Surgical Assocs., P.C.*, 510 S.E.2d 880, 885 (Ga. Ct. App. 1999), the surgeon claimed that, even if a legitimate protectable interest were recognized, the covenant was unenforceable because it specified too large a restricted area. In deciding that issue, the court focused upon whether the non-competition agreement was truly bargained for and not the product of overreaching by an employer.

Importantly, the doctor had not been a typical employee, but had an agreement to move from employment into an equal ownership position within 18 months. In its earlier decision in *Rash*, the court had noted that, although employees might receive no consideration for a non-competition agreement, partners were situated differently. When partners agree not to compete, "the consideration flows equally among the contracting parties." *Rash*, 320 S.E.2d at 173. Based upon that distinction, the court had developed differing levels of scrutiny depending upon the nature of the relationship between covenantor and covenantee.

The physician's agreement to receive a partnership position within 18 months reflected a relative equality of bargaining power with the covenantee. As a result, "this covenant was not subject to the strict level of scrutiny accorded normal employment contracts, but to the middle level of reduced scrutiny accorded professional contracts where the parties are considered as having equal bargaining power." *Keeley*, 510 S.E.2d at 885.

This differentiation in scrutiny based upon the relative bargaining power of the parties to the agreement is reminiscent of the position once taken by the ABA Comm. on Prof. Ethics and articulated in Informal Opinion 521. *See supra* text accompanying note 34.

B. RESTRICTIONS ONLY ON REPRESENTATION OF FIRM CLIENTS

A narrower class of restriction does not attempt to limit all competitive practice, but precludes only a departing lawyer's subsequent representation of clients of the old law firm. These restrictions may apply only to representation of a client in the same matter previously handled by the law firm, or they may extend also to new matters involving a client of the firm, but arising after the lawyer's departure.

1. Continued Client Patronage Generally

It is a fundamental economic reality that a law firm's continued viability as a provider of professional services depends upon its ability to attract *and retain* a sufficient clientele to produce an adequate operating revenue.[134] A threshold issue critical to the consideration of non-competition agreements is whether a law firm, as an aggregate or entity, has a relationship with the client, separate from the individual professional relationship that may exist between an individual lawyer in the firm and the client, sufficient to create, on the part of the firm, a justifiable expectation of and financial interest in the continued patronage of clients. An entity's interest in a specific continued patient or client relationship differs somewhat from the general interest, discussed earlier, of protecting against appropriation of goodwill for reputational advantage.

Individual lawyers who practice within a firm develop individual professional relationships with clients. Although the lawyer is part of a multi-lawyer firm, the fiduciary and confidential nature of the attorney-client relationship still require the development of personal trust between the individual lawyer and client. The client must rely upon the individual skills, judgment, and experience of the lawyer or lawyers within the firm who handle a particular matter.

The individual attorney-client relationships that may exist even within a law-firm practice, however, should not obscure the

134. Robert Parker argues that to "allow a firm to expend resources forming and nurturing such [client] relationships, but to prohibit the firm from protecting them against those who would seek to benefit personally from the expenditure of resources by the firm, is fundamentally unfair." Parker, *supra* note 76, at 13-14. Recognition of a lawyer's unmistakable "financial interest in the continued patronage" of a clientele, Howard v. Babcock, 863 P.2d 150, 157 (Cal. 1993), does not diminish in anyway the lawyer's traditional professional obligations to the client of loyalty, competency, and diligence. Nor does it suggest any impediment upon the client's ability to seek other counsel if the client desires.

reality that the clientele of a law firm is not simply a composite of individual attorney-client relationships.[135] When a decision is made by the client to retain a law firm, the client retains the entire law firm as its counsel[136] and compensates the firm, not individual members of the law firm, for the legal services received. The understanding that a professional relationship exists between the entire firm and the client has important practical ramifications. By engaging the firm, the client obtains access to the services of multiple lawyers within the firm, offering the client a range or depth of representation beyond that available from any single lawyer. Because clients retain the firm, all lawyers within the firm ethically may share confidential information of the client among themselves and all lawyers within the firm owe a duty of loyalty to the client.

If a client retains the law firm because of the reputation of the entire firm, and not simply that of an individual lawyer within the firm, then it is arguable that the relationship creates in the entity a legitimate expectation of continued patronage. Even prospective clients who are favorably aware of a particular lawyer's individual reputation may select a firm, not only because of that lawyer's individual reputation, but also because of the greater resources of the firm as a whole. Again, in that situation, the firm may assert a relationship with the client sufficient to sustain a legitimate expectation of continued patronage.

