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You Can't Take It with You: Enforcing Noncompetition Agreements between Law Firms and Withdrawing Attorneys

Christopher D. Goble

Comments

You Can't Take It With You: Enforcing Noncompetition Agreements Between Law Firms And Withdrawing Attorneys

At the esteemed Wall Street firm of Lord, Day & Lord, Richard Cohen was a senior partner and head of the tax department.[1] During his tenure with the firm, Cohen became an expert in certain areas of tax law and served on committees of the New York Bar Association Tax Section and the American Law Institute.[2] However, after twenty years, Cohen withdrew from Lord, Day & Lord, and crossed Wall Street to join the firm of Winthrop, Stimson, Putnam & Roberts.[3] He took several clients with him.[4] After departing, Cohen sought withdrawal benefits due him under the firm's partnership agreement.[5] Lord, Day & Lord refused full payment citing a clause in the partnership agreement that terminated the benefits of a withdrawing partner who competed with the firm.[6] Cohen sued, asserting that the clause violated an ethical rule which prohibits lawyers from entering into agreements restricting their right to practice.[7] Ironically, Cohen's new firm of Winthrop, Stimson, Putnam & Roberts also had a no-compete clause within its partnership agreement, but graciously agreed to strike the clause pending the outcome of the case.[8] Furthermore, Cohen benefitted during his twenty years at Lord, Day & Lord from the clause's application to other withdrawing partners.[9] Apparently, Cohen even participated in drafting the agreement.[10] Regardless, Cohen won his suit[11] by relying on a per se rule that invalidates

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1. Cohen v. Lord, Day & Lord, 550 N.E.2d 410 (N.Y. 1989), *recounted in* Stephen Brill, *The Partnership Breakup Follies*, AM. LAW., March 1988, at 3.
2. Brill, *supra* note 1, at 102.
3. Brill, *supra* note 1, at 3.
4. *Cohen*, 550 N.E.2d at 411.
5. Brill, *supra* note 1, at 3.
6. Brill, *supra* note 1, at 3.
7. *Cohen*, 550 N.E.2d at 411. The rule at issue was MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(A) (1969). The disciplinary rule provides that an attorney shall not enter into an agreement with another attorney that restricts the right of the attorney to practice law. *Id. See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1993).
8. Brill, *supra* note 1, at 3 (Cohen's new partners authorized him to tell the court, if the subject came up, that "Winthrop, Stimson is prepared to strike the no-compete clause from its partnership agreement if it is ruled a violation of the code by the court.").
9. *Cohen*, 550 N.E.2d at 415 (Hancock, J., dissenting).
10. *Id.*
11. *Id.* at 413.

noncompetition agreements between attorneys.[12] Cohen's windfall demonstrates a peculiarity within attorneys' ethical rules: sometimes lawyers' ethics prevent them from upholding the agreements they sign.[13]

Although the ethical rules are clear and the courts strictly interpret these rules, attorneys continue to draft clauses restricting competition, insert no-compete clauses in partnership and employment agreements, and even attempt to enforce no-compete clauses.[14] Furthermore, for over thirty years,[15] no court upheld a restrictive covenant between attorneys.[16] State bar associations have found clauses restricting competition equally invalid.[17]

During the last decade, commentators recognized the decreasing stability of law firms.[18] As lawyers withdraw from firms, they "grab"

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12. The rule is an absolute bar to enforcement of any restriction on a lawyer's right to practice. Serena L. Kafker, *Golden Handcuffs: Enforceability of Non-Competition Clauses in Professional Partnership Agreements of Accountants, Physicians, and Attorneys*, 31 AM. BUS. L.J. 31, 52 (1993). *See infra* notes 53-90.

13. Gail Diane Cox, *Defect at Your Own Risk*, NAT'L L.J., Oct. 14, 1991, at 13 (paraphrasing Don Howarth, attorney for Haight, Brown & Bonesteel in Haight, Brown & Bonesteel v. Superior Court, 285 Cal. Rptr. 845 (Ct. App. 1991)). Howarth's statement was "[w]hat we had sounded like the ultimate lawyer joke: Lawyers' ethics compel them not to keep the agreements they sign." *Id.*

14. Laurel S. Terry, *Ethical Pitfalls and Malpractice Consequences of Law Firm Breakups*, 61 TEMP. L. REV. 1055, 1075 (1988) ("[Restrictive covenants] have been used in two-person firms, mid-size firms, and even legal clinics."). *See also* Brill, *supra* note 1, at 102 (reporting that one half of firms surveyed had such agreements, though most attorneys seemed unaware of the difficulty of enforcing them).

15. The ban on restrictive covenants dates to 1961 when the American Bar Association [hereinafter ABA] Committee on Professional Ethics declared post-employment covenants restricting competition per se invalid. ABA Comm. on Professional Ethics, Formal Op. 300 (1961). A more detailed discussion of the opinion appears *infra* notes 54-55 and accompanying text.

16. *See, e.g.*, Weiss v. Carpenter, Bennet & Morrissey, 646 A.2d 473 (N.J. Super. Ct. App. Div. 1994); Hagen v. O'Connell, Goyak & Ball, P.C., 683 P.2d 563 (Or. Ct. App. 1984); Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528 (Tenn. 1991). *See also* Stephen E. Kalish, *Covenants Not To Compete and The Legal Profession*, 29 ST. LOUIS U. L.J. 423, 456 (1985) ("[T]he per se approach has spread to the courts, which have refused per se to enforce reasonable agreements."); Terry, *supra* note 14, at 1073-74 ("[R]esearch has not yet revealed any cases decided *after* the adoption of the Model Code or Model Rules that have upheld a restrictive covenant between lawyers.").

17. *See, e.g.*, 1991 WL 279170 (Or. St. B. Ass'n.), Formal Eth. Op. 29 (1991); Va. St. B. Legal Eth. Comm., Eth. Op. 880 (1991) (contained in VA. CODE ANN. LEGAL ETHICS AND UNAUTHORIZED PRACTICE OPINIONS); O. MARU, DIGEST OF BAR ETHICS OPINIONS No. 10126, at 493 (Supp. 1975) (Virginia, Informal Op. 200).

18. *See* ROBERT W. HILLMAN, LAW FIRM BREAKUPS § 1.1, at 1 (1990 & Supp. 1993). Hillman wrote:

> Law firms are under siege. The traditional view of the law firm as a stable institution with an assured future is now challenged by an awareness that even the largest and most prestigious firms are fragile economic units facing a myriad of risks in their quests to survive and prosper.

Id. See also Glenn S. Draper, *Enforcing Lawyers' Covenants Not to Compete*, 69 WASH. L.R. 161 (1994); Kalish, *supra* note 16; Kirstan Penasack, *Abandoning the Per Se Rule Against Law Firm Agreements Anticipating Competition: Comment on* Haight, Brown & Bonesteel v. Superior Court of Los Angeles County, 5 GEO. J. LEGAL ETHICS 889 (1992).

clients.[19] Chief Justice Rehnquist of the United States Supreme Court commented several years ago, "[p]artners in law firms have become increasingly 'mobile,' feeling much freer than they formerly did and having much greater opportunity than they formerly did, to shift from one firm to another and take revenue-producing clients with them."[20] The *Wall Street Journal* also noted that "[r]ainmakers-partners who bring in hefty clients-used to stay put for life. But the prosperity of the 1980's triggered an unprecedented free-agent market for heavy hitters."[21] This increasing mobility causes noncompetition agreements to flourish. Firms draft agreements to inhibit an attorney's easy transfer from one firm to another. Consequently, courts began to reexamine the per se rule invalidating lawyers' covenants not to compete.[22]

This comment examines and consolidates ethical and judicial opinions concerning noncompetition agreements between attorneys. First, the comment provides the history of the per se rule and compares the per se rule with the reasonableness test generally applied to other professionals. Second, the comment argues for the abandonment of the per se rule and the adoption of the reasonableness test to restrictive covenants between attorneys. Third, the comment gives potential impermissible and permissible restrictions on practice under Wyoming's reasonableness test. Fourth, the comment furnishes a revised model rule for agreements restricting an attorney's right to practice law.

