NOTE

SHOULD MINNESOTA ABANDON THE PER SE RULE AGAINST LAW FIRM NONCOMPETITION AGREEMENTS?

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I. INTRODUCTION

As the practice of law becomes increasingly competitive, the profession is changing dramatically.\(^1\) Less than one year after his appointment

\(^1\) The author received the 1996 Jonathan Weitzman Professional Responsibility Writing Award for this Note.


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as Chief Justice of the U.S. Supreme Court, William Rehnquist said, "Institutional loyalty appears to be in decline. 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 and to take revenue-producing clients with them." The dramatic changes in the profession are reflected by the breakup of large, established law firms, the creation of an unprecedented free-agent market for rainmaker partners who bring in bulging portfolios of well-paying clients, and the increasing structural pressures on law firms to compete for clients. The more the practice of law is organized on a business basis, the more likely it is that ethical considerations will conflict with profit-driven activities. The professional ethical codes that constrained these pressures in the past no longer seem to function.

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3. See Hillman, supra note 1, § 1:1, ("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."); see also Steven P. Handler, et al., The Ethics of Solicitation of Business from Corporate Clients, 5 GEO. J. LEGAL ETHICS 423, 423 (1991) ("Both clients and lawyers have increasingly become willing to break longstanding ties to law firms. At the same time, those firms have had to grapple with skyrocketing costs associated with computerization, inflated rents and salary wars for top law school graduates. These changes have ushered in the 'Era of the Rainmaker.'"; James W. Jones, The Challenge of Change: The Practice of Law in the Year 2000, 41 VAND. L. REV. 683, 688 (1988) ("The concept of the 'portable practice' and the increasing willingness of lawyers to leave their current firms to work for the highest bidding competitors have created a whole new growth industry in legal recruitment services."); Briefly... NAT'L L.J., Oct. 14, 1991, at 47, 48 (describing an "unseemly fight over a projected $4 million to $6 million fee" that exploded between two nationally prominent firms over the manner in which a departing partner took clients and cases to that partner's new firm); Gail Diane Cox, Smile When You Say That, Partner, NAT'L L.J., Apr. 3, 1989, at 1 (detailing the mudslinging between Lord, Day & Lord and Winthrop, Stimson, Putnam & Roberts "[i]n what may have been the most embarrassing performance of 1988 by two silk-stocking firms"); Douglas Linton, Loyal No Longer, MANHATTAN LAW., Apr. 1991, at 3 (describing an interview with a former partner of Milbank, Tweed, Hadley & McCloy, who left with an estimated $5 million in client business to join another Manhattan law firm).

4. See Rehnquist, supra note 2, at 154 ("It is only natural... that as the practice of law in large firms has become organized on a more and more of a business basis, geared to the maximization of income, this practice should on occasion push towards the margins of ethical propriety... [T]he stronger the pressure to maximize income the more difficult it is to avoid the ethical margins.").

5. The codes of professional responsibility for attorneys, promulgated by the American Bar Association (ABA), require that the profession's members put the
The decline of loyalty has generated at least four pernicious dividends: increased public distrust and cynicism about attorneys, increased cynicism about the law profession within the profession itself, increased business risks to law firms, and increased instability and dissolution of law firms. These form a vicious circle: as business risks to law firms increase, more attorneys feel the need to protect themselves individually by any means necessary, including leaving their firms with clients in tow. The more that attorneys protect themselves in this way, the greater the business risks become; the greater the business risks, the more attorneys feel the need to protect themselves.

Law firms of all sizes, understandably concerned about protecting their business interests, have responded to these problems by including noncompetition agreements in their partnership and employment agreements. These agreements, routinely employed by other professional firms including medical practices and accounting firms, restrict a departing partner from establishing a competing practice and from representing former clients of the firm. If that partner violates the agreement, the firm may demand restitution. The increased number of attorneys moving between firms has caused noncompetition agreements to flourish, as law firms have sought to inhibit streams of attorneys from easily transferring between firms.

client and the legal system above the attorney's own interests. This is a necessary element of professionalism and distinguishes a profession from a business. See Freeman v. Freeman, 311 N.E.2d 480, 483 (N.Y. 1974). "A profession is not a business. It is distinguished by . . . a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace . . . [and] a duty to subordinate financial reward to social responsibility . . . ."


