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

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

CHARLES E. CANTU*
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have been written.
Clients are not merchandise. Lawyers are not tradesmen. They have nothing to sell but personal service. An attempt, therefore, to barter in clients would appear to be inconsistent with the best concepts of our professional status.  

I. INTRODUCTION

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

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

1. New York County Lawyer's Ass'n, Comm. on Professional Ethics, Op. 109 (1943); see also ABA Comm. on Professional Ethics, Formal Op. 300 (1961) (stating that restrictive covenants in attorney contracts were unethical despite lack of express prohibition in Canons of Ethics). ABA Formal Opinion 300 states:
   [A] general covenant restricting an employed lawyer, after leaving the employment from practicing in the community for a stated period, appears to this Committee to be an unwarranted restriction on the right of a lawyer to choose where he will practice and inconsistent with our professional status. Accordingly, the Committee is of the opinion it would be improper for the employing lawyer to require the covenant and likewise for the employed lawyer to agree to it.


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

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

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

A lawyer shall not participate in offering or making:

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

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

MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 5.6 (1983).
clauses between attorneys. The first view is exemplified by two Oregon appellate court cases and the landmark New York Court of Appeals' decision, *Cohen v. Lord, Day & Lord*, whereby noncompetition clauses between attorneys were found void as against public policy.

The second view adopts a contrary position, questioning

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

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


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

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


6. Cox, *supra* note 4, at 1, col.2. A "reasonable" restrictive covenant that may be enforceable in a commercial setting or between non-lawyers is analyzed differently when between lawyers. This difference stems from the ethical standards prohibiting lawyers from restricting other lawyers' rights to practice law. See Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 147 (N.J. 1992) (recognizing that ABA ethical opinions of 1960s "set stage" for contemporary rules prohibiting restrictive covenants among attorneys); see also Dwyer, 396 A.2d at 499 ("A lawyer's clients are neither chattels nor merchandise, and his practice and good will may not be offered for sale.") (citing *Henry S. Drinker, Legal Ethics* 189 (1953)); cf. Michael G. Getty, *Enforceability of Noncompetition Covenants in Physician Employment Contracts*, 7 J. LEGAL MED. 235, 250-53 (1986) (discussing public interest in context of postemployment covenants among physicians).

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

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

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

10. For complete coverage of the *Cohen* decision, see *infra* notes 99-115 and accompanying text. For a discussion of the court decisions in the 1990s that upheld the enforceability of postemployment restrictive covenants between attorneys, see *infra* notes 119-63 and accompanying text.
permissibility of noncompetition clauses between lawyers. Part VIII discusses the adverse impact resulting from the application of the balancing test. Finally, in Part IX, this Article concludes that the legal profession is inherently different from any other profession, mandating that attorney noncompetition clauses be treated differently in order to protect the best interests of the client.