II. DEVELOPMENT OF THE PER SE RULE

Most courts use a per se rule developed from ethical rules to invalidate noncompetition agreements between attorneys.[23] However, the courts only applied the per se rule during the last thirty years.[24] Previously,

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19. Grabbing occurs when attorneys withdraw from a firm and take several major clients with them. *Id.* at 4. *See also* Penasack, *supra* note 18, at 889.

20. William H. Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151, 152 (1986).

21. Arthur S. Hayes, *Law Firms Use Various Tactics to Prevent Exodus by Partners*, WALL ST. J., Jan. 20, 1992, at B6.

22. *See, e.g.*, Howard v. Babcock, 863 P.2d 150 (Cal. 1993); Haight, Brown & Bonesteel v. Superior Court, 285 Cal. Rptr. 845 (Ct. App. 1991); Jacob v. Norris, McLaughlin & Marcus, 588 A.2d 1287 (N.J. Super Ct. App. Div. 1991), *rev'd*, 607 A.2d 142 (N.J. 1992).

23. Penasack, *supra* note 18, at 892. *See, e.g.*, Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598 (Iowa 1990); Minge v. Weeks, 629 So. 2d 545 (La. Ct. App. 1993); Denburg v. Parker, Chapin, Flattau & Klimpl, 624 N.E.2d 995 (N.Y. 1993); Gray v. Martin, 663 P.2d 1285 (Or. Ct. App. 1983).

24. *Penasack, supra* note 18, at 892. *See, e.g.*, Weiss v. Carpenter, Bennet & Morrissey, 646 A.2d 473 (N.J. Super. Ct. App. Div. 1994); Hagen v. O'Connell, Goyak & Ball, P.C., 683 P.2d 563 (Or. Ct. App. 1984); Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528 (Tenn. 1991).

courts used a reasonableness test in cases involving restrictive covenants between attorneys.[25]

A. *The Reasonableness Test*

Since the eighteenth century, courts have used a reasonableness test to analyze covenants restricting post-employment competition.[26] A restrictive covenant is a reasonable restraint of trade if it is (a) necessary to protect the promisee, (b) not unduly harsh to the promisor, and (c) not injurious to the public.[27] Reasonable restrictive covenants are enforceable if they are ancillary to the selling of a business, to an employment contract, or to a partnership agreement.[28] Noncompetition covenants are a valid means for employers to protect their legitimate interests in trade secrets, confidential information, and client relationships.[29] Courts apply the reasonableness test to the restrictive covenants of accountants,[30] doctors,[31] veterinarians,[32] and other professionals.[33]

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25. *See, e.g.*, Heinz v. Roberts, 110 N.W. 1034 (Iowa 1907); Smalley v. Greene, 3 N.W. 78 (Iowa 1879); Hicklin v. O'Brien, 138 N.E.2d 47 (Ill. App. Ct. 1956); Thorn v. Dinsmoor, 178 P. 445 (Kan. 1919).

26. Harlan M. Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625, 629-31 (1960). Curiously, enforcement of noncompetition agreements is governed uniformly by state common law rather than federal antitrust law. Harvey J. Goldschmid, *Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants Under Federal Law*, 73 COLUM. L. REV. 1193, 1206 (1973) (stating that "[t]he Antitrust Division apparently has not initiated suits in this area because of a belief that restrictive covenants present issues of essentially local concern"). *See also* United States v. Empire Gas Corp., 537 F.2d 296, 307 (8th Cir. 1976) (asserting that "covenants of [this type] have not generally been considered violative of antitrust laws"); Marshall v. Miles Lab., Inc., 647 F. Supp. 1326, 1332 (N.D. Ind. 1986) (declaring that "[a]n analysis of the reasonableness of a restrictive covenant utilizes state law").

27. RESTATEMENT (SECOND) OF CONTRACTS § 188(1)(a)-(b) (1981).

28. RESTATEMENT (SECOND) OF CONTRACTS § 188(2) (1981). *See, e.g.*, Westec Security Serv., Inc. v. Westinghouse Elec., 538 F. Supp. 108 (E.D. Pa. 1982) (upholding as reasonable a covenant not to compete because it was ancillary to the sale of a business); James S. Kemper & Co., S.E. v. Cox & Assoc., 434 So. 2d 1380 (Ala. 1983) (upholding a restrictive covenant between a insurance company and former salesman when salesman began to solicit former customers); Pathology Consultants v. Gratton, 343 N.W.2d 428 (Iowa 1984) (invalidating an agreement between a pathologist and his former partnership as harmful to the public and holding that the harm to the former partner far outweighed the harm to the partnership).

29. RESTATEMENT (SECOND) CONTRACTS § 188(1)(a)-(b) cmt. b (1981). *See, e.g.*, Folsom Funeral Serv. v. Rodgers, 372 N.E.2d 532 (Mass. 1978) (declaring restrictive covenant unreasonable because customer relationships and contacts did not have a great impact on the undertaking business); Purchasing Assoc. v. Weitz, 196 N.E.2d 245 (N.Y. 1963) (upholding a restrictive covenant after discovering loss of trade secrets, customers, and unique and extraordinary services).

30. *See, e.g.*, Fuller v. Brough, 411 P.2d 18 (Colo. 1966) (upholding as reasonable a restrictive covenant prohibiting a withdrawing accountant from practicing within 45 miles of city for five years); Peat, Marwick, Mitchell & Co. v. Sharp, 585 S.W.2d 905 (Tex. 1979) (declaring that a restrictive covenant agreed to by an accountant was unreasonable because the clause failed to designate a specific geographic area).

31. *See, e.g.*, Odess v. Taylor, 211 So. 2d 805 (Ala. 1968) (holding unreasonable and unen-

Courts also applied the reasonableness test to attorneys. In the late nineteenth and early twentieth centuries, courts enforced reasonable covenants that restricted attorneys' right to practice ancillary to the sale of a law practice.[34] However, the ABA ethics committee declared that such sales violated the Canons of Ethics.[35] Yet, in a case following the ABA's declaration, *Hicklin v. O'Brien*,[36] the court upheld a reasonable covenant not to compete ancillary to the sale of a law practice.[37] The court rejected any argument based on the Canons of Ethics.[38] Even the *Restatement of Contracts* suggested that courts would enforce reasonable post-employment covenants not to compete.[39]

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forceable a restrictive covenant prohibiting a specialist from practicing in area where shortage of specialists existed); Gelder Medical Group v. Webber, 363 N.E.2d 573 (N.Y. 1977) (upholding a reasonable covenant restricting a physician's right to practice within thirty miles of former partnership based on lack of injury to the public).

32. *See, e.g.*, Cukjati v. Burkett, 772 S.W.2d 215 (Tex. 1989) (invalidating as unreasonable a covenant not to compete in veterinarian's employment contract which prohibited him from practicing veterinary medicine within 12 miles of his employer's clinic); Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531 (Wyo. 1993) (upholding covenant restricting competition by declaring that restricting veterinarian from practicing on small animals within five-mile radius of city limits was reasonable but that three year limit was unreasonable).

33. *See, e.g.*, Ridley v. Krout, 63 Wyo. 252, 180 P.2d 124 (1947) (declaring unreasonable and unenforceable an agreement restricting mechanic from working for seven years in specific cities and counties). *See generally* 14 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1636 (3d ed. 1972 & Supp. 1994).