6. See Hillman, supra note 1, § 1:1, at 1:2 ("Law firms, in short, are in turmoil, and many of their problems arise from within the firms themselves.").

7. See Penasack, supra note 5, at 890.

8. See id.

9. See id. at 891 (describing covenants not to compete in law firm partnership agreements). "Noncompetition agreements," "restraints on competition," "noncompetition provisions," "covenants not to compete," and "noncompetition covenants" are used interchangeably in this paper and, generally, in ethical rules, statutory regulations, and the common law.

10. See id.

11. See Howard v. Babcock, 863 P.2d 150, 157 (Cal. 1993) (explaining that noncompetition agreements have become common, despite the nearly universal recognition by courts and ethics committees that such agreements are unenforce-
Problematic for law firms is the adoption by courts and legal ethics committees of a per se rule that invalidates attorney noncompetition agreements as a violation of public policy.12 The rule is driven by three strong policies: clients must be free to choose and discharge their attorneys; attorneys have an unwaivable interest in freedom of movement to practice their profession;13 and the public has a justifiable interest in preventing monopolies and restrictions on production.14 The principle of client choice is cited most frequently as the primary reason for the ethical ban prohibiting the enforcement of these agreements.15 The American Bar Association addressed noncompetition agreements in 1961 and promulgated model codes, which include the per se rule.16


13. Both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct provide that clients are free to discharge their attorneys at any time and, thus, no firm or attorney may claim a possessory interest in a client. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(B)(4) (1969) (amended 1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(3) (1983). "Although the firm may refer to clients of the firm as 'the firm's clients,' clients are not the 'possession' of anyone, but, to the contrary, control who will represent them." Kelly v. Smith, 611 N.E.2d 118, 122 (Ind. 1993).

14. See Howard, 863 P.2d at 160 (finding that one purpose of the ban on noncompetition agreements is to assure attorneys the right to practice their profession where they choose); ABA Comm. on Professional Ethics, Informal Op. 1072 (1968) ("The attorney must remain free to practice when and where he will and to be available to prospective clients who might desire to engage his services.").


17. The per se ban on noncompetition agreements dates from 1961, when the ABA Committee on Professional Ethics declared that post-employment covenants restricting competition were per se invalid. ABA Comm. on Professional Ethics, Formal Op. 300 (1961). In 1969, the ABA formally adopted its Model Code of Professional Responsibility, which included a disciplinary rule addressing noncompetition agreements. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR
thirty years, courts and legislatures embraced this rule, and every state's legal ethics code prohibited the use of covenants not to compete.

Recently, however, several courts and commentators have begun a push toward abandoning the ethical prohibitions against noncompetition agreements. Since 1991, three courts have held that attorney noncompetition agreements that impose an "economic consequence"—but do not exert an outright ban on competition—are enforceable. Concurrently, a

2-108 (1969). In order to increase professionalism (or at least the perception of professionalism) in the practice of law, the ABA in 1983 adopted the Model Rules of Professional Conduct, which included a rule regarding restrictions on the right to practice law. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1983) (amended 1990). Minnesota adopted the model code in 1970 as the Minnesota Code of Professional Responsibility, which included the exact language of the model code's DR 2-108. MINN. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108 (1970). In 1985, Minnesota adopted the model rules as its Rules of Professional Conduct, and adopted model rule 5.6 verbatim as Minnesota rule 5.6, the current Minnesota rule regarding noncompetition agreements among attorneys. MINN. RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1985). Only one published Minnesota opinion has to date cited Minnesota rule 5.6. See Barna, Guzy & Steffen, Ltd. v. Beens, 541 N.W.2d 354, 356-57 (Minn. Ct. App. 1995).

18. Courts have concluded that the codes' implicit public policy goal—to protect a client's right to her choice of counsel—is advanced by invalidating noncompetition agreements that conflict with the rule. See Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 411 (N.Y. 1989); Hagen v. O'Connell, Goyak & Ball, 683 P.2d 563, 565 (Or. Ct. App. 1984). Courts and legislatures have adopted the codes to "[measure] authoritatively...a lawyer's liability to professional discipline." CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 51 (1986).