II. STATE OF THE MARKET

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

11. For an analysis of the application of the balancing test, see infra notes 164-82 and accompanying text.
12. For an analysis of the adverse effects resulting from application of the balancing test, see infra notes 183-209 and accompanying text.
13. For this Article's conclusion, see infra note 210 and accompanying text.
14. William H. Rehnquist, The Legal Profession Today, 62 IND. L.J. 151, 152 (1986); see also Johnson, supra note 4, at 4-6 nn.2-4 (discussing structural changes in legal environment and lawyers' increased mobility); The Roads Taken, HARV. LAW SCHL. BULL., No. 3, at 15 (1986) ("Law is a very mobile profession . . . . The road not taken is not gone forever . . . . [T]oday's graduates are likely to revise their choices along the way.").
15. See Doug Lavine, Who Corrals Clients When Law Firms Split?, NAT'L L.J., Apr. 30, 1979, at 8 (defining "split-offs"); see also Johnson, supra note 4, at 6 n.8 ("The events and reasons giving rise to termination of attorney's employment are myriad.").
16. See Howard v. Babcock, 863 P.2d 150, 157 (Cal. 1993) (recognizing sweeping changes in practice of law); Johnson, supra note 4, at 6 (labeling attorney departure as "break-up"); see also Eleanor Kerlow, Messy Breakup Takes Nasty Turn, LEGAL TIMES, June 13, 1988, at 3, col. 1 (describing departure as "break-up"). See generally Laurle S. Terry, Ethical Pitfalls and Malpractice Consequences of Law Firm Breakups, 61 TEMPLE L. REV. 1055, 1117-22 (1988) (examining ethical consequences of law firm "break-ups"). Recently, headlines have chronicled the increasing incidence of lawyers departing their firms to join competing firms or start their own firms. Id. at 1056.
Law firms are under siege. The traditional view of the law firm as a stable institution with an assured future is now challenged by an awareness that even the largest and most prestigious firms are fragile economic units facing a myriad of risks in their quests to survive and prosper. No longer can the graduate join a major firm with the sanguine assumption that the firm will not experience major upheavals, turnovers in lawyers, or, in extreme cases, receivership.
Id. § 1.1, at 1; see also Johnson, supra note 4, at 6 (using term "lateral hire" to describe partnership departures); Rita Henley Jensen, The Urge to Merge Isn't Gone, NAT'L L.J., Aug. 15, 1988, at 1, col. 1 (discussing "lateral hiring").
18. Such disputes may precipitate lawsuits filed by departing attorneys against their former firms or remaining partners. E.g., Howard, 863 P.2d at 152 (withdrawing
larities of many of these departures make for interesting reading. For example, in one case a departing partner came to his firm on Thanksgiving weekend with a suitcase to remove client files. In another case, a lawyer physically assaulted a departing partner and threw him out of the office. Similar examples abound: Attorneys tortiously interfered with their former firm's contractual obligations and falsely represented to clients that the firm had split up; a lawyer falsely told his clients he was still associated with his former firm; a personality conflict between a partner's son and the remaining partners resulted in the breakup of a nationally known law firm; a lawyer intentionally changed the filing cabinet locks to prevent other partners from accessing the files; lawyers carted away over 2000 client files late at night; and a partner informed ing partner brought action against remaining partners for accounting, damages and declaration of rights); Miller v. Foulston, Siefkin, Powers & Eberhardt, 790 P.2d 404, 404 (Kan. 1990) (involving former partner suing firm for wrongful discharge and fraud); Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 144 (N.J. 1992) (concerning former partner's lawsuit for compensation due under service termination agreement). Law firms have also resorted to litigation in an attempt to enforce partnership agreements or otherwise protect the firm's interests. E.g., Williams & Montgomery, Ltd. v. Stellato, 552 N.E.2d 1100, 1101 (Ill. App. Ct. 1990) (attempting to enjoin former partners from soliciting clients of the firm); Gray v. Martin, 663 P.2d 1285, 1286 (Or. Ct. App. 1983) (seeking accounting of withdrawing attorney's fees collected after departure); see also Johnson, supra note 4, at 7 (discussing bitter disputes over clients by existing partner and former firm); Lavine, supra note 15, at 1, col. 4 (describing ex-partner's struggle with former firm over clients). Many of the most bitter litigation fights today involve clients, funds and even office space claimed by both the firm and the departing attorney. Tamar Lewin, When Law Partners Split Up, N.Y. TIMES, Nov. 26, 1984, at D12, col. 3.


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


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

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

III. The Traditional View

A covenant not to compete in a partnership agreement usually requires a departing partner to refrain from associating with a competitor or establishing a competing business for a specific period of time in a particular geographical area. Problems concerning cov-
enants not to compete have been before the courts for more than 500 years. Nevertheless, the emergence of similar covenants in postemployment agreements between attorneys is a relatively recent phenomena whose genesis can be traced to the early twentieth century.

A. The Canons and the Pre-1960s “Balancing Test”

The Alabama State Bar Association promulgated the first code

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

1) restraints “ancillary” to valid underlying contracts, including, in addition to employment agreements . . . assignment of patent rights, leases of property for business purpose, and more recently employee-retirement agreements;

2) restraints not “ancillary” to valid underlying contracts, but typically undertaken to divide territory or markets, limit production, pool profits, fix prices, or buy out potential competitors. “Nonancillary” arrangements did not come to be commonly regarded as subject to the traditional “restraint of trade” doctrines either in the United States or England until the nineteenth century.

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

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

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


32. Professor Stephen E. Kalish asserts that prior to the promulgation of the Model Code of Professional Responsibility, the enforceability of noncompetition clauses in attorney contracts was governed by a “balancing test” approach. Kalish, supra note 31, at 427-28.
of professional ethics in 1887. The Alabama Code of Professional Ethics required a lawyer to guard against the "rough tongue," ex-tol the morality of a minister, and avoid the display of a special concern for the jurors' uncomfortable situation. The Alabama Code, however, had no explicit provision dealing with postemployment restrictive covenants between lawyers. Moreover, the 1908 Canons of Professional Ethics, the first attempt by the American Bar Association (ABA) to codify a uniform body of ethical rules, lacked such a provision.