34. Heinz v. Roberts, 110 N.W. 1034 (Iowa 1907); Smalley v. Greene, 3 N.W. 78 (Iowa 1879); Thorn v. Dinsmoor, 178 P. 445 (Kan. 1919).

35. ABA Comm. on Professional Ethics and Grievances, Formal Op. 266 (1945). The committee stated: "Clients are not merchandise. Lawyers are not tradesman. They have nothing to sell but personal service. An attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status." *Id.* The committee relied on Canon 7 of the Canons of Professional Ethics which provided that any direct or indirect efforts that infringed upon the business of a member of the bar was improper. *Id. See* CANONS OF PROFESSIONAL ETHICS Canon 7 (1908).

36. 138 N.E.2d 47 (Ill. App. Ct. 1956).

37. *Id.* at 52.

38. *Id.* The court said:

> The defendant next contends that the performance of the contract entered into by him and the plaintiff requires them to engage in illegal and unethical practices and is contrary to the public policy of this state. The public policy of a state is found in its constitution, its statutes and the decisions of its courts . . . . No constitutional provision or statute or judicial decision . . . would make the contract in question illegal. It is not necessary for us to determine whether the contract violates some canon of professional ethics.

Id. (citations omitted).

39. RESTATEMENT (FIRST) OF CONTRACTS § 515, illus. 5 (1932). Restatement section 515, which states the factors to be balanced in determining whether a covenant is reasonable, contains the following illustration:

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

Id.

The Wyoming Supreme Court has not addressed noncompetition agreements between attorneys. However, the court has addressed such agreements in other professions.[40] In those cases, the court applied the reasonableness test to noncompetition agreements between employers and their former employees.[41]

The most recent case delineating Wyoming's reasonableness test is *Hopper v. All Pet Animal Clinic, Inc.*[42] In *Hopper*, a veterinarian agreed to a post-employment covenant that restricted her right to treat small animals for three years within five miles of the corporate city limits of Laramie, Wyoming.[43] The Wyoming Supreme Court cited section 188 of the *Restatement (Second) of Contracts*[44] when it determined the reasonableness of the restrictive covenant.[45] The court held that the terms of the restriction and the geographic restriction were reasonable,[46] but that the durational restriction was unreasonable.[47] In determining the reasonableness of the covenant, it declared that "[e]mployers are entitled to protect their business from the detrimental impact of competition by employees who, but for their employment, would not have had the ability to gain a special influence over clients or customers."[48] The court held that restricting Dr. Hopper's practice to large animals within Laramie was limited sufficiently to avoid undue hardship on Hopper while protecting the interests of her former employer.[49] However, the tribunal felt that the three-year restriction was an unreasonable restraint.[50] It de-

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40. *See, e.g.*, Keller v. California Liquid Gas Corp., 363 F. Supp. 123 (D. Wyo. 1973) (analyzing a no-compete agreement between a buyer and seller of a liquid gas business); Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531 (Wyo. 1993) (addressing a noncompetition agreement between a veterinarian and her former employer); Ridley v. Krout, 63 Wyo. 252, 180 P.2d 124 (1947) (examining a restrictive covenant between an automobile and bicycle mechanic and his former employer).

41. *Keller*, 363 F. Supp. at 127; *Hopper*, 861 P.2d at 539; *Ridley*, 63 Wyo. at 266, 180 P.2d at 127.

42. 861 P.2d 531 (Wyo. 1993).

43. *Id.* at 536.

44. *Id.* at 539. *See supra* notes 27-29 and accompanying text.

45. *Hopper*, 861 P.2d at 540. The court also stated that the legitimate interests of an employer may be protected from competition when:

(a) the employer's trade secrets which have been communicated to the employee during the course of employment;

(b) confidential information communicated by the employer to the employee, but not involving trade secrets, such as information on a unique business method; and

(c) special influence by the employee obtained during the course of employment over the employer's customers.

Id. (citing *Ridley*, 63 Wyo. 269, 180 P.2d at 129).

46. *Id.* at 543-44.

47. *Id.* at 545.

48. *Id.* at 542 (citing *Ridley*, 63 Wyo. 273, 180 P.2d at 131).

49. *Id.* at 543 (holding that Hopper could still practice, but since the clinic's clients were located throughout the county, she could only practice on large animals).

50. *Id.* at 545.

cleared that a one-year durational limit sufficiently protected All Pet's business interests and did not violate public policy.[51] The court balanced the parties' interests against public policy.[52]

B. *Ethics Opinions and the Per Se Rule*

Before 1960, courts analyzed noncompetition agreements between attorneys as they did such agreements between other professionals.[53] The genesis of the per se rule is ABA Committee on Professional Ethics Formal Opinion 300.[54] This opinion began a thirty-year trend by declaring that a covenant restricting an attorney's right to practice law was a per se violation of legal ethics.[55] Over the next several years, the ABA Committee continued to address the issue,[56] until, in 1969, the ABA adopted Model Code DR 2-108.[57] Following the adoption of DR 2-108, the com-

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51. *Id.* (holding that a replacement veterinarian could effectively demonstrate his or her own skills to virtually all the clinic's clients within one year).

52. *Id.* at 548 (stating that there is a "need to protect employees from unfair restraints on competition which defeat broad policy goals in favor of small business and individual advancement").

53. *See, e.g.*, Hicklin v. O'Brien, 138 N.E.2d 47 (Ill. App. Ct. 1956); Heinz v. Roberts, 110 N.W. 1034 (Iowa 1907); Smalley v. Greene, 3 N.W. 78 (Iowa 1879); Thorn v. Dinsmoor, 178 P. 445 (Kan. 1919). *See also* Blake, *supra* note 26, at 662 (stating "[r]estraints upon professional employees, such as associates or technical assistants of lawyers, doctors, architects, accountants, and dentists, are also generally upheld when the customer relationships are substantial").

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

55. *Id.* The committee stated:

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

Id. The committee felt that an agreement restricting practice would constitute a "barter in clients." *Id.*

56. In 1962, the committee applied the principles of Formal Opinion 300 to withdrawing attorneys employed by clients of their former firm. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 521 (1962). It also stated that an agreement between parties of equal bargaining power (e.g., partners) did not involve ethical questions. *Id.*

In 1968, the committee rejected the employee/partner distinction and stated that restrictive covenants between a lawyer-employer and a lawyer-employee or between lawyer-partners were unethical. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1072 (1968). The basis for the decision was the right of an attorney to practice when and where she wishes and clients' freedom to choose their own counsel. *Id.*

57. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108 (1969). Model Code DR 2-108 provides:

> (A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition of retirement benefits.
>
> (B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

Id.

mittee issued several more ethical opinions addressing covenants restricting an attorney's right to practice law.[58] Finally, in 1983, the ABA adopted Rule 5.6 of the Model Rules of Professional Conduct.[59] The committee has addressed noncompetition agreements between lawyers only once after the adoption of Rule 5.6.[60]

Model Rule 5.6 is substantially similar to the Model Code provision.[61] Both prohibit attorneys from executing agreements that restrict their right to practice after leaving a firm.[62] The official comment to Rule

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58. In 1971, the committee declared unethical a clause in a partnership agreement limiting the representation of the firm's clients after the partner withdrew. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1171 (1971). It held that the clause was unprofessional under Formal Opinion 300 and newly enacted DR 2-108(A). *Id.*

Four years later, the committee examined an agreement between an in-house counsel and his corporate employer in which the lawyer agreed not to render services for any potentially conflicting product. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1301 (1975). It held that DR 2-108(A) did not cover agreements between lawyers and lay-persons and thus, there was no transgression of the code. However, the committee concluded the agreement was unprofessional. *Id.*

In its last opinion before the adoption of the Model Rules, the committee examined an agreement that prohibited a withdrawing partner from hiring or affiliating with any associate of his former firm. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1417 (1978). It determined that while the agreement did not directly restrict the right of an attorney to practice, impeding the right to associate with other attorneys was an indirect restriction on practice and violative of DR 2-108(A). *Id.*

59. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1993). Model Rule 5.6 provides:

> A lawyer shall not participate in offering or making:
>
> (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
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> (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.
>
> *COMMENT*
>
> [1] An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.
>
> [2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.
>
> [3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Id.

60. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-381 (1994). In 1994, the committee addressed a prohibition in an employment agreement between a corporation and its in-house counsel. *Id.* The prohibition restricted the attorney from representing any party against the corporation in the future. *Id.* The committee declared that the restriction was an impermissible restraint on the attorney's right to engage in her profession. *Id.* It also stated that the prohibition restricted the public's access to lawyers. *Id.* The committee relied on Informal Op. 1301 and Model Rules Rule 5.6 for its decision. *Id. See supra* notes 58 and 59.

61. *Compare* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1993) and MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108 (1969). *See supra* notes 59 and 57.

62. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6(a) (1993); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(A) (1969). *See supra* notes 57 and 59. Every state

5.6 demonstrates that the drafters of the Model Rules intended to rearticulate DR 2-108.[63] The comment to Rule 5.6 also provides the grounds for these provisions: restrictive covenants limit a lawyer's professional autonomy and a client's freedom to choose a lawyer.[64]

C. *Judicial Opinions and the Per Se Rule*

Although Model Rule 5.6 and[65] DR 2-108[66] are not law,[67] courts continually cite them in their decisions and use them to define public policy.[68] Those courts distinguish between direct and indirect restrictions on attorneys' right to practice. Yet, interpreting the ethical rules, courts hold attorneys' restrictive covenants per se invalid,[69] unlike covenants restricting competition made by other professionals.

The court in *Dwyer v. Jung*,[70] the first case to address the enforceability of a restrictive covenant in a legal partnership agreement, relied on DR 2-108(A) to establish the trend for future cases. In *Dwyer*, a law firm drafted an agreement providing that, upon dissolution of the firm, clients would be divided between the partners and that all partners would be restricted from doing business with another's client for five years.[71] The court rejected the reasonableness test and found that "[t]he attorney-client relationship is consensual, highly fiduciary on the part of counsel, and he may do nothing which restricts the right of the client to repose confidence

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has adopted a form of the Model Rule 5.6 or Model Code DR 2-108. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 56, 62 (1986). While most states adopted these ethical rules verbatim, a few made variations that are insignificant for the purposes of this comment. Wyoming adopted Model Rule 5.6 verbatim. WYOMING RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rule 5.6 (1987).

63. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6 cmt. (1993).

64. *Id. See also* 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT, § 5.6: 202, at 824.5 (2d ed. Supp. 1993).

65. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1993).

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

67. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1969); MODEL RULES OF PROFESSIONAL RESPONSIBILITY Scope (1993). *Cf.* WOLFRAM, *supra* note 62, at 51 (stating that "a lawyer's violation of a mandatory rule should not, by itself, be a basis for the imposition of civil liability").

68. *See, e.g.*, Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598 (Iowa 1990); Minge v. Weeks, 629 So. 2d 545 (La. Ct. App. 1993); Denburg v. Parker, Chapin, Flattau & Klimpl, 624 N.E.2d 995 (N.Y. 1993); Gray v. Martin, 663 P.2d 1285 (Or. Ct. App. 1983).

69. *See, e.g.*, Weiss v. Carpenter, Bennet & Morrissey, 646 A.2d 473 (N.J. Super. Ct. App. Div. 1994); Hagen v. O'Connell, Goyak & Ball, P.C., 683 P.2d 563 (Or. Ct. App. 1984); Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528 (Tenn. 1991).

70. 336 A.2d 498, (N.J. Super. Ct. Ch. Div.), *aff'd per curiam*, 348 A.2d 208 (N.J. Super. Ct. App. Div. 1975).

71. *Dwyer*, 336 A.2d at 499.

in any counsel of his choice."[72] The New Jersey court distinguished the practice of law from commercial businesses and found that the agreement was a direct restriction on the practice of law, and thus, per se unenforceable and against public policy.[73]

After *Dwyer*, firms carefully drafted agreements to avoid direct restrictions on a client's freedom to choose an attorney.[74] Instead, firms began imposing two types of economic disincentives. The first, a forfeiture-for-competition clause, requires the withdrawing attorney to forfeit certain withdrawal benefits[75] if the lawyer competes with the firm. The second type of financial disincentive is client-based. A client-based restriction reduces the attorney's withdrawal benefits by a set amount for each client who elects to follow the attorney.[76] It also may provide that the attorney must pay to the firm some or all of the fees ascribed to work for certain clients after the attorney's withdrawal.[77]

Gray v. Martin[78] is the principal case addressing a financial forfeiture-for-competition clause. In *Gray*, a law firm sued a departing partner for an accounting of attorney fees he collected after withdrawing.[79] The withdrawing partner counterclaimed for his withdrawal benefits.[80] The agreement at issue denied a departing partner withdrawal benefits if he practiced in three specific counties.[81] The court found that the agreement constituted an indirect restriction on the attorney's right to practice and was per se unenforceable.[82] Additionally, the court rejected the firm's

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72. *Id.* at 500. *See also* Robert L. Schonfeld, Note, *Attorneys Must Not Enter Into Partnership Agreements Prohibiting Themselves from Representing Former Clients Upon Termination of the Partnership*, 4 FORDHAM URB. L.J. 195, 203 (1975).

73. *Dwyer*, 336 A.2d at 500.

74. Kafker, *supra* note 12, at 43.

75. Withdrawal benefits typically consist of reimbursement of the attorney's capital contribution and payment of uncollected salary and earnings. Withdrawal benefits can also include the attorney's billable hours not yet remitted by clients and hours worked but not yet billed to clients. Chuck Santangelo & Gerry Malone, *Partnership Agreements: Don't Dance Around the Issues*, TRIAL, Apr. 1988, at 62. *See also* Draper, *supra* note 18, at 167.

76. Draper, *supra* note 18, at 168.

77. Draper, *supra* note 18, at 168.

78. 663 P.2d 1285 (Or. Ct. App. 1983).

79. *Id.* at 1287. The firm sought an accounting of contingent fees collected from former firm clients. *Id.*

80. *Id.* at 1290. The withdrawing partner sought benefits provided in the partnership agreement. *Id.* The partnership agreement provided for payment of the partner's interest in any unpaid draw, the partner's capital account, and "one-fourth of his share of such profits based upon the average percentage of participation which he and the firm held during the preceding 36 months." *Id.*

81. *Id.*

82. *Id.* at 1290-91. The court stated that "[t]he purpose of the rule is to govern the relationships between attorneys for the protection of the public." *Id.* However, the court elaborated in a later case that restrictive covenants are "contrary to the public policy of making legal counsel available,

argument that the agreement only affected the retirement benefits of the withdrawing attorney, falling within the retirement exception of DR 2-108(A).[83] The court found that giving withdrawal the same meaning as retirement in DR 2-108(A) would destroy the intent of the rule.[84]

Other jurisdictions also strike down financial forfeiture-for-competition clauses.[85] In *Cohen v. Lord, Day & Lord,* the New York Court of Appeals struck down an agreement which provided for a forfeiture of benefits by withdrawing partners who practiced in any jurisdiction in which the firm maintained an office.[86] The court found that, while the agreement did not directly restrict the practice of law, the monetary penalty for practicing in the same area effectively prohibited the partner from representing clients.[87]

The leading case concerning client-based restrictions is *In Re Silverberg*,[88] decided in 1980. The New York Supreme Court examined a partnership agreement which required that, upon dissolution, an attorney who represented a client brought to the firm by another partner would remit, for eighteen months, eighty percent of the fees billed to that client.[89] The court found that the agreement was per se violative of DR 2-108(A) and was violative of the public policy against bartering clients.[90]

D. Departures from the Per Se Rule

Within the last few years, several courts have taken a markedly different course from precedent.[91] They equated law firms with cor-

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insofar as possible, according to the wishes of the client." Hagen v. O'Connel, Goyak & Ball, P.C., 683 P.2d 563, 565 (Or. Ct. App. 1984).