The law already recognizes in several different contexts that the expectation of a continued client relationship is a valuable asset of a law firm. A number of states expressly recognize law firm goodwill as an asset in valuing a partnership interest upon the partner's divorce.[137] Oregon courts, while steadfastly refusing to enforce non-competition agreements among lawyers, allow a law firm to reduce the value paid for a departing lawyer's share of the firm to reflect the loss of business taken by the departing lawyer. "[A] professional corporation must have the right to adjust the value of its stock according to the effect created when a withdrawing shareholder takes clients from the firm."[138] The

135. *See* Hillman, *supra* note 129, at 393.

136. *See* Corti v. Fleisher, 417 N.E.2d 764, 768 (Ill. Ct. App. 1981) ("It is fundamental that the employment of one member of a law firm is the employment of all . . . ."); Fred Siegel Co. v. Arter & Hadden, 707 N.E.2d 853, 859 (Ohio 1999), *reh'g denied*, 709 N.E.2d 1216 (noting that clients employ a firm, not an individual lawyer); Kalish, *supra* note 8, at 441-43.

137. *See, e.g.*, Thompson v. Thompson, 576 So. 2d 267 (Fla. 1991); Dugan v. Dugan, 457 A.2d 1 (N.J. 1983); Hertz v. Hertz, 657 P.2d 1169 (N.M. 1983).

138. Hagen v. O'Connell, Goyak & Ball, P.C., 683 P.2d 563, 565 (Or. App.

New Jersey Supreme Court in *Jacob* refused to enforce the non-competition agreement, but recognized goodwill as a legitimate consideration in valuing the departing lawyer's share of the firm.

> The probability of future patronage can be translated into prospective earnings.... Accordingly, we recognize that if a partner's departure will result in a decrease in the probability of a client's return and a consequent decrease in prospective earnings, that departure may decrease the value of the firm's goodwill. It would not be inappropriate therefore for law partners to take that specific effect into account in determining the shares due a departing partner.[139]

Courts have also protected the existing professional relationships of law firms through an action against a departing lawyer for tortious interference with existing contractual relations or an action for breach of fiduciary duty.[140] At least one court has recognized that even a prospective contractual relationship between lawyer and client can create a sufficient interest to give rise to an action at tort for wrongful interference. A law firm "could properly seek to enjoin conduct of the defendants that allegedly interfered with its relationships with clients even though no contingent fee contracts had as yet been entered into with these clients."[141]

Neither professional duties nor the at-will character of the professional relationship are necessarily inconsistent with the law firm's asserted interest in the continued patronage of a client.[142] Courts have recognized explicitly that the at-will nature of an attorney-client relationship does not preclude the existence of a sufficient law firm interest to support a claim for tortious interference with an attorney-client relationship. "[T]he fact that a client has a right to discharge his or her attorney ... does not, of itself, provide a competing attorney with justification for encouraging the client to exercise that right, and thus does not necessarily preclude a finding that a tortious interference with contract has occurred."[143] Similarly, the Pennsylvania Supreme Court in 1963 noted that a "claimant or patient may, of course, disengage himself from a professional relationship ... but if that

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1984).

139. Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 152 (N.J. 1992).

140. A law firm has a recognized interest in fees to be earned under an existing fee agreement with the client, and interference with those anticipated revenues may be tortious. *See* Adler, Barish, Daniels, Levi & Creskoff v. Epstein, 393 A.2d 1175, 1184-85 (Pa. 1978).

141. Paul L. Pratt, P.C. v. Blunt, 488 N.E.2d 1062, 1068 (Ill. App. Ct. 1986).

142. *See* Kalish, *supra* note 8, at 439-41.

143. Fred Siegel Co. v. Arter & Hadden, 707 N.E.2d 853, 859 (Ohio 1999), *reh'g denied*, 709 N.E.2d 1216.

disassociation is the result of coercion or misrepresentation practiced by others, the intervenors are answerable in law as anyone else would be liable for causing the rupture of a binding contract."[144] The claim of interference was brought in that case by a law firm against third parties who coerced the client to fire the lawyer.[145] A Wisconsin court considering the issue in connection with the medical profession held that a professional medical practice which "expended considerable time, effort and advertising to generate new patients"[146] had a legitimate interest in its continued relationship with the patient, sufficient to justify enforcement of a restraint on competition by departing physicians.