Prior to the 1960s, courts rarely distinguished between restrictive covenants among attorneys and restrictive covenants in other professions. Following the First Restatement of Contracts, published in 1932, courts frequently enforced covenants that were not overbroad or did not create undue hardship. Reasonable cove-
nants were upheld as valid. The courts defined reasonableness by balancing the competing interests.

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

The Restatement employs the following illustration:

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

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

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

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

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

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


44. See Hicklin v. O'Brien, 138 N.E.2d 47, 52 (Ill. App. Ct. 1956) (finding it unnecessary to determine whether non-competition clause violated Canons of Professional Ethics); see also Kalish, supra note 31, at 427 (discussing early cases rejecting barter rationale).
B. Pre-Code Ethic's Opinions: The Evolution of a Jurisprudential Change in Legal Ethics

The 1908 Canons of Professional Responsibility made no express reference to restrictive covenants between attorneys and the issue was not addressed in a formal ethics opinion until 1961. In its Formal Opinion 300, the ABA Committee on Professional Ethics considered whether an attorney and an employer may enter into an agreement that contains a restrictive covenant preventing the employee from practicing law for a specified period of time after the employment terminates. Relying heavily on the language of Canon 7, which stated that “[e]fforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the Bar,” the Committee concluded that the agreement constituted a per se violation of professional ethics.

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

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

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

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


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

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

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

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

52. Id.

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

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

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


58. Id.; see also Kalish, supra note 31, at 430-31 (discussing rationale of Informal Opinion 1072).
C. Adopting the Model Code

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

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

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

The ABA cited Formal Opinion 300 in a footnote to DR 2-108.

59. See Model Code of Professional Responsibility DR 2-108(A) (1969) (discussing agreements restricting practice of lawyer); Kalish, supra note 31, at 431 (discussing Committee's firm stand on noncompetition clauses). See generally Draper, supra note 4, at 163-65 (discussing impact of DR 2-108(A)).

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


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

63. See id. at n.93. Footnote 93 reads, in part:
[A] general covenant restricting an employed lawyer, after leaving the employment, from practicing in the community for a stated period, appears to this Committee to be an unwarranted restriction on the right of a lawyer to choose where he will practice and inconsistent with our professional status. Accordingly, the Committee is of the opinion it would be improper for the employing lawyer to require the covenant and likewise for the employed lawyer to agree to it.

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

64. Kalish, supra note 31, at 432.

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

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

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

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

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

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


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

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

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

70. Gross, supra note 69, at 279-80.
Model Rule 5.6 provides:

A lawyer shall not participate in offering or making:

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

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

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

While expressing the policy concerns voiced in ABA Formal Opinion 300 and Informal Opinion 1072, the comment to Model Rule 5.6 indicates that the rule is intended to rearticulate the language and spirit of DR 2-108. The comment states that “[a]n agreement restricting the right of partners or associates to practice


72. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6.


In Anderson, the Supreme Court of Iowa noted that:

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

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

75. See Kalish, supra note 31, at 433 (discussing comments to Model Rule 5.6).
after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer.”

States following the Model Rules have therefore reached the same conclusion as jurisdictions adopting the Model Code of Professional Responsibility; postemployment restrictive covenants are per se unenforceable.

IV. ARE LAWYERS DIFFERENT?

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

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

76. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6 cmt. (1983).
77. Texas has adopted a modified version of the Model Rules of Professional Responsibility. The Texas equivalent to Model Rule 5.6, Texas State Bar Rule 5.06, contains an exception that permits a restrictive covenant that is part of a settlement of a disciplinary proceeding against a lawyer. Texas Rule 5.06 states:

A lawyer shall not participate in offering or making:
(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
(b) an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a suit or controversy, except that as part of the settlement of a disciplinary proceeding against a lawyer an agreement may be made placing restrictions on the right of that lawyer to practice.


78. See LEONARD G. ARCHER, ETHICAL OBLIGATIONS OF A LAWYER 35 (1910) (discussing how lawyers differ socially).
79. Id.
80. Id. at 36.
81. Id.
82. See HILLMAN, supra note 17, at 29 (discussing unique nature of prohibition on lawyer’s restrictive covenants).
accountants and physicians frequently sign noncompetition agreements. Some commentators assert that the policy arguments for setting lawyers apart from other professions are tenuous, and question whether the clients' freedom to choose their desired professional is any less crucial when the professional is a physician, rather than a lawyer.