19. See Robert W. Hillman, The Law Firm as Jurassic Park: Comments on Howard v. Babcock, 27 U.C. DAVIS L. REV. 533, 535 (1994); see also Oregon State Bar Ass'n, Formal Ethics Op. 29 (1991), available in 1991 WL 279170 (finding that attorney covenants against competition are impermissible, and law firm partnerships are prohibited from requiring a withdrawing attorney to pay any penalty as a precondition to competing with former firm); OLAVI MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS No. 10126, at 493 (Supp. 1975) (citing Va. State Bar Standing Comm. on Legal Ethics, Op. 1556 (1994), in VA. CODE ANN., LEGAL ETHICS & UNAUTHORIZED PRACTICE OPINIONS (Michie Added Vol. 1996)) (stating that it is improper for an attorney to enter into an employment agreement with a law firm where the attorney was precluded from practicing in the same geographical area as that firm after the attorney had terminated employment with another firm). The Minnesota Lawyers Professional Responsibility Board, charged by the Minnesota Supreme Court with addressing issues of attorneys' professional conduct, has to date issued no formal opinions regarding these agreements.

20. See Howard v. Babcock, 863 P.2d 150, 161 (Cal. 1993); Haight, Brown & Bonesteel v. Superior Court, 285 Cal. Rptr. 845, 850 (Cal. Ct. App. 1991); Jacob v. Norris, McLaughlin & Marcus, 588 A.2d 1287, 1293 (N.J. Super. Ct. App. Div. 1991), rev'd, 607 A.2d 142 (N.J. 1992). An economic consequence is a cost, the reasonableness of which is in the eye of the beholder, assessed against a departing attorney for competing with his former partners within a prescribed geographical area. For example, a noncompetition agreement may provide that if the departing attorney chooses later to represent a client of the former firm, that attorney forfeits the right to receive any interest he otherwise would have been entitled to
rising tide of commentary in the professional literature has demanded that the per se rule be discarded and that these agreements be analyzed under the ordinary “rule of reason” test. The rule of reason's advocates claim this radical shift is necessary, because the “revolution” in the practice of law has left law firms vulnerable and in need of judicial protection.

What has been missing since 1961, however, is a serious judicial effort to balance, consistent with the per se rule's underlying philosophy, the four competing interests surrounding the enforceability of these agreements. These interests are: the client's interest in freedom of choice; the attorney's interest in professional autonomy; the law firm's interest in a stable client base and in protection from withdrawing partners; and the

in the firm's capital accounts and accounts receivable. See Haight, 285 Cal. Rptr. at 846. One commentator equates competition with “economic injury” to the former partners, because the departing attorney “can release herself from mutually incurred liabilities and then also both reap the benefits of taking former clients and dip back into her former firm’s shrinking profits by retaining a withdrawal payment,” and argues that an economic consequence is rightful so long as it provides “legitimate recompense.” See Penasack, supra note 5, at 912. However, many courts have little patience for this kind of logic. “[C]onstruing the forfeiture clause in the firm’s partnership agreement as a ‘financial disincentive’ rather than a restriction on competitive practice” is a transparent distinction. Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598, 601 (Iowa 1990) (citing Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 411 (N.Y. 1989)).


See Penasack, supra note 5, at 909-13. Penasack argues that noncompetition agreements as outright bans on competition should be distinguished from instruments Penasack assigns the more “desirable” appellation “agreements anticipating competition,” which allow competition but recognize some form of recompense for a law firm’s “loss” of clients. Id. at 891 n.11. This phrase is justified, Penasack believes, because it “more accurately reflects the agreements that are now most often in existence in law firm partnership agreements, and it neutralizes the negative implications associated with the term covenant not to compete.” Id. (citing with approval Cohen, 550 N.E.2d at 414 (Hancock, J., dissenting)). However, Penasack and Judge Hancock minimize what the Cohen majority recognizes as the inextinguishable strength of considerations of public policy: the client’s, attorney’s, and public’s respective interests. See Cohen, 550 N.E.2d at 410-13.
public’s interest in preventing monopolies and productivity restrictions.\textsuperscript{23} In commercial transaction or relationship settings, courts apply a three-part reasonableness test that balances the interests of employers, employees, and the public.\textsuperscript{24} Attorneys are treated differently: noncompetition agreements, other than those concerning retirement benefits, are per se unenforceable, and no effort is made to balance the parties’ competing interests.\textsuperscript{25}