83. *Gray*, 663 P.2d at 1290 (declaring that retirement and withdrawal do not share the same meaning). The retirement benefits exception allows attorneys to enter into noncompetition agreements "as a condition of retirement benefits." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(A) (1969).

84. *Gray*, 663 P.2d at 1290. Giving the words an equivalent meaning treats every withdrawal as a retirement and effectively nullifies the disciplinary rule. *Id.*

85. *See, e.g.*, Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598 (Iowa 1990) (invalidating an agreement that stopped payment of withdrawal benefits if the withdrawing partner committed an act detrimental to the firm); Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528 (Tenn. 1991) (declaring unenforceable an agreement which provided that an employee who withdrew from the firm would receive deferred compensation unless she continued to practice law).

86. Cohen v. Lord, Day & Lord, 550 N.E.2d 410 (N.Y. 1989). *See supra* notes 1-11 and accompanying text.

87. *Cohen*, 550 N.E.2d at 411.

88. 427 N.Y.S.2d 480 (App. Div. 1980).

89. *Id.* at 481-82.

90. *Id.* at 482-83.

91. *See, e.g.*, Howard v. Babcock, 863 P.2d 150 (Cal. 1993); Haight, Brown & Bonesteel v. Superior Court, 285 Cal. Rptr. 845 (Ct. App. 1991); Jacob v. Norris, McLaughlin & Marcus, 588 A.2d 1287 (N.J. Super. Ct. App. Div. 1991), *rev'd*, 607 A.2d 142 (N.J. 1992).

porations instead of distinguishing them as organizations with special rules.[92] These courts analyzed restrictive covenants under the reasonableness test[93] and began balancing law firms' interests with attorneys' interests in personal autonomy and freedom of movement.[94]

Although it was later reversed, *Jacob v. Norris, McLaughlin & Marcus*[95] was the first case to question forfeiture restrictions between law firms and withdrawing attorneys. The agreement at issue provided that withdrawing attorneys would receive more benefits than mandated by their equity interest in the firm, unless they competed with the firm upon voluntary withdrawal.[96] The court balanced the requirements of the rules of ethics against the firm's need for financial stability.[97] It found that the agreement did not restrict the attorney's right to practice.[98] Instead, the agreement ended the firm's obligation to pay termination compensation: compensation intended to provide financial assistance to the departing attorney if consistent with the firm's economic interest.[99]

The second challenge to the per se rule came from the Second Appellate District in California in *Haight, Brown & Bonesteel v. Superior Court*.[100] The agreement in question provided that if any withdrawing partner engaged in the practice of any area regularly practiced by the firm and represented any client of the former firm within twelve months, the partner forfeited all withdrawal benefits.[101] The court, interpreting California Code Section 16602[102] in tandem with

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92. *Howard*, 863 P.2d at 159; *Haight*, 285 Cal. Rptr. at 850; *Jacob*, 588 A.2d at 1293.

93. *See supra* notes 26-29 and accompanying text.

94. *See supra* notes 56-64 and accompanying text.

95. 588 A.2d 1287 (N.J. Super. Ct. App. Div. 1991) [hereinafter Jacob I], *rev'd*, 607 A.2d 142 (N.J. 1992) [hereinafter Jacob II].

96. *Jacob I*, 588 A.2d at 1289-90.

97. *Id.* at 1291.

98. *Id.* at 1293.

99. *Id.* When the New Jersey Supreme Court reversed the decision on appeal, the court conceded that departing firm members could inflict substantial harm on a firm, but felt that firms could protect themselves with less restrictive means. *Jacob II*, 607 A.2d at 151. The court then offered an alternative it viewed as valid: reducing the departing partner's withdrawal benefits commensurate to the decrease in value of the firm's goodwill. *Id.* at 152.

100. 285 Cal. Rptr. 845 (Ct. App. 1991). For an excellent and thorough discussion of the case, *see* Penasack, *supra* note 18, (arguing that *Haight* was decided correctly and that the courts should abandon the per se rule).

101. *Haight*, 285 Cal. Rptr. at 846.

102. CAL. BUS. AND PROF. CODE § 16602 (West 1987). The code section provides, in pertinent part, that:

> [a]ny partner may, upon or in anticipation of a dissolution of the partnership, agree that he will not carry on a similar business within a specified county or counties, city or cities . . . where the partnership business has been transacted, so long as any other member of the partnership . . . carries on a like business therein.

Id.

California's version of Model Rule 5.6,[103] found that the rules of ethics did not prohibit an attorney from compensating his former firm if he continued to represent that firm's clients.[104] The court noted that its interpretation ensured that a withdrawing attorney could practice anywhere in the state, but also allowed the remaining attorneys to guarantee the economic stability of the firm.[105]

The premier case invalidating the per se rule also comes from California. In *Howard v. Babcock*,[106] the California Supreme Court, again interpreting Code section 16602[107] with the state's model rule,[108] found valid an agreement forfeiting withdrawal benefits of departing attorneys choosing to practice in the same region.[109] The court determined that the agreement did not restrict the practice of law, but rather, left the departing partner free to practice at a price, while compensating the firm for a loss of clients.[110] It also declared that firms are more business-like than previously thought due to changes in the legal profession.[111] According to the court, simultaneous satisfaction of public policy interests and the firm's business interests is feasible.[112]

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103. CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-500 (1994). California's rule, in pertinent part, provides:

> (A) A member of the State Bar Shall not be a party to or participate in an agreement, whether in connection with settlement of a law suit or otherwise, if the agreement restricts the right of a member of the State Bar to practice law.

Id.

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

105. *Id.*

106. 863 P.2d 150 (Cal. 1993). For a thorough criticism of the *Howard* decision, *see* Robert W. Hillman, *The Law Firm as Jurassic Park: Comments on* Howard v. Babcock, 27 U.C. DAVIS L. REV. 533 (1994).

107. CAL. BUS. AND PROF. CODE § 16602 (West 1987).

108. CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-500 (1994).

109. *Howard*, 863 P.2d at 160. Article X of the agreement stated:

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

Id. at 151.

110. *Id.* at 160.

111. *Id.* at 157. The court explained that a firm has a financial interest in the continued patronage of its clients. Firms develop the client-base practically and financially. As associates and partners move from firm to firm, firms' security is undermined. The court characterized the increasing mobility of attorneys and decreasing stability of firms as a "sweeping" change in the practice of law. *Id.*

112. *Id.* at 160. The court sought a balance between a client's interest in the attorney of her choice and the law firm's interest in a stable business environment. *Id.*

III. COURTS SHOULD DISCARD THE PER SE RULE

Most cases and ethics opinions follow the per se rule that invalidates agreements restricting an attorney's right to the post-employment practice of law.[113] However, the reasoning of those courts and committees has flaws. Courts should apply the reasonableness test equally to lawyers and other professionals.