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

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

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


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

87. Id. at 500. According to the court, the application of commercial stan-
Dwyer court was persuaded by the policy arguments supporting the adoption of DR 2-108(A) of the Model Code of Professional Responsibility. Consequently, the Dwyer court held the restrictive covenant to be “void as against public policy.”

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

The New Jersey Superior Court has also refused to extend the Dwyer rationale to accountants. Relying on the reasonableness standards to lawyers' restrictive covenants is precluded by strong policy considerations. Id. Because the attorney-client relationship is consensual and "highly fiduciary on the part of counsel," an attorney may do nothing that restricts the clients right to freely choose counsel. Id. “No concept of the law is more deeply rooted.” Id.; see also Kalish, supra note 31, at 434-38 (discussing Dwyer decision).

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

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

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

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


91. Id. at 618.

92. Id.

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

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

test, the court in *Mailman, Ross, Toyes & Shapiro v. Edelson*\(^6\) was uncertain as to whether the potential injurious effect on the public, which justified the reasonableness standard, warranted the adoption of a per se approach.\(^7\) Although the *Edelson* court came close to extending the *Duyer* rationale to accountants, such a per se rule was rejected.\(^8\)

V. The Cornerstone: *Cohen v. Lord, Day & Lord*

In 1985, Richard G. Cohen, partner and head of the tax department at the law firm of Lord, Day & Lord, resigned from the firm to become a partner in a rival New York City law firm.\(^9\) Cohen's partnership agreement with Lord, Day & Lord entitled withdrawing partners to their proportionate share of the profits from unpaid fees for services they had rendered prior to their departure.\(^10\) Upon requesting this "departure compensation," Cohen was informed that he had surrendered his right to such compensation by accepting employment with a rival firm.\(^11\) The firm relied on a forfeiture-for-competition clause contained in the partnership

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97. *Id.* at 80 (demonstrating propriety of reasonableness standard). The court stated:
Accountants are not commercial business people like the salespersons restricted by noncompetition agreements in [other cases]. Accountants, like doctors and lawyers, are engaged in a profession which necessarily requires clients to reveal personal and confidential information to them in the course of the professional relationship. Like the lawyer-client relationship characterized in *Duyer*, the accountant-client relationship is also consensual and fiduciary, and the right of the client to repose confidence in the accountant of his or her choice should not readily be circumscribed. It is this distinction between restrictive covenants in a commercial or business setting, where primarily economic interests are at stake, and those binding professionals who depend largely on unconditional confidential relationships to serve their clients satisfactorily, which underscores the greater degree of injury to the public that may occur in the latter instance.
*Id.* (footnote omitted); see also *Kalish*, supra note 31, at 436-37 (discussing *Edelson* decision and noting court's uncertainty with decision to apply New Jersey reasonableness test).
98. *Edelson*, 444 A.2d at 78.
100. *Id.* The clause was inserted in the partnership agreement to protect against the possibility of automatic dissolution. *Id.; see also UNIF. PARTNERSHIP AGREEMENT § 29 (1993) ("The dissolution of a partnership is the change in the relation of the parties caused by any partner ceasing to be associated in the carrying on . . . of the business."); REV. UNIF. PARTNERSHIP ACT §§ 601-603 (1994) (discussing partner's dissociation generally).*
101. *Cohen*, 550 N.E.2d at 411. Lord, Day & Lord also complained that Cohen took an associate attorney and several clients with him to his new firm. *Id.*
agreement to support its position that Cohen had relinquished his right to the fees.\footnote{102} In response, Cohen brought suit against the law firm to recover the amount due under the partnership agreement.\footnote{103}

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

\footnote{102} \textit{Id.} The clause provided:
Notwithstanding anything in this Article \ldots to the contrary, if a Partner withdraws from the Partnership and without the prior written consent of the Executive Committee continues to practice law in any state or other jurisdiction in which the Partnership maintains an office or any other contiguous jurisdiction, either as a lawyer in private practice or as a counsel employed by a business firm, he shall have no further interest in and there shall be paid to him no proportion of the net profits of the Partnership collected thereafter, where for services rendered before or after his withdrawal. There shall be paid to him only his withdrawable credit balance on the books of the Partnership at the date of his withdrawal, together with the amount of his capital account, and the Partnership shall have no further obligation to him.