Aside from a cursory examination by the Minnesota Court of Appeals,\textsuperscript{26} there is no case law to date in Minnesota that addresses whether these agreements among attorneys are valid. Economic pressures within the legal profession may soon force a Minnesota court to decide, in a more considered fashion, how to balance the competing interests of client, attorney, law firm, and the public. In anticipation of that inquiry, Part II of this Note surveys the development and application of the per se rule and examines the reasonableness test and recent departures from the per se rule. Part III analyzes the competing interests at stake, with special attention given to arguments that the scales be tipped in favor of law firms’ economic interests, and Part IV balances the competing interests. This Note concludes that the legal profession should not seek shelter under the rule of reason from the problems of declining institutional loyalty, because the rule of reason treats the symptoms rather than the causes of these problems. Important ethical considerations in the attorney-client relationship demand a higher standard for noncompetition agreements among attorneys than those between other professionals and business partners. This Note recommends that Minnesota courts balance the competing interests by applying the per se rule to these disputes.

\begin{itemize}
\item \textsuperscript{24} See RESTATEMENT (SECOND) OF CONTRACTS § 188(1)(a)-(b) (1981). A post-employment restrictive covenant will be found to restrain trade unreasonably if it is greater than needed to protect the promisee’s legitimate interest, if the promisee’s need is outweighed by the hardship to the promisor, or if injury to the public interest appears likely. See \textit{id}.
\item \textsuperscript{25} See, \textit{e.g.}, Denburg v. Parker Chapin Flattau & Klimpl, 586 N.Y.S.2d 107, 109 (N.Y. App. Div. 1992) (finding that a provision in a partnership agreement requiring payment upon a partner’s withdrawal is unenforceable per se as violative of public policy), \textit{aff’d as modified}, 624 N.E.2d 995, 1002 (N.Y. 1993). Agreements concerning benefits on retirement are exempt from the per se rule under both MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(A) (1969) and MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6(a) (1983) (amended 1990). Minnesota parallels the model code and model rules’ retirement exemption. See MINN. RULES OF PROFESSIONAL CONDUCT Rule 5.6(a) (1985).
\item \textsuperscript{26} See Barna, Guzy & Steffen, Ltd. v. Beens, 541 N.W.2d 354, 357 (Minn. Ct. App. 1995).
\end{itemize}
II. DEVELOPMENT AND APPLICATION OF THE PER SE RULE

A. Regulation of Restraints on Competition

Noncompetition agreements raise restraint of trade issues that have been before courts for more than five centuries, and consequently, there is a wealth of authority on the subject. In most jurisdictions, including Minnesota, the question of the enforceability of noncompetition covenants is determined by principles of common law. Only a few states, including California, Colorado, and Texas, have enacted statutes to regulate noncom-

27. See Blake, supra note 15, at 626. "The common law's policy against restraint of trade is one of its oldest and best established." RESTATEMENT (SECOND) OF CONTRACTS: RESTRAINT OF TRADE introductory note at 35 (1981); see also Alexandra Sowell, Covenants Not to Compete: A Review of the Governing Standards of Enforceability After DeSantis v. Wackenhut Corp. and the Legislative Amendments to the Texas Business and Commerce Code, 45 Sw. L.J. 1009, 1009 (1991) ("The fact that courts have adjudicated the enforceability of contractual restraints of trade in the post-employment context for more than five hundred years indicates the serious problems created by such agreements.").