A. Attorneys' Noncompetition Agreements Do Not Injure the Public

Courts declare attorneys' restrictive covenants per se invalid based upon public policy concerns.[114] They contend that maintaining lawyers' personal autonomy and clients' freedom to choose their own attorney serves the public's interests.[115] However, courts lack a principled reason for distinguishing attorneys from other professionals.

The courts' reasons for distinguishing attorneys from other professionals are perplexing. Indeed, many commentators express bewilderment at the courts' lack of justification when distinguishing attorneys from other professionals.[116] Doctors, accountants, and veterinarians have similar interests in personal autonomy, yet courts regularly balance their interests against those of their respective employers.[117] Doctors[118] and accountants[119] also have confidential and intimate relationships with their clients. These relationships require them to elevate their clients' interest above their own. In both professions, doctors and accountants receive

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113. *See supra* notes 54-90 and accompanying text.

114. *See, e.g.*, Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598 (Iowa 1990); Minge v. Weeks, 629 So. 2d 545 (La. Ct. App. 1993); Denburg v. Parker, Chapin, Flattau & Klimpl, 624 N.E.2d 995 (N.Y. 1993); Gray v. Martin, 663 P.2d 1285 (Or. Ct. App. 1983).

115. *See, e.g.*, Weiss v. Carpenter, Bennet & Morrissey, 646 A.2d 473 (N.J. Super. Ct. App. Div. 1994); Hagen v. O'Connell, Goyak & Ball, P.C., 683 P.2d 563 (Or. Ct. App. 1984); Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528 (Tenn. 1991).

116. HILLMAN, *supra* note 18, § 2.3.2, at 29 ("The reasons for distinguishing lawyering from other professions in this context are vague, and it is questionable whether the availability of choice for the client is any less critical when the professional engaged is a physician, for example, rather than a lawyer."). *See also* Draper, *supra* note 18, at 172.

117. *See supra* notes 30-32 and accompanying text.

118. Howard v. Babcock, 863 P.2d 150, 160 (Cal. 1993). *See also* Karlin v. Weinberg, 390 A.2d 1161, 1171 (N.J. 1978) (Sullivan, J., dissenting) ("Both [the doctor-patient and lawyer-client] relationships are consensual, highly fiduciary and peculiarly dependent on the patient's or client's trust and confidence in the physician consulted or attorney retained."); Ladd v. Hikes, 639 P.2d 1307, 1311 (Or. Ct. App. 1982) (Butler, J., dissenting) (arguing for the application of the per se rule to doctors).

119. *See* Mailman, Ross, Toyes & Shapiro v. Edelson, 444 A.2d 75, 80 (N.J. Super. Ct. Ch. Div. 1982) ("Accountants, like doctors and lawyers, are engaged in a profession which necessarily requires clients to reveal personal and confidential information to them in the course of the professional relationship."); Racine v. Bender, 252 P. 115, 116 (Wash. 1927) (declaring that "confidence is the basis of the relation between client and the [accountant], and is the foundation stone of business").

personal and confidential information during the professional relationship. The attorney-client relationship is also highly personal in nature and requires the protection of confidential information.[120] Additionally, clients hire law firms, medical groups and accounting firms, not the individual professionals within the firms or groups.[121] Yet, though law firms have the same legitimate interest in protecting their stability as other professional entities,[122] law firms remain unprotected while medical groups, accounting firms and other professional organizations maintain stability through noncompetition agreements.

Noncompetition agreements do not undermine attorneys' personal autonomy. One commentator argues that lawyers gain more respect regarding their personal autonomy if they exercise their freedom as they wish.[123] An attorney may even realize advantages by agreeing to noncompetition agreements.[124] Furthermore, reasonable restrictive covenants will not prohibit an attorney from using her skills.[125] Attorneys can always practice law, though they may be restricted as to location or clients.[126]

A more forceful, but still unpersuasive, argument justifies the per se rule from the client's perspective. The attorney-client relationship is highly personal[127] and a client's confidence in her attorney is vital.[128] Attorneys'

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120. The principle of confidentiality is deeply embedded in traditional attorney-client relationships. WOLFRAM, *supra* note 62, at 242. The Model Rules and Model Code provide for confidentiality of client information gained during the attorney-client relationship. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1993); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 to 4-6, DR 4-101 (1969).

121. The ethical rules prove that clients hire law firms. They permit disclosure of client confidences to other members of the firm unless the client expressly directs otherwise. *See* MODEL RULES OF PROFESSIONAL CONDUCT 1.6 cmt. 8 (1993); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-2 (1969).

122. Law firm's legitimate interests are client patronage, trade information related to clients, and client confidences. Kalish, *supra* note 16, at 438-444.

123. Kalish, *supra* note 16, at 450.

124. Kalish, *supra* note 16, at 455. Lawyers may increase their marketability and income by representing new clients and practicing in different areas of law. Lawyers may find their new environments more conducive to productivity. Still, lawyers also may experience disadvantages. Increased overhead and re-establishing a client base are two possible disadvantages for attorneys entering private practice. Lawyers switching law firms are less distinguishable.

125. *See* Kalish, *supra* note 16, at 450. "[A] lawyer is a member of one of the most mobile professions. In a sense, he carries his skills in his head, and he will be able to move easily to find a new and different job." *Id.*

126. Kalish, *supra* note 16, at 450.

127. *See* Mark H. Epstein & Brandon Wisoff, Comment, *Winding Up Dissolved Partnerships: The No-Compensation Rule and Client Choice*, 73 CAL. L. REV. 1597 (1985). *See also supra* note 120 and accompanying text.

128. Draper, *supra* note 18, at 173.

ethical rules promote a client's right to choose a lawyer.[129] However, proponents of client choice claim that clients should have the right to choose their attorneys without restrictions.[130] Such a claim is impossible to meet.

A client's right to choose often yields to other interests. Attorneys retain discretion to choose among prospective clients.[131] A conflict of interest also may restrict a client's freedom to choose counsel.[132] An attorney may withdraw from representing a client for non-payment or when the representation creates an unreasonable financial burden, even if the withdrawal is materially adverse to the client.[133] Finally, the ethical rules do not forbid attorneys from leaving the practice of law, including retiring or entering government service.[134]

Furthermore, denying a client the services of a particular lawyer is forgivable. Over 800,000 attorneys practice in the United States.[135] Clients denied the services of one lawyer can always find another. Additionally, the lawyer not serving one client becomes more readily available for other prospective clients.[136]

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129. Draper, *supra* note 18, at 174.

130. Kalish, *supra* note 16, at 450.

131. The Code of Professional Responsibility states that "[a] lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-26 (1969). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-28. Ethical Consideration 2-28 provides that "[t]he personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community does not justify his rejection of tendered employment." *Id.*

132. For Example, Model Rules Rule 1.7 forbids representation of a client if the representation is potentially adverse to another client or if the representation is materially limited by the lawyer's responsibility to another client or a third person. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1993). Furthermore, Model Rules Rule 1.9 forbids representation of a client in the same or substantially related matter if that client's interests are materially adverse to those of a former client. *Id.* Rule 1.9. The imputed disqualification rules result in a denial of representation by a greater number of lawyers to inevitably an even larger pool of otherwise potential clients. *See Id.* Rule 1.10 (stating that where a conflict of interest exists for one lawyer at a firm, all other lawyers of the same firm are also disqualified from representation).

133. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1993). However, a lawyer must take all reasonable steps to protect a client's interests. *Id.* Rule 1.16(d).

134. The ethical rules allow attorneys to execute noncompetition agreements as a condition of retirement benefits. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6(a) (1993); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(A) (1969). The rules provide ethical guidance for public officials. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 8-101. The ABA's Code of Judicial Conduct establishes ethical standards for judges and candidates for judicial office. *See* MODEL CODE OF JUDICIAL CONDUCT (1990).

135. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S., at 210, No. 327 (1994).

136. Kalish, *supra* note 16, at 452.

Finally, the ethical rules, in one instance, actually restrict a client's choice of attorney. Model Rule 1.17 requires that the seller of a law practice not compete with the purchaser in the same geographic area or jurisdiction.[137] Although clients are free to reject representation by the purchaser,[138] the rule mandates that their former attorney be unavailable to them.[139] The harm to the client in that instance is indistinguishable from the harm caused by a similar covenant contained in an employment or partnership agreement. Yet, courts forbid a client's choice of attorney from being bargained away through a restrictive covenant.[140] The Model Rules explain that the purchaser of a practice must receive the goodwill[141] for which she bargained.[142] Thus, the Model Rules elevate the need to preserve the value of a firm's goodwill over the client's freedom to choose.[143] Rule 1.17 illustrates that while client choice is important, it is not necessarily superior to all other interests.[144]

The public's interest in choosing an attorney is no greater than the public's interest in choosing a physician or accountant. Restrictive covenants between attorneys do not injure the public more than restrictive covenants between other professionals. Courts, therefore, should discard the per se rule and adopt the reasonableness test as applied to other professionals.

B. Ethical Standards Fail to Protect Law Firms' Legitimate Interests

The potential injury to law firms from the application of the per se rule is significant. Law firms have a financial interest in the continued patronage of their clientele.[145] Courts recognize this financial interest as a definable

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137. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.17 (1993). The rule provides, in pertinent part:

> A lawyer or a law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:
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> (a) The seller ceases to engage in the private practice of law [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted . . . .

Id.

138. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.17 cmt. 2 (1993).

139. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.17 (1993).

140. *See, e.g.*, Minge v. Weeks, 629 So. 2d 545 (La. Ct. App. 1993); Dwyer v. Jung, 336 A.2d 498 (N.J. Sup. Ct. Ch. Div. 1975); Gray v. Martin, 663 P.2d 1285 (Or. Ct. App. 1983).

141. Goodwill is defined as "every positive advantage that has been acquired by a proprietor in carrying on his business, whether connected with the premises in which the business is conducted, or with the name under which it is managed, or with any other matter carrying with it the benefit of the business." BLACK'S LAW DICTIONARY 694 (6th ed. 1990). *See infra* note 146 and accompanying text.

142. HAZARD & HODES, *supra* note 64, at 824 n.1.

143. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.17 (1993).

144. *See Id.*

145. Kalish, *supra* note 16, at 438.

property interest called goodwill.[146] Goodwill belongs to firms. Firms' capital usually finances the development of a client base, the support services and the training necessary to adequately represent clients.[147] Furthermore, attorneys may develop professionally and in reputation at great costs to firms.[148] Generally, clients retain law firms and not individual attorneys.[149]

Application of the per se rule results in the forfeiture[150] of law firms' goodwill. When attorneys leave firms and take clients with them, the firms lose their goodwill or anticipated income from those clients. To protect themselves, firms draft noncompetition agreements imposing either a financial forfeiture-for-competition[151] or a client-based restriction.[152] However, courts compel firms to forfeit their goodwill by per se invalidating such agreements.

IV. COURTS SHOULD ADOPT THE REASONABLENESS TEST

The per se rule's shortcomings are apparent: it does not allow courts to consider the relative weight of all the interests affected by a restrictive covenant. Conversely, the reasonableness test promotes an ad hoc balancing of all the competing interests. The reasonableness test also fulfills the purpose of the ethical rules: protection of client choice of representation while promoting integrity in attorneys' relations with each other.[153]

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146. Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 152 (N.J. 1992); Smith, Keller & Assoc. v. Dorr & Assoc., 875 P.2d 1258, 1265 (Wyo. 1994). *See also supra* note 141.

147. Howard v. Babcock, 863 P.2d 150, 157 (Cal. 1993). *See also* Kalish, *supra* note 16, at 438.

148. Affidavit of Henry Baldwin, Cohen v. Lord, Day & Lord, 550 N.E.2d 410 (N.Y. 1989), *quoted in* Brill, *supra* note 1, at 102. The plaintiff in *Cohen*, for example:

> was allowed to spend a considerable amount of his professional time writing tax articles and serving on committees of the New York State Bar Association Tax Section and the American Law Institute . . . . As a result, he gradually established a reputation as an expert in certain areas of practice . . . essentially at the firm's expense. Obviously, it was anticipated that the benefit of the enhancement of his reputation and expertise would eventually enure to the firm which had supported him while he obtained his stature. Cohen's departure from the firm before this goal was achieved results in direct financial injury to the firm-but none at all to Cohen.

Id.

149. Kalish, *supra* note 16, at 439. *See also* Anthony L. Marks, *Barefoot Shoemakers: An Uncompromising Approach to Policing the Morals of the Marketplace When Law Firms Split Up*, 19 ARIZ. ST. L.J. 509, 529 n.148 (1987). The Model Rules and Model Code demonstrate the general rule that clients hire firms by allowing attorneys to disclose clients' confidences to other attorneys in the firm, unless the clients direct otherwise. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 8 (1993); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-2 (1969).

150. A forfeiture is the "taking away of some preexisting valid right without compensation." BLACK'S LAW DICTIONARY 650 (6th ed. 1990).

151. *See supra* note 75 and accompanying text.

152. *See supra* note 77 and accompanying text.

153. *See* MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1993); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1969).

A. *The Reasonableness Test Weighs All Competing Interests*

The reasonableness test balances the interests of law firms, withdrawing attorneys, clients, and the public. Law firms have an interest in maintaining stability. Withdrawing attorneys have an interest in minimizing restrictions on their future practice. Clients and the public have similar interests: freedom to retain the counsel of their choice. Since the reasonableness test is an individualized inquiry applied to the particular circumstances of each case,[154] courts can promote the goals of the ethical rules and protect each party's legitimate interests. Whether a restrictive covenant is reasonable varies from case to case, depending on each party's competing interests. Thus, allowing reasonable restrictive covenants circumvents the inequities of a blanket per se rule. Reasonable restrictive covenants enforce each party's expectations, rather than allowing one party to shift the costs of complying with public policy and ethical rules to the other party.

B. *Application of the Reasonableness Test to Wyoming*

Wyoming courts use the reasonableness test to analyze restrictive covenants in other professions.[155] However, no Wyoming case has addressed restrictive covenants between attorneys. Regardless, it is possible to speculate how a Wyoming court might apply a reasonableness test to specific types of restraints.

A general geographic prohibition on practicing in a Wyoming community is unreasonable. The restriction is too broad to relate to a legitimate firm interest.[156] For example, the restriction applies whether the departing attorney served any clients belonging to her former firm. The restriction applies even if the attorney specialized in a field in which her former firm did not practice. Furthermore, the restriction is so broad that an attorney who wishes to continue practicing is forced to relocate. Finally, a geographic prohibition harms the public by making an attorney unavailable to all potential clients in the community, not just those clients who dealt with the attorney in her former firm.[157]

A geographic restriction limited in duration is more reasonable.[158] However, due to the inherent nature of practicing law in Wyoming, such a re-

154. Draper, *supra* note 18, at 180.

155. *See supra* notes 41-51 and accompanying text.

156. *See supra* notes 145-147. *See also* Howard v. Babcock, 863 P.2d 150, 157 (Cal. 1993).