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

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

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


\footnote{104} \textit{Cohen,} 534 N.Y.S.2d at 161.

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

\footnote{106} \textit{Cohen,} 550 N.E.2d at 410.

\footnote{107} \textit{Id.} at 411.
Although the agreement did not expressly prohibit a departing partner from practicing law, the monetary penalty for practicing with a competitor imposed a financial disincentive that constituted, in effect, an impermissible restriction on the practice of law. Nevertheless, the \textit{Cohen} court warned that the holding should be construed narrowly and should not be transformed "into something broader than it is." The court emphasized that it addressed only the particular clause at issue in the context of the particular professional relationship.

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

108. \textit{Id.} In invalidating the forfeiture-for-competition provision, the court noted:

\textit{[W]hile the provision in question does not expressly or completely prohibit a withdrawing partner from engaging in the practice of law, the significant monetary penalty it exacts, if the withdrawing partner practices competitively with the former firm, constitutes an impermissible restriction on the practice of law. The forfeiture-for-competition provision would functionally and realistically discourage and foreclose a withdrawing partner from serving clients who might wish to continue to be represented by the withdrawing lawyer and would thus interfere with the client's choice of counsel.}

\textit{Id.; see also New York Code of Professional Responsibilities DR 2-108(A) (mirroring Model Code DR 2-108 in prohibiting a lawyer from "participat-ing in a[n] ... agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits").}

109. \textit{Id.} The court expressly limited its holding and cautioned against a "categorical interpretation or application." \textit{Id.}

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

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

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


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

114. Id. at 999.

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


117. Id. at 414. The agreement at issue in Judge included a termination pay provision for payment upon termination of employment. Id. at 413. The provision applied to all attorneys employed with the firm for at least ten years. Id. The agreement also provided that the terminated employees could not engage in competition within a thirty mile radius of any office of the firm for a period of five years. Doing so would result in the forfeiture of 75% of all future payment of termination benefits. Id.
therefore unenforceable. 118

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

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

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


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


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

A. Ethical Considerations

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

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

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

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

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

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

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

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


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

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

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

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

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131. *Id.*

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

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

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

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

134. *Id.* at 848.
Any partner may, upon or in anticipation of a dissolution of the partnership, agree that he will not carry on a similar business within a specified county or counties, city or cities, or a part thereof, where the partnership business has been transacted, so long as any other member of the partnership, or any person deriving title to the business or its goodwill from such other member of the partnership carries on a like business therein.  

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

135. CAL. BUS. & PROF. CODE § 16602 (Deering 1976). Compare TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon Supp. 1994) with CAL. BUS. & PROF. CODE § 16602. Section 15.50 of the Texas Business and Commercial Code states: Notwithstanding Section 15.05 of this code, a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is reasonably necessary to protect the goodwill or other business interest of the promisee.

136. Haight, 285 Cal. Rptr. at 847-48. The California Supreme Court, in Howard, gave a similar reading to section 16602, stating: "The Haight court's construction [of California State Bar Rules of Professional Conduct Rule 1-500] is consistent with Business and Professions Code section 16602, permitting agreements between partners restricting competition." Howard v. Babcock, 863 P.2d 150, 156 (Cal. 1993). The Howard court rejected the public policy arguments against forfeiture for competition clauses, relying instead on "a revolution in the practice of law that has occurred requiring economic interests of the law firm to be protected as they are in other business enterprises." Id. But see, e.g., Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598, 601 (Iowa 1990) (citing Cohen for proposition that restrictions on lawyer's right to practice are detrimental to clients); Dwyer v. Jung, 336 A.2d 498, 501 (N.J. Super. Ct. Ch. Div.) (criticizing treatment of issue as business proposition while failing to recognize underlying ethical considerations within legal profession), aff'd, 348 A.2d 208 (App. Div. 1975); Denburg v. Parker Chapin Flattau & Klimpl, 624 N.E.2d 995, 998-1000 (N.Y. 1993) (recognizing law firm's legitimate economic and survival interests while invalidating a forfeiture-for-competition clause that restricted client's free choice of counsel); cf. Mailman, Ross, Toyes & Shapiro v. Edelson, 444 A.2d 75, 80 (N.J. Super. Ct. Ch. Div. 1982) (addressing restrictive covenant as applied to accountant, stating that "[i]t is this distinction between restrictive covenants in a commercial . . . setting, where primary economic interests are at stake, and those binding professionals who depend largely on unconditional confidential relationships . . . which underscores the greater degree of injury to the public that may occur in the latter instance"). Justice Kennard, dissenting in Howard, lambasted the majority's analysis for narrowly focusing on the business interests of the law firm. Howard, 863 P.2d at 161 (Kennard, J., dissenting). Justice Kennard stated: Although the law is a business in the sense that an attorney in a law firm earns a living by practicing law, it is also and foremost a profession, with
In reaching its conclusion, the court balanced the competing interests of the departing attorney and the employer-law firm and concluded that the forfeiture penalty did not violate the rules of professional conduct of the State Bar. In balancing the equities, the court stated that the agreement allows the departing attorney to practice law anywhere and to accept employment from any client “who desires to retain him.” Additionally, the agreement preserved the stability of the law firm by making the withdrawing partner’s share of capital and accounts receivable available to replace the lost income from clients taken by the withdrawing partner. The court reasoned that the monetary penalty could not be interpreted as prohibiting the ex-partners from practicing law, or from representing any client, because the agreement allowed the departing attorney to compete against the employer firm. Only an agreement that required the attorney to completely refrain from practicing law would be an impermissible violation of the Rules of Professional Conduct.