2. An Expectation of New Matters from Old Clients

In valuing a partner's interest in the law firm upon the partner's divorce, the Florida court defined a law firm's goodwill as a "monetary value over and above its tangible assets and cases in progress which is separate and distinct from the presence and reputation of the individual attorney."[147] Professional goodwill in that context has been extended beyond immediate contractual relationships to include the expectation of new matters being received. Its value is said to come from "the tendency of clients/patients to return to and recommend the practice irrespective of the reputation of the individual practitioner."[148] In other words, a law firm does enjoy "the expectation of continued public patronage."[149]

An Illinois court has suggested, however, that in certain types of law practice, it is not appropriate to find an expectation of further representation of an old client in *new* matters. In af-

144. Richette v. Solomon, 187 A.2d 910, 912 (Pa. 1963).

145. *Compare* Brown & Bins v. Lehman, No. C5-93-415, 1993 WL 377101, at *4 (Minn. Ct. App. Sept. 28, 1993) (holding that "[a]ny interference is actionable if a binding contract was in existence, 'even if the contract is terminable at will'"), *with* Koeppel v. Schroder, 505 N.Y.S.2d 666, 669 (App. Div. 1986) (holding that "[a] competitor who lawfully induces termination of a contract terminable at will commits no ethical violation and does not produce a result contrary to the expectations of the parties").

146. Pollack v. Calimag, 458 N.W.2d 591, 599 (Wis. Ct. App. 1990).

147. Thompson v. Thompson, 576 So. 2d 267, 270 (Fla. 1991).

148. *Id.* at 269; *cf.* Hillman, *supra* note 129, at 393.

149. *Thompson*, 576 So. 2d at 269. *But see* Illinois St. Bar Ass'n, Adv. Op. on Prof. Conduct 84-15, 1985 WL 286868, at *2 (May 21, 1985) (finding that a fee splitting clause of an employment agreement would be unethical, because a law firm has no proprietary interest in its clients and "no ethical, legal or moral rights to the continued patronage of past clients who freely choose to retain the terminating partner or employee as their attorney").

firming a trial court's determination that a law firm performing insurance defense work did not have a "near-permanent" relationship with its clients, the Illinois Court of Appeals observed that "common sense suggests that insurance defense firms are more likely to share clients [with other lawyers] than doctors or veterinarians"[150] and thus have no legally protectable expectation of future business.

A broad requirement, providing not only that a professional enjoy a "near-permanent" relationship with its client, but also that it be an exclusive relationship with no other lawyers sharing the legal work of the client, would narrow substantially the circumstances in which a protectable expectation might be recognized. A requirement of exclusivity, however, is inappropriate in defining a law firm's expectation of a continued relationship. Consider, for example, a client who employs one firm to handle litigation matters and another firm for tax planning. The referral of different matters to different firms in that circumstance does not diminish either firm's expectation of a continued relationship with the client.

As a second example, consider a client who divides similar types of matters among multiple firms. Despite performing only a portion of the client's legal work, a law firm may well have an expectation that it will continue to receive a similar proportion of the work in the future. The fact that the law firm "shares" the client with other firms may have no effect on the "near-permanency" of its relationship with the client. A client's use of multiple firms does not necessarily preclude the recognition of a close relationship between any of those firms and the client, sufficient to support a recognizable expectation of continued patronage. Despite the assertions of the Illinois court to the contrary, common sense does not dictate a conclusion that the relationship between a law firm and an insurance company is any less permanent than the relationship between doctor and patient. The use of multiple firms may be explained by the need not to overburden a single firm or by the need to avoid conflicts of interest, rather than by any lack of permanency in the client's relationship with the firms.

Ultimately, the permanency of the relationship refers not to the exclusivity of the relationship, but to a variety of factors including the "time, cost, and difficulty involved in developing and

150. Williams & Montgomery, Ltd. v. Stellato, 552 N.E.2d 1100, 1107 (Ill. App. Ct. 1990).

maintaining the clientele, the parties' intention to remain affiliated for an indefinite period, and the continuity and duration of the relationship."[151]

V. UNFAIR COMPETITIVE ADVANTAGE AND THE LIMITATIONS OF TORT LAW PROTECTION

A law firm's legitimate economic interest in the continued client relationship can be protected by use of a non-competition agreement only if the departing lawyer has gained an unfair competitive advantage because of the relationship with the law firm.[152] Even then, the former employer's interest, which would be furthered by the enforcement of a non-competition agreement, must be balanced against any public interest that would be harmed by enforcement. If other sources already exist for protection of the employer's interests, the need for competition restraints is diminished. The extent of protection that the tort of interference with contractual relations affords to a law firm, therefore, must be considered in evaluating the importance to the law firm of a non-competition agreement as an alternative means of protecting the expectation of a continued client relationship.

Tortious interference cases involving law firms identify a legitimate law firm interest in the continued patronage of firm clients. They also recognize that a departing lawyer may have an advantage in competing for that patronage because of the lawyer's association with the firm.

In a 1990 Pennsylvania case, for example, the court considered whether the conduct of departing lawyers tortiously interfered with contractual relations between the former firm and its clients.[153] The lawyers were accused of a variety of allegedly tortious acts, including removing client files, spreading "scurrilous statements" about the law firm, and sending "misleading letters" to clients of the old firm.[154] In considering the tortious interference claims, the court noted that the departing associates should not be able to abuse the advantage they had gained from trust placed in them by their former employer.[155] "It was by virtue of their former positions as salaried associates . . .