28. See Arthur Murray Dance Studios v. Witter, 105 N.E.2d 685, 687-88 (Ohio Ct. C.P. 1952); see also Blake, supra note 15, at 666 (citing Judge Earl R. Hoover's decision in Arthur Murray as a decision to be celebrated for its trenchant wit and cogent analysis). The Arthur Murray court considered the range of authority on noncompetition agreements by observing:

This is not one of those questions on which the legal researcher cannot find enough to quench his thirst. To the contrary there is so much authority it drowns him. It is a sea—vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything, if he lives so long. This deep and unsettled sea pertaining to an employee's covenant not to compete with his employer after termination of employment is really Seven Seas; and now that the court has sailed them, perhaps it should record those seas so that the next weary traveler may be saved the terrifying time it takes just to find them. Arthur Murray, 105 N.E.2d at 687. From its crow's nest, the court then called out 82 sightings in the "sea of periodicals," 21 in the "sea of annotations," 10 in the "sea of encyclopedias," 10 in the "sea of treatises," two in the "restatement sea," and many more in Ohio's own sea. Id. at 687-88. Those seas' levels have swelled significantly since Arthur Murray. More than 200 additional periodical and law review articles alone have bobbed up since Judge Hoover's masterful opinion.

petition agreements. Restrictive covenants that include a promise not to compete in a certain geographic area, for a particular period of time, with respect to certain activities, or regarding certain customers or clients, all invite the attention of the courts, legislatures and, in the case of attorneys, ethics committees and bar associations.

B. Common-Law Regulation

In settings involving commercial transactions or relationships, the common-law policy against restraints on competition is well established. While courts have long disfavored restrictions on competition, they routinely enforce restrictive covenants if those covenants are found to be reasonable under the rule of reason test. Reasonableness is measured by balance.

30. See CAL. BUS. & PROF. CODE § 16600 (West 1987); COLO. REV. STAT. ANN. § 8-2-113 (West 1994); TEX. BUS. & COM. CODE ANN. § 15.05 (West 1987). In the 1970s, several critics argued that restrictive covenants should be governed by federal antitrust law. See Goldschmid, supra note 15, at 1204-07; Charles A. Sullivan, Revisiting the "Neglected Stepchild": Antitrust Treatment of Postemployment Restraints of Trade, 1977 U. ILL. L.F. 621, 625-32.

31. In a broad sense, every agreement regarding trade is a covenant in restraint of trade; it would be absurd to suggest that our legal system recognizes a principle that all restrictive covenants are illegal and unenforceable. See Board of Trade v. United States, 246 U.S. 231, 238 (1918). As Justice Brandeis explained in Board of Trade:

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. When, however, a court finds that an overriding interest of society is incongruous with the enforcement of an agreement, the court will refuse to enforce the agreement. See infra note 33.

32. See RESTATEMENT (SECOND) OF CONTRACTS § 186 (1981); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 (1993); Blake, supra note 15, at 625, 629-31. The great majority of post-employment restrictive covenants litigated are those that have arisen in non-legal, commercial settings. See Draper, supra note 21, at 162. An agreement to refrain from competition is the only type of agreement in restraint of trade left to judicial development; federal antitrust laws and state statutes have so dominated the field that common-law rules are of slight significance. See E. ALLAN FARNsworth, CONTRACTS § 5.3, at 16 (2d ed. 1990); see also supra note 30 (providing examples of various statutes).

33. See Farnsworth, supra note 32, § 5.3, at 16; John E. Murray, Jr., Murray on contracts § 98, at 513-16 (3d ed. 1990); see also RESTATEMENT (SECOND) OF CONTRACTS §§ 187-88 (1981) (providing that such restraints are permitted only in
ancing the promisee's legitimate interest in preventing unfair competition, the promisor's interest in working in her chosen profession or trade, and the public's interest in preventing monopolies and restrictions on production. If a court finds that enforcement of a covenant not to compete clashes with an overriding societal interest, the court will refuse to enforce the covenant for two basic reasons: (1) to discourage undesirable conduct, and (2) to avoid giving the impression that the court condones such an unsavory transaction. The conflicting fundamental interests raised by commercial noncompete agreements in effect have not changed since the fifteenth century.

Noncompetition agreements ancillary to a transaction or relationship generally fall into three categories: those incidental to the sale of a business; those related to employment agreements; and those involving a partnership agreement. Employers use restrictive covenants as a means

limited circumstances). Courts have disfavored restrictions on competition for more than 140 years. See Blake, supra note 15, at 644 (stating that in two 1851 New York cases, the courts determined that "restraints extending over the entire state were void"). A covenant that is overbroad in terms of geographic scope, length of time, or line of business will be unenforceable because it is more restrictive than needed to protect an employer's legitimate business interests. See Restatement (Second) of Contracts § 188 cmt. d (1981); 14 Samuel Williston, A Treatise on the Law of Contracts § 1638, at 107 (3d ed. 1972). In Minnesota, when a commercial restraint is "for a just and honest purpose, for the protection of a legitimate interest of the party in whose favor it is imposed, reasonable as between the parties, and not injurious to the public," it will be upheld. Bennett v. Storz Broad. Co., 270 Minn. 525, 533, 134 N.W.2d 892, 898 (1965); see also Laurie & Harbeck, supra note 29, at 114-15.