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

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

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

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


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

141. *Id.* Many other courts addressing similar “financial disincentive” provisions have rejected the argument that such provisions should be construed differently from absolute prohibitions on the right to practice. See, e.g., *Anderson* v. *Aspelmeier, Fisch, Power, Warner & Engberg*, 461 N.W.2d 598, 601 (Iowa 1990) (stating partnership agreement allowing reduction of former partner’s share served solely as penalty for continuing legal practice); *Jacob* v. *Norris, McLaughlin & Marcus*, 607 A.2d 142, 150 (N.J. 1992) (stating that agreement creating disincentive to accept representation violates Rules of Professional Conduct); *Denburg* v. *Parker Chapin Flattau & Klimpl*, 624 N.E.2d 995, 998 (N.Y. 1993) (stating financial disincentives are objectionable because they interfere with client’s choice of counsel); *Gray* v. *Martin*, 663 P.2d 1285, 1290 (Or. Ct. App.) (stating agreement
By refusing to interpret the applicable Rule of Professional Conduct "in such a narrow fashion," the California Court of Appeals all but rendered Rule 1-500 impotent. In effect, the California court emphasized the business code at the expense of the ethical code. After *Haight*, a law firm employer could include a forfeiture clause that would discourage even the noblest of attorneys.

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

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

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

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

143. 863 P.2d 150, 151 (Cal. 1993).
144. *Id.*
145. *Id.*
146. *Id.* at 160.
Like the *Haight* court, the court in *Howard* found it unreasonable to distinguish lawyers from other professionals who also owe a duty of loyalty to their clients.\(^{147}\) Consequently, the court rejected the per se approach and expressly stated that it was seeking a balance between the client's interest in free choice of counsel and the law firm's interest in a stable business environment.\(^{148}\) According to the *Howard* court, an absolute ban on competition would be per se impermissible. An agreement that limits competition within a specific geographic area, however, may be reasonable.\(^{149}\)

**B. Equitable Considerations: Unclean Hands**

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

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147. Id.

148. Id.

149. Id.


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

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

154. *Id.*

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

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

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

VII. Analysis

A. Applying the Balancing Test

In addition to the California decisions in *Haight* and *Howard*, numerous commentators and several dissenting opinions have rejected the conventional wisdom of the per se approach of unenforceability. Instead, they argue that postemployment restrictive...
covenants between lawyers should be subject to a balancing test similar to that applied to restrictive covenants in other professions.\textsuperscript{165} The instigators of this legal ethics revolution contend that a court can determine the reasonableness of a restrictive covenant by application of a simple balancing test.\textsuperscript{166} The test for enforecability, critics of the per se approach assert, should be reasonableness based on a balancing of the competing interests.\textsuperscript{167}

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

\textsuperscript{165} For further discussion of this argument, see sources cited supra note 164.