151. Rapp Ins. Agency, Inc. v. Baldree, 597 N.E.2d 936, 939 (Ill. App. Ct. 1992).

152. *See supra* text accompanying note 99.

153. *See* Joseph D. Shein, P.C. v. Myers, 576 A.2d 985, 986 (Pa. Super. Ct. 1990).

154. *Id.* at 986, 989.

155. *See id.* at 988-89.

that they had contact with the client and were able to exploit this relationship and to induce [the clients] to break contracts" with the former law firm.[156]

Similarly, an Illinois court considered a law firm's claims that two former associates had unfairly used information and client contacts derived from their association with the firm. The court noted that the firm "had a legitimate interest in its relationships with clients for which it sought protection."[157] The firm alleged that the departing lawyers were soliciting firm clients improperly, allegedly using solicitation methods barred by professional disciplinary rules.[158] Finding that the former associates had been "able to make contacts with clients and gain knowledge of cases . . . because of [their] position of trust and responsibility they had enjoyed as salaried employees,"[159] the court expressed concern that the former firm was unfairly prejudiced and that the former associates, by soliciting firm clients improperly, had intentionally interfered with the law firm's contractual rights.[160] A preliminary injunction was upheld on appeal, preventing the former associates from further soliciting current clients of their former firm.[161]

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156. *Id.* at 988-89.

157. Paul L. Pratt, P.C. v. Blunt, 488 N.E.2d 1062, 1068 (Ill. App. Ct. 1986).

158. *See id.* at 1065-66.

159. *Id.* at 1067.

160. *See id.* at 1069, 1070 (upholding but limiting the scope of the injunction).

161. If a departing lawyer's professional relationship with a client is sufficiently close, however, the departing lawyer may not need to engage in any form of overt solicitation to attract the client from the firm. Is it unfair for the lawyer to take advantage of the close relationship developed at the old law firm? In rejecting a claim of intentional interference brought against a departing lawyer who had continued to represent old firm clients after departure from the firm, the District of Columbia Court of Appeals noted a strong individual relationship between firm clients and a departing lawyer, as well as an absence of any similar relationship between the clients and other firm members. *See* Connors, Fiscina, Swartz & Zimmerly v. Rees, 599 A.2d 47, 51 (D.C. 1991). The law firm failed to show that clients had been drawn to the departing lawyer by any wrongdoing or misrepresentations on the part of the lawyer. *See id.* Instead, the clients testified simply that "they had a close and satisfying professional relationship with [the departing lawyer], that they had no relationship with any other attorney at [the old firm], and, in some instances, that they would have followed" the departing lawyer anywhere. *Id.*

The lack of tortious conduct does not necessarily mean that subsequent competition is "fair" for purposes of considering whether a non-competition agreement is justified. When the clients identify exclusively with the individual lawyers and with no one else in the law firm, it is possible the firm had no sufficient relationship with the client to create an expectation of continued pa-

An action for tortious interference protects a law firm from the wrongful conduct of a departing lawyer. The departing lawyer may not use illegal or unethical means to solicit existing firm clients or take advantage of protected confidential information derived from the association with the law firm.[162] A lawyer also may not breach a fiduciary duty to the law firm by soliciting clients prior to departure from the firm.[163] When the departing lawyer has engaged in wrongful conduct, therefore, existing law adequately protects the interests of the law firm without need for a non-competition agreement.

If the departing lawyer has not used wrongful means to attract a client away from the law firm, however, mere competition for firm clients may not be actionable in tort under a privilege of fair competition exception to the tort of tortious interference, set forth in section 768 of the *Restatement (Second) of Torts*.[164] The

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tronage. Other courts have found, however, that strong individual professional relationships with a client still may not justify interference with a law firm's interest in its relationship with an existing client. For example, in 1983, the California courts heard a dispute between a law firm and two departing lawyers. *See* Rosenfeld, Meyer & Susman v. Cohen, 194 Cal. Rptr. 180, 184 (Ct. App. 1983). *But see* Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454 (Cal. 1994) (disapproving of *Rosenfeld* on a separate issue). A major litigation client discharged the law firm shortly after the two lawyers who had been primarily responsible for their matter left the firm. *See Rosenfeld*, 194 Cal. Rptr. at 185. The client hired the departing lawyers' new firm. *See id.* The old law firm, among other claims, alleged a breach of fiduciary duty and interference by the departing lawyers with existing contractual relations. *See id.* at 186. The court remanded the case for trial, noting that a lawyer "has no absolute privilege to interfere with contractual relations, whether those of his client or anyone else." *Id.* at 198. Although the departing lawyers had been the only partners familiar with the case, the court noted that the matter had substantially increased the expenses of the old firm. *See id.* at 184. The firm, for example, "was required to rent additional office space, hire additional support personnel . . . and employ additional attorneys to handle matters" that would otherwise have been handled by the partners working on the case. *Id.*

162. *See* RESTATEMENT (SECOND) OF TORTS § 768 (1979).