34. See Restatement (Second) of Contracts § 188 (1981); Murray, supra note 33, § 98, at 514; Blake, supra note 15, at 627. "It is the function of the law to maintain a reasonable balance, and this requires us to recognize that there is such a thing as unfair competition by an ex-employee as well as unreasonable oppression by an employer. The circumstances of each case must be carefully scrutinized." 6A Arthur Corbin, Corbin on Contracts § 1394, at 89 (1962); see also Steven M. Schaeffer, Comment, Employee Restrictive Covenants: Unscrupulous Employees vs. Overreaching Employers, 27 S.D. L. Rev. 220, 221-23 (1982) (discussing challenges generated by the balancing of the competing interests for employers seeking to prevent misappropriation of trade secrets by former employees).

35. See Murray, supra note 33, § 98, at 508 (citing Restatement (Second) of Contracts: Unenforceability on Grounds of Public Policy introductory note (1981)).

36. See Blake, supra note 15, at 626-62. Blake writes:

The treatment [of noncompetition agreements] at the hands of the courts has reflected the evolution of industrial technology and business methods, as well as the ebb and flow of such social values as freedom of contract, personal economic freedom, and business ethics. But the fundamental interests which come into conflict have not basically changed. Id. at 626-27; see also id. at 631-37 (discussing the first known case on restrictive covenants, the celebrated Dyer's Case, Y.B. Mich. 2 Hen. 5, f. 5, pl. 26 (C.P. 1414)).

37. See Restatement (Second) of Contracts § 188(2) (1981).
of protecting their interests in confidential information, trade secrets, and client relationships. Employees resist post-employment contractual restraints because those agreements reduce employees' economic mobility and personal freedom to follow their interests, diminish demand for their skills by intimidating potential employer-competitors, and dampen the dissemination of ideas, processes, and methods. Both sides often seek the protection of the courts when they believe their interests are threatened.

The common law distinguishes attorney noncompetition agreements from noncompetition covenants incidental to the sale of a business, and from the general category of employment and partnership agreements restricting post-employment competition. Many courts have stressed that strong policy considerations preclude the use of commercial standards to evaluate attorney noncompetition agreements.

38. See id. § 188 cmt. b; see also, e.g., Minnesota Mining & Mfg. Co. v. Kirkevold, 87 F.R.D. 324, 334-35 (D. Minn. 1980) (finding that Minnesota has significant interest in protecting its corporations from loss of trade secrets and confidential information); James S. Kemper & Co. v. Cox & Assoc., 434 So. 2d 1380 (Ala. 1983) (upholding restrictive covenant between insurance company and former employee when employee began to solicit former customers); Dynamic Air, Inc. v. Bloch, 502 N.W.2d 796, 800 (Minn. Ct. App. 1993) (upholding restrictive covenant to protect employer's commercial interests against employee's disclosure of confidential information and trade secrets).


40. "In this titanic struggle for protection, one cannot but sympathize with both employer and employee. Each is needled by need; each plagued by peril." Arthur Murray Dance Studios v. Witter, 105 N.E.2d 685, 692 (Ohio Ct. C.P. 1952) (referencing 6 CORBIN ON CONTRACTS § 1394, at 514 (1962) and Specific Performance of Employee's Contract Not to Compete After a Term of Employment, 41 HARV. L. REV. 782, 784 (1928)).