\textsuperscript{166} See Howard v. Babcock, 863 P.2d 150, 160 (Cal. 1993) (purporting to balance “interest of clients in having the attorney of choice, and the interest of law firms in a stable business environment”); see also Blake, supra note 29, at 655-84 (discussing restrictive covenants); Kalish, supra note 31, at 427-38 (discussing balancing test as applied to noncompetition clauses between attorneys); Draper, supra note 4, at 161 (rejecting per se approach in favor of reasonableness test); cf. Getty, supra note 6, at 244-53 (advocating reasonableness approach to financial forfeiture clauses between physicians).

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

\textsuperscript{168} 264 A.2d 53, 56 (N.J. 1970).


\textsuperscript{170} See Blake, supra note 29, at 627 (outlining viewpoints and interests and balancing these interests).
B. Protecting the Law Firm’s Interests

1. Client Confidences

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

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

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

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

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

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

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

¹⁷⁵ Model Rules of Professional Conduct Rule 1.6(a) (1983).

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

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

2. Lost Revenue and Trade Secrets

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


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

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


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

181. Cohen, 550 N.E.2d at 413; see also Post v. Merrill Lynch, Pierce, Fenner & Smith, 397 N.E.2d 358, 360-61 (N.Y. 1979) (stating that employer should not be able to use anticompetition clause offensively).
impede the client's freedom to choose counsel.\textsuperscript{182}

VIII. RECONCILING THE CONFLICT: AD HOC BALANCING

A. Public Interest

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

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

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{182} See Cohen, 550 N.E.2d at 412 (reasoning that client should have freedom of choice); Post, 397 N.E.2d at 360-61 (stating that covenant should not be used to "economically cripple" former employee).
\item \textsuperscript{183} See Orkin Exterminating Co. v. Murrell, 206 S.W.2d 185, 188-89 (Ark. 1947) (stating that restraint of trade is unenforceable if it violates public interest); Wren v. Pearah, 249 S.W.2d 985, 987 (Ark. 1952) (finding restriction on trade void as contrary to public-interest). See generally Scrantom & Wilson, supra note 29 (discussing evolution of judicial attitudes toward covenants not to compete and emergence of reasonableness test).
\item \textsuperscript{184} Lewis, supra note 169, at 217.
\item \textsuperscript{185} For an examination of the development of the law regarding the unenforceability of restrictive covenants among attorneys, see supra notes 45-118 and accompanying text.
\item \textsuperscript{186} See Hazard & Hodes, supra note 73, at 486. Hazard and Hodes note that Model Rule 5.6(a) was designed, in part, "to protect lawyers, particularly young lawyers, from bargaining away their right to open their own offices after they end an association with a firm or a legal employer." Id. The authors go on to note, however, that the most important function of Rule 5.6 is in protecting "future clients against having only a restricted pool of attorneys from which to choose." Id.
\item \textsuperscript{187} See, e.g., Eureka Laundry Co. v. Long, 131 N.W. 412 (Wis. 1911). In Long, the Supreme Court of Wisconsin addressed an employee's contract that contained a provision not to service the employer's customers during employment and for two years after termination. The court upheld the contract as being reasonably necessary to protect the employer's business while not unduly infringing on the employee's rights. Id. See generally Blake, supra note 30, at 686 (discussing injury to society from restrictive covenants). For a discussion of the general enforceability of reasonable restrictive covenants, see supra notes 39-42 and accompanying text.
\end{enumerate}
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the employer's interest against the burden on the employee. 188
The third prong of this balancing test, injury to the public, has
been largely ignored. Once a court determines that a restrictive
 covenant is reasonable, the court rarely proceeds to consider poten-
tial injury to the public. 189 Commentators argue that this is not
surprising because the balancing of competing interests will always
maximize the interests of the parties involved.190

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

B. Separate But Equal

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

C. Cost-Benefit v. Freedom of Choice

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

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

\(^{195}\) See Haight, 285 Cal. Rptr. at 850.

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

\(^{197}\) Cox, supra note 4, at 13, col. 1 (quoting Professor Vincent R. Johnson).

\(^{198}\) Blake, supra note 29, at 687.
is blind to the personal idiosyncrasies that make a particular lawyer attractive to a client. Suppose client X prefers lawyer Y simply because he feels comfortable with her. If lawyer Y departs from the employer-firm and is expressly prohibited from serving client X, or dissuaded from doing so through a financial disincentive, then the restrictive agreement has effectively limited X’s access to counsel. How much weight should be allocated to a client’s freedom of choice?