163. *See* Graubard, Mollen, Dannett & Horowitz v. Moskovitz, 653 N.E.2d 1179, 1183 (N.Y. 1995); HILLMAN, *supra* note 1, § 4.8.2; RESTATEMENT (SECOND) OF AGENCY § 393 cmt. e (1958).

164. *See* RESTATEMENT (SECOND) OF TORTS § 768 (1979) (providing that a person who "intentionally causes a third person . . . not to continue an existing contact terminable at will does not interfere improperly with the other's relation" if four factors are proven, including that "the actor does not employ wrongful means"). The privilege of fair competition was applied recently to a dispute between a lawyer and former law firm in *Fred Siegel Co. v. Arter & Hadden*, 707 N.E.2d 853, 860-61 (Ohio 1999). When "an existing contract is terminable at will, and where all the elements of Section 768 of the Restatement are met, a competitor may take action to attract business, even if that

issue then is whether a law firm and its lawyers may contract voluntarily, using a non-competition agreement, to extend protection of the firm's interests to situations not protected by tort law. The rule of reason allows enforcement of a non-competition agreement if use by the departing lawyer of the competitive advantage would be unfair, even if not tortious or wrongful.

When a law firm has invested to develop goodwill that attracts clients and has provided its lawyers with the opportunity to develop direct professional relationships with firm clients, the later use of that opportunity for the competitive advantage of a departing lawyer without compensation to the firm is unfair, even if not tortious. The Nebraska Supreme Court has clearly distinguished "ordinary" from "unfair" competition in the non-professional marketplace on exactly this basis.

> To distinguish between "ordinary competition" and "unfair competition," courts and commentators have frequently focused on an employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers. Where an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair, and the employer has a legitimate need for protection against the employee's competition.[165]

Traditional contract law parlance describes a category of commercial customer as a "route customer." A route customer is one who purchases goods typically from a single supplier and thus comes to depend upon a particular route salesperson. Courts have distinguished between route customers and other customers in evaluating the unfairness of competition by a salesperson against a former employer.[166] Because a route salesperson is likely to have developed a close customer relationship due to the employment, later competition with the employer is more likely to be deemed unfair.[167] The opportunity for professional service providers to develop close relationships with clients and patients has prompted a Wisconsin court to suggest in dicta that

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action results in an interference with another's existing contract." *Id.* at 860. The court remanded the case for trial on the question of whether the departing lawyer had "employed wrongful means" in competing with the former firm. *Id.* at 861.

165. Boisen v. Petersen Flying Serv., Inc., 383 N.W.2d 29, 33 (Neb. 1986).

166. *See* Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376 (Iowa 1983); Gary Van Zeeland Talent, Inc. v. Sandas, 267 N.W.2d 242 (Wis. 1978).

167. *See Iowa Glass Depot, Inc.*, 338 N.W.2d at 383; *Gary Van Zeeland Talent, Inc.*, 267 N.W.2d at 248-49.

"dentists, doctors, lawyers, and accountants" are subject to the same route sales rationale in determining whether competition is unfair.[168]

A departing lawyer may have an advantage in competing for clients served by the lawyer while at the former firm. Whether it is unfair to the law firm for a lawyer to continue a strong professional relationship with a firm client after leaving the law firm may depend upon how, or more particularly when, the individual professional relationship began. In an action to enforce a non-competition agreement against a certified public accountant, a New York appellate court recognized the distinction in fairness, depending upon when the accountant's relationship with the client was created.[169] The court partially enforced the agreement by preliminarily enjoining the accountant from representing clients "who had no contact with defendant . . . prior to defendant joining plaintiff's firm."[170] An intermediate Illinois appellate court reached a similar conclusion when an insurance agency asserted an interest in continued customer patronage as the basis for enforcing a non-competition agreement against a departing salesman.[171] The court held that not only must the employer have a "near-permanent" relationship with the customer, but the employer must also show that "but for his or her employment, defendant would not have had contact" with the customer.[172]

If a professional relationship already existed between a lawyer and client prior to the lawyer's relationship with the law firm, the lawyer's subsequent association with the law firm would not give the lawyer any additional advantage over the firm if the lawyer attempts to continue the relationship after leaving the firm. If the individual relationship was created while the client was represented by the law firm and the lawyer was associated with the firm, however, the "but-for" test of the Illinois court may be satisfied. If the lawyer gained access to the client only because of the lawyer's firm affiliation, the case is much stronger that continuation of the individual relationship afterwards would amount to an unfair appropriation of a firm asset. Recognition of a competitive benefit to the departing lawyer would not be novel in those circumstances. In tortious interference cases, the courts

168. *Gary Van Zeeland Talent, Inc.*, 267 N.W.2d at 249.