157. Terry, *supra* note 14, at 1078 n.124.

158. The Wyoming Supreme Court recently upheld a covenant restricting the right of a veterinarian to practice in a Wyoming community for one year. Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 548 (Wyo. 1993). *See supra* notes 42-51 and accompanying text.

striction may be as unreasonable as a general geographic prohibition. The size of Wyoming communities perpetuates a general practice.[159] Specializing in single fields of law is relatively uncommon, even in larger Wyoming communities. Thus, for example, a one-year restriction on practicing law in a small Wyoming community is unreasonable.[160] An absolute one-year restriction compels a general practitioner to relocate.[161] In larger Wyoming communities, where specialists are more prevalent, a durational restriction may be reasonable. However, the shortcomings accompanying a geographic restriction still exist.[162] The reasonableness of a restrictive covenant limited in duration depends upon individual circumstances.[163]

Economic disincentives are more reasonable than general geographic or durational prohibitions. For example, forfeiture-for-competition clauses reduce the attorney's withdrawal benefits if she competes with her former firm.[164] These clauses allow the withdrawing attorney to determine whether competing with her former firm makes economic sense.[165] Departing attorneys can still practice anywhere, while firms can maintain their economic stability by replacing anticipated income from former clients with the withdrawing attorney's share of capital and accounts receivable.[166] Forfeiture-for-competition clauses also serve the public. Unlike client-based restrictions,[167] such clauses do not prevent attorneys from serving particular clients.[168] However, forfeiture-for-competition clauses are less favorable than client-based restrictions because they are not narrowly tailored to protect firm interests. As with general geographic and durational prohibitions, they can apply whether or not the firm suffers any actual loss of goodwill.[169]

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159. The population of Wyoming cities ranges from 50,000 to just over 100 people. Over half of Wyoming's cities have populations of less than 1,000 people. PHIL ROBERTS ET AL., WYOMING ALMANAC 180 (3d ed. rev. 1994) (relying on the 1990 U.S Census).

160. In *Hopper*, the court limited the veterinarian's practice to large animals for one year so that a replacement veterinarian could demonstrate her skills to the clinic's small animal clients. 861 P.2d at 543-545. However, the general practice of law is not analogous to a general veterinary practice in this respect.

161. A California court upheld an agreement prohibiting an attorney from practicing in an area of law regularly practiced by the firm or representing any client of the former firm for one year in *Haight, Brown & Bonesteel v. Superior Court*. 285 Cal. Rptr. 845 (Ct. App. 1991). However, all Wyoming communities are much smaller than Los Angeles, California. *See supra* note 159. A Wyoming practitioner in a small community must move if restricted from practicing in an area of law for one year.

162. *See supra* notes 156-157 and accompanying text.

163. *See supra* note 154 and accompanying text.

164. *See supra* note 75 and accompanying text.

165. Howard v. Babcock, 863 P.2d 150, 156 (Cal. 1993).

166. *Id.*

167. *See supra* note 75 and accompanying text.

168. *See* Terry, *supra* note 14, at 1078 n.124.

169. *See supra* notes 145-147 and accompanying text.

Client-based restrictions are most narrowly tailored to protect legitimate firm interests. Such restrictions reduce an attorney's withdrawal benefits for each client she "grabs."[170] Courts could find a client-based restriction unreasonable if the effect on the withdrawing attorney is too burdensome in comparison with the firm's interests. However, a client-based restriction that reduces an attorney's withdrawal benefits by an amount equal to the firm's loss of goodwill[171] is reasonable. Reasonable restrictions are the minimum needed to protect the firm's interests.[172] Finally, a client-based restriction minimizes the harm to the public because it potentially affects only those clients served by the withdrawing attorney.

C. *Archetype for Revised Model Rule 5.6*

Although the reasonableness test suffices to protect the competing interests of attorneys, firms, and the public, Model Rule 5.6 requires revision. Courts and state bar associations rely heavily on the Model Rules when formulating opinions.[173] To achieve universal accord within those opinions, a revised model rule is essential.

Proposed Rule 5.6: Post-employment Agreements Regarding Competition

A lawyer:

(a) shall respect and safeguard the right of a client to choose representation.

(b) may contract with fellow members of a law firm to allocate the assets and liabilities of the firm in case of a lawyer's withdrawal, subject to the following restrictions:

(1) the agreement may not require recompense from the withdrawing lawyer beyond what is reasonably necessary to protect the firm's legitimate interests;

(2) the agreement may not contain overbroad restrictions on the practice of law in its geographic or time limit restraints.

(c) shall not participate in offering or making an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

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170. *See supra* note 18 and accompanying text.
171. *See supra* notes 145-147 and accompanying text.
172. *See supra* notes 27-29 and accompanying text.
173. *See supra* notes 14-17 and accompanying text.

COMMENT

[1] A lawyer should take special care to recognize increasing protection for the client where the attorney-client relationship can be defined as particularly personal and close in character.

[2] Paragraph (b) prohibits general geographic restrictions imposing undue hardship on the attorney. Geographic restrictions of limited duration are reasonable if the attorney can continue to practice without substantial impairment and the firm's legitimate business interests are reasonably protected.

[3] Paragraph (c) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[4] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.[174]

The proposed model rule promotes the goals of the per se rule: clients' freedom to choose their attorneys and lawyers' right to personal autonomy.[175] However, the rule also promotes a balancing of the competing interests of all interested parties. Law firms retain their goodwill,[176] while attorneys may decide whether competing with their former firm is viable. The comment to the rule accommodates Wyoming's unique position regarding the practice of law.[177] Finally, the proposed rule incorporates provisions of the established model rule[178] to maintain the interrelation between the Model Rules.

The proposed rule gives courts guidance when determining whether a noncompetition agreement is reasonable. The rule's criteria will lead to uniformity and predictability of results. Lawyers and their firms can predict whether a court will find a noncompetition agreement reasonable. Additionally, a list of criteria promotes judicial economy by reducing the number of lawsuits and appeals.[179] The proposed rule gives the courts and lawyers standards by which noncompetition agreements are adjudged and drafted.

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174. The proposed model rule emulates parts of the established model rule and a similarly designed rule. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1993) and Penasack, *supra* note 18, at 913-14.

175. *See supra* notes 62-64.

176. *See supra* note 141 and accompanying text.

177. *See supra* notes 159-162 and accompanying text.

178. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1993).

179. Initially, the criteria may increase the number of lawsuits and appeals. However, once a jurisdiction applies the criteria, lawyers will discover the extent of permissible restrictions and ideally, will only execute reasonable noncompetition agreements.

V. CONCLUSION

Courts distinguish attorneys' and other professionals' covenants not to compete. Most courts mistakenly apply Model Code DR 2-108 and Model Rule 5.6 to invalidate such agreements between attorneys. However, by doing so, courts fail to recognize legitimate employer interests. There is little reason to treat attorneys differently from other professionals.

As the practice of law changes, becoming more business-like, the justification for treating attorneys and other professionals differently is less compelling. The reasonableness test is a suitable mechanism for determining whether a restrictive covenant is enforceable. By upholding reasonable covenants not to compete between attorneys, courts recognize the competing interests of all interested parties: attorneys, law firms, clients, and the public.

Furthermore, attorneys, like other professionals, should keep the promises they make to each other. The legal profession's stability and its ability to meet the needs of clients depend upon the integrity of lawyers' dealings with each other. Enforcement of reasonable restrictive covenants ensures that integrity. The courts, therefore, should enforce reasonable restrictive covenants not to compete.

> *It is noble and daring to embark on a career of law by cutting the umbilical cord that ties one to an employment contract. But taking the heart and soul of the benefactor is immoral, illegal and repulsive. If they want their own firm, let them get their own clients.*[180]

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180. Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 382 A.2d 1226, 1233 (Pa. Super. Ct. 1977) (Spaeth, J., concurring) (quoting trial court) (emphasis added).