Merely balancing the interests of the departing attorney and the employer-law firm relegates the client to the unfortunate status of merchandise.199 Clients, however, are not merchandise. “Lawyers are not tradesmen. They have nothing to sell but personal service. An attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status.”200 Public policy, as embodied in the Model Code and Model Rules, requires that the public have its choice of counsel.201

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

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

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


201. See, e.g., Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 149 (N.J. 1992) (“Because the client’s freedom of choice is the paramount interest to be served by the [Rules of Professional Conduct], a disincentive provision is as detrimental to the public interest as an outright prohibition.”); Denburg v. Parker Chapin Flattau & Klimpl, 624 N.E.2d 995, 998 (N.Y. 1993) (asserting that restrictions against competition are “objectionable primarily because they interfere with client’s choice of counsel”); Cohen, 550 N.E.2d at 410 (asserting public must have
restrictive covenants that recognize a guaranteed property right to clients overlooks the most important consideration: the clients' freedom to choose his or her own counsel.\textsuperscript{202}

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

\textsuperscript{202} See Cox, supra note 4, at 13, col. 1 (quoting Professor Vincent R. Johnson).

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

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

\textsuperscript{205} See Hazard & Hodes, supra note 73, at 822 (discussing covenants not to compete within legal profession).

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

\textsuperscript{207} Mailman, Ross, Toyes & Shapiro v. Edelson, 444 A.2d 75, 80 (N.J. Super. Ct. Ch. Div. 1982). In Edelson, an accounting firm sought injunctive enforcement of a restrictive covenant against the defendant, its former employee. Id. at 75. The Superior Court of New Jersey addressed the enforceability of restrictive covenants among accountants and found that the accountant-client relationship, like the attorney-client relationship, is consensual and fiduciary. Id. at 80. Consequently, the court deemed it inappropriate to prevent the firm's clients from exercising their free choice to leave the firm and seek the accounting services of the defendant. Id. The court, however, refused to accept a per se rule of impermissibility. Id.
According to ethics opinions, the client market can be ethically divided only through "individual performance and the establishment of a well-merited reputation for professional capacity and fidelity to trust." 208 Strong public policy principles articulated in the Code and Rules prohibit the use of restrictive covenants. Because the restrictive covenants injure the public, they fail to satisfy the third prong of the reasonableness test. 209 The first two prongs in the reasonableness test, although probative, are not conclusive. The question of reasonableness, when lawyers are involved, necessarily turns on the final prong— injury to the public. If a state chooses to reject the policies embodied in DR 2-108 and Model Rule 5.6, the policy arguments that focus on injury to the public would not exist, leaving just the first two prongs of the balancing test. Unfortunately, in such states the best interests of the client and the public will not be adequately safeguarded.

IX. Conclusion

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

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


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

210. Archer, supra note 78, at 35.
mandates be reconciled with modern restrictive covenant jurisprudence.

X. Appendix

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

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

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

(1) Is a part of an employment, shareholders’, or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship; or

(2) Requires payments to a member upon the member’s retirement from the practice of law; or

(3) Is authorized by Business & Professions Code sections 6092.5, subdivision 1, or 6093.212

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

Connecticut: Connecticut adopts the language of Model Rule 5.6.214

213. Id.
FLORIDA: Rule 4-5.6 of the Florida Rules of Professional Conduct is identical to Model Rule 5.6.\textsuperscript{215}

IOWA: Iowa adopts the language of the Model Code DR 2-108.\textsuperscript{216}

MARYLAND: Rule 5.6 of the Maryland Rules of Professional Conduct, which governs restrictions on an attorney's right to practice law, adopts the language of the Model Rule 5.6.\textsuperscript{217} Maryland had allowed agreements between attorneys that

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

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

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

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

\textsuperscript{215.} RULES REGULATING THE FLORIDA BAR Rule 4-5.6 (1993).

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


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


\textsuperscript{220.} See Pennsylvania Bar Ass'n Comm. on Legal Ethics and Professional Responsibility, Op. 88-249 (undated) (stating law firm cannot create employment contract that requires departing attorney to pay law firm 50% of fees received from pirated client).
ceeding against a lawyer.\footnote{Recently, article 10, section 9 of the State Bar Rules (Texas Disciplinary Rules of Professional Conduct) was adopted and former article 10, section 9 of the State Bar Rules (Texas Code of Professional Responsibility) was repealed, effective January 1, 1990.}\footnote{Virginia DR 2-106 traces the language of Model Code DR 2-108.}

\footnotetext{221. TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 5.06 (1991).}

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

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