169. *See* Arthur Young & Co. v. Black, 466 N.Y.S.2d 10, 11 (App. Div. 1983).

170. *Id.*

171. *See* Rapp Ins. Agency, Inc. v. Baldree, 597 N.E.2d 936, 939-40 (Ill. App. Ct. 1992).

172. *Id.* at 939.

have recognized that a departing lawyer benefits significantly from access that the lawyer has to clients of the old law firm.[173]

A law firm invests in its goodwill to attract clients and enables its lawyers to develop beneficial professional relationships with them. Even when departing lawyers do not engage in any tortious misconduct, they take with them the advantages of access to and contact with those clients of the law firm. If that access or contact was derived solely because of their employment with the firm, the later use of that advantage by a departing lawyer in competition with the law firm, without compensation to the firm, is unfair.[174]

VI. SCARCITY OF SERVICES AS JUSTIFICATION FOR REFUSING TO ENFORCE—THE MEDICAL PROFESSION EXAMPLE

A fundamental principle of contract law governing non-competition agreements is that any harm to the public resulting from enforcement must not outweigh the value of the interests protected by the restriction. The per se rejection of non-competition agreements among lawyers assumes that the harms will always outweigh the benefits. A move away from the categorical rejection of these agreements to a conflict-of-interest analysis is not a rejection of these public protections, but is simply a recognition that the most significant potential harm of enforcement stems from a conflict of interest. Conflict of interest rules will take into account the interests of existing clients and ensure that clients are not subject to unreasonable injury as a consequence of enforcement. Normally, the impact of enforcement upon the broader public will be minimal. If enforcement would cause a severe shortage of legal services in a particular area, however, effectively eliminating any choice of counsel for a person in need of legal services, then the public interest in affording some selection of counsel may justify rejection of the non-competition agreement, even in the absence of an individual conflict of interest. Case law in the medical profession provides a relevant study of how courts might differentiate the usual impact upon the public from the impact in circumstances of scarcity.

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173. *See* Paul L. Pratt, P.C. v. Blunt, 488 N.E.2d 1062, 1068-69 (Ill. App. Ct. 1986); Joseph D. Shein, P.C. v. Myers, 576 A.2d 985, 986-87 (Pa. Super. Ct. 1990).

174. *See* Professional Bus. Servs., Co. v. Rosno, 589 N.W.2d 826, 831 (Neb. 1999).

Two states bar the enforcement of non-competition agreements among physicians.[175] Most recent cases considering the impact upon the public of restrictive covenants in the medical profession, however, find the public harm caused by non-competition agreements to be generally insufficient to deny enforcement. These cases stand in striking contrast to those involving the legal profession.[176] The attention, or lack thereof, given by the Kansas court in *Weber v. Tillman*[177] to the impact on the public welfare of enforcement of restrictions is typical of much of the modern case law involving medical professionals. The court noted that enforcement could leave only one dermatologist in town, but seemed relatively unconcerned.[178] Because of the possibility that the departing Dr. Tillman might buy out the restriction on practice, the court observed that "as a practical matter, the people . . . may not lose Dr. Tillman's services as a dermatologist. Further, their welfare is not injured if they have to travel further to obtain dermatology services" should Dr. Tillman elect not to pay the amount required under the contract if he were to practice in the area.[179] Weighing the lack of "any substantial public injury" to potential patients against the public's

175. *See* COLO. REV. STAT. § 8-2-113(3) (1998); DEL. CODE ANN. tit. 6, § 2707 (1993).

176. In 1960, the American Medical Association (AMA) focused primarily upon the fairness of a non-competition agreement as between the affected doctors, indicating that non-competition agreements are not inherently unethical. *See* Paula Berg, *Judicial Enforcement of Covenants Not to Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense*, 45 RUTGERS L. REV. 1, 6, 9 (1992) (citing the American Medical Association, Principles of Medical Ethics, Opinions and Reports of the Judicial Council 25). The AMA, however, did acknowledge, at least, that questions remained as to whether enforcement of an agreement was harmful to the public. *See id.* The AMA in 1980 declared that non-competition agreements are not in the best interests of the public, but the AMA continues to permit reasonable restraints on competition, at least as long as the patient has some choice of physician. *See id.* Current Opinion 9.02 of the American Medical Association Council on Ethical and Judicial Affairs, updated in June 1998, "discourages" non-competition agreements, but rules them unethical only if "they are excessive in geographic scope or duration in the circumstances presented, or if they fail to make reasonable accommodation of patients' choice of physician." COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AMA CODE OF MEDICAL ETHICS, CURRENT OPINIONS WITH ANNOTATIONS 158 (1998-1999 ed.). References to the public interest were dropped in 1994, but current Opinion 9.02 states that covenants not to compete "potentially deprive the public of medical services." *Id.*

177. 913 P.2d 84 (Kan. 1996).

178. *See id.* at 88, 93.

179. *Id.* at 96.

interest in maintaining "freedom to contract," the court enforced the non-competition agreement.[180]

Public harm is also mitigated in the view of some courts by treating one community's loss of a doctor as another community's gain. The Missouri Supreme Court noted, in enforcing a non-competition agreement against a surgeon in 1973, that the services of the displaced doctor were "as valuable and needed in one community of the State as in another."[181] The Georgia court in *Rash v. Toccoa Clinic Medical Associates*[182] considered the interests of potential medical patients only briefly, but reached a similar conclusion. Recognizing the argument that enforcement of a restriction might "limit the right of potential patients" in a certain area "to avail themselves" of the doctor's services, the court found the point to be unpersuasive.[183]

> [I]t can be argued with at least equal conviction that this would afford countless other people in other areas, both in and outside of the state, the opportunity to have a physician in their areas. There is no reason to conclude . . . that the need for the appellant's services, in the context of this case, is sufficient to outweigh the law's interest in upholding and protecting freedom to contract and to enforce contractual rights and obligations.[184]

Fifteen years later in *Keeley*, the court never mentioned the interests of any potential patients.

Despite the apparent lack of concern by the court in *Weber* for the possibility that only one dermatologist would remain if the agreement were enforced, other cases involving non-competition agreements among doctors do consider the potentially greater public harm if enforcement would not merely diminish the range of choice, but would eliminate choice.[185] States that have denied enforcement of medical non-competition agreements because of

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180. *Id.*

181. Willman v. Beheler, 499 S.W.2d 770, 777 (Mo. 1973) (noting that most communities are short on medical practitioners).

182. 320 S.E.2d 170 (Ga. 1984).

183. *See id.* at 173.

184. *Id.* at 173-74; *see also* Canfield v. Spear, 254 N.E.2d 433, 435 (Ill. 1969) (holding a doctor "can be as useful to the public at some other place in the State" as he can be in the place the non-competitor agreement is effective because the health of persons elsewhere is just as important).

185. *See* Pathology Consultants v. Gratton, 343 N.W.2d 428, 436 (Iowa 1984) (refusing to enforce a covenant that would result in a monopoly on laboratory services on the grounds that a monopoly was "not in the best interests of the public"). *But see Canfield*, 254 N.E.2d at 435 ("If a severe shortage exists in any particular place [because of enforcement] young doctors will tend to move there, thus alleviating the shortage.").

harm to the public interest have applied a traditional reasonability test, denying enforcement when the restriction would result in a harmful shortage of available doctors. Courts have not found sufficient harm to the public to deny enforcement simply because the restriction might limit a patient's ability to select any doctor of choice.[186] To be unenforceable, the restriction must result in an insufficient number of doctors to handle the medical needs of the community or must deny the public *any* choice of physicians by creating a monopoly.

The North Carolina Court of Appeals, in *Iredell Digestive Disease Clinic, P.A. v. Petrozza*,[187] refused to enforce a covenant that would have created at least a temporary monopoly. "[W]e are extremely hesitant to deny the patient-consumer any choice whatsoever."[188] The attention given by courts to the number of doctors that would remain available if the agreement were enforced suggests that the public's right to a choice of physicians[189] means only that enforcement of a restriction should not leave so few available physicians that "a substantial question of potential harm to the public health" would exist.[190]

The public's interest in ensuring that all of its members have reasonable access to legal representation is reflected in professional obligations that impose upon lawyers a duty to strive toward that goal.[191] This Article earlier rejected the argument that the public has an overriding interest in avoiding any diminution in the number of lawyer's from which to choose counsel. If the

186. *See Rash*, 320 S.E.2d at 173-74; Bauer v. Sawyer, 126 N.E.2d 844, 851 (Ill. App. Ct. 1955) (finding no evidence that enforcement would create a shortage of doctors in the restriction area and thus finding no public harm); *see also* Marshall v. Covington, 339 P.2d 504, 506-07 (Idaho 1959) (citing *Bauer* for the same proposition); Cogley Clinic v. Martini, 112 N.W.2d 678, 681-82 (Iowa 1962) (finding that a sufficient number of doctors remained available to the community to avoid public harm from enforcement).

187. 373 S.E.2d 449 (N.C. Ct. App. 1988).

188. *Id.* at 455.

189. See Weber v. Tillman, 913 P.2d 84, 93-95 (Kan. 1996) (discussing the public interest in the ability to access physician care).

190. *Iredell*, 373 S.E.2d at 453. Even if enforcement would create a shortage of doctors within the restriction area, the resulting harm still may not always be deemed sufficient to justify denying enforcement. *See, e.g.*, *Weber*, 913 P.2d at 96 (enforcing a restriction). The Kansas court in *Weber* noted that each of the cases it cited for having held a restriction unenforceable because of the potential shortage of physicians dealt with "a shortage of physicians [in] specialties which were, for lack of a better term, medically necessary." *Id.* at 95. Perhaps the court would tolerate shortages in less critical specialties.

191. *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983) (regarding pro bono obligations of lawyers).

impact of enforcement is to create a monopoly on the provision of legal services in an area, however, and if a monopoly would affect detrimentally the public's reasonable access to legal representation, then a far different interest is at stake. Balanced against the business interests of a law firm, the client's interest in having some choice of counsel should prevail. Just as courts have refused to enforce non-competition agreements among physicians when a scarcity of doctors would result, the same reasoning should apply to non-competition agreements among lawyers.[192] If enforcement of a non-competition agreement would mean that effective representation would not be reasonably available to any portion of the public,[193] then the public interest in that circumstance may become sufficiently great to outweigh the asserted interest of the law firm in enforcement.

VII. CONCLUSION

In *Cohen*, the New York Court of Appeals cautioned against interpreting its rejection of a non-competition agreement in that case as creating "a categorical interpretation or application."[194] By focusing on a public interest described too broadly as the freedom to select any lawyer of its choosing, the courts have, nevertheless, encouraged a categorical rejection of all non-competition agreements among lawyers. Such a prophylactic rule is not necessary, however, to adequately address the concerns that may be

192. In *Blackburn*, the Indiana Court of Appeals noted that a consequence of reducing the supply of lawyers is to increase the cost of legal services. *See* Blackburn v. Sweeney, 637 N.E.2d 1340, 1343 (Ind. Ct. App. 1994).

193. Robert Parker concludes that enforcement of non-competition agreements among lawyers would be relatively unlikely to affect adversely the supply of legal services in a macroeconomic sense. *See* Parker, *supra* note 76, at 15. "Such agreements do not reduce either the number of lawyers or the time they have available to serve clients." *Id.* In a very small legal services market, enforcement of a non-competition agreement, even if limited to preclude only representation of the original firm's clients, could deny a member of the public any effective access to local legal representation. For example, a client of the firm might continue to retain the firm because of the restrictive covenant prohibiting the departing lawyer from representing the client. While that client would continue to have legal counsel, an adverse party might also be unable to hire the departing lawyer because of the lawyer's conflict of interest. *See* MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.9 (1983). If no other competent lawyers are available, that adverse party is left without a local lawyer. If the non-competition agreement were not enforced and the original client followed the departing lawyer, the lawyer's old firm might be allowed to represent the adverse party in certain circumstances thereby providing local legal counsel. *See* MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.10(b) (1983).

194. Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 413 (N.Y. 1989).

unique to the enforcement of a non-competition agreement among lawyers. A rule of reason analysis, including particular attention to the potential harm from conflicts of interest, offers a better approach to the issue.

A law firm will only rarely have a legitimate interest in barring all competition by a departing lawyer within a specific time and geographic area. Unless the law firm can establish a particular interest in protecting referral relationships with other lawyers or protecting proprietary business information obtained by the lawyer during the relationship with the law firm, broad practice restraints are likely to fail for lack of a sufficient employer interest. Narrower restraints limiting only the representation of current or former clients of the law firm may be justified more readily by legitimate firm expectations of a continuing client relationship. Whenever a legitimate firm interest does exist to justify a non-competition agreement, courts should consider whether protection of that interest through enforcement of the agreement would be reasonable under the particular circumstances. The current disciplinary rule and the per se refusal of courts to enforce non-competition agreements are inappropriately rigid approaches that do not give adequate consideration to legitimate interests of a law firm. The rule of reason analysis, addressing the potential harm of a conflict of interest, would adequately preserve the professional nature of the attorney-client relationship, without unduly ignoring the contractual undertaking of the parties to the agreement.

As with non-competition agreements among doctors, each agreement restricting competition by a lawyer should be evaluated on the basis of whether enforcement would be reasonable in the particular situation. The potential public harm is a legitimate and important consideration in that evaluation. However, the determinative issue should not be simply whether enforcement will preclude a prospective client from hiring the restricted lawyer. Only one answer to that question is possible. The more appropriate questions are whether the law firm has put its interests before those of a client to whom it owes a fiduciary duty, without properly informing the client and obtaining its consent, or whether the restriction would so restrict the availability of competent legal representation as to risk harm to the public. Only then would enforcement impermissibly harm the public interest.