41. Restrictive covenants regarding the sale of a business or post-employment competition must be: (1) necessary to protect the business buyer's, employer's, or partnership's legitimate interests, (2) reasonable with respect to time and territory, (3) not unduly harsh or oppressive to the seller, employee, or departing partner, and (4) not injurious to the public. See Arthur Murray Dance Studios, 105 N.E.2d at 691-92; RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981). The Restatement (First) of Contracts, supplanted by the Restatement (Second) in 1981, articulated a different test: a covenant is unreasonable if it is greater than necessary for the protection of the person for whom the restraint is imposed, imposes undue hardship on the person restricted, or tends to create or creates a monopoly, price control, or artificial limitation on production. RESTATEMENT (FIRST) OF CONTRACTS § 515 (1932).

42. See Blackburn v. Sweeney, 637 N.E.2d 1340, 1343 (Ind. Ct. App. 1994) (stating that the per se rule is designed to serve the public interest by maximizing access to attorneys and precluding commercial arrangements that interfere with that goal), vacated, 659 N.E.2d 131 (Ind. 1995). According to one court, [c]ommercial standards may not be used to evaluate the reasonableness
The standard of review for evaluating attorney noncompetition agreements has evolved in three stages. Before 1961, courts analyzed post-employment attorney noncompete covenants in the same way that those courts treated noncompete agreements involving other professionals or tradespeople: by subjecting those covenants, ancillary to the sale of a law practice, to the ordinary balancing test applied to all restrictive covenants. Between 1961 and 1991, these agreements were exclusively treated under the per se rule, which barred enforcement of any restriction on an attorney's right to practice after termination of a relationship with a firm. Since 1991, the standard is uncertain; many courts continue to apply the per se rule, while a few have rejected the per se rule and reverted to the reasonableness test's balancing of the competing interests.

C. Legal Ethics and the Per Se Rule

A unique process of dual regulation controls attorneys through the use of: (1) the common-law provisions on restraints of competition that affect anyone involved in professional or commercial activities, and (2) the inherent power of state legislatures and courts, acting through bar associations, to regulate the legal profession.

of lawyer restrictive covenants. Strong public policy considerations preclude their applicability. In that sense lawyer restrictions are injurious to the public interest... The attorney-client relationship is consensual, highly fiduciary on the part of counsel, and he may do nothing which restricts the right of the client to repose confidence in any counsel of his choice. No concept of the practice of law is more deeply rooted. The lawyer's function is to serve, but serve he must with fidelity, devotion and erudition in the highest traditions of his noble profession.

Dwyer v. Jung, 336 A.2d 498, 500 (N.J. Super. Ct. Ch. Div. 1975) (emphasis added); see also Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 411 (N.Y. 1989) (“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.”).

43. See supra note 21. As of 1960, restraints on professional employees, including associates or technical assistants of attorneys, doctors, accountants, and dentists, were often upheld “when the customer relationships [were] substantial.” Blake, supra note 15, at 662. The Restatement (First) of Contracts applied its rule of reason test to restrictive covenants between attorneys. See RESTATEMENT (FIRST) OF CONTRACTS § 515 illus. 5 (1932).


46. See Hillman, supra note 19, at 541-42. See generally HILLMAN, supra note 1,
This regulation demands that attorneys owe a fiduciary duty of the highest order to clients, and the enforceability of attorney noncompetition agreements is evaluated by ethical standards exclusively applied to the legal profession. These unique ethical standards place attorneys in a consensual and fiduciary relationship with clients that is distinguished from ordinary commercial endeavors and from other professional disciplines, including medicine and accounting. These ethical rules counsel

§ 6.4 (discussing judicial expansion of statutory limitations on liability). A profession is an occupational monopoly, and society is unwilling to grant monopoly status unless that profession is used for the public good rather than for purely selfish reasons. See Freidson, supra note 15, at 425-27. In Minnesota, the Minnesota Supreme Court has the inherent power to regulate the practice of law. See Sharood v. Hatfield, 296 Minn. 416, 423, 210 N.W.2d 275, 279 (1973).

47. Post-employment noncompetition agreements involving accounting professionals are subject to the same reasonableness test as those involving nonprofessionals. See Kafker, supra note 12, at 34. When evaluating restrictive covenants involving physicians or dentists, courts also consider the need of the public for medical services, but disregard the needs of individual patients in having their choice of physician. See id. at 37-41. The courts' treatment of noncompetition agreements involving physicians has been perplexing. Courts generally enforce medical partnership clauses that absolutely restrict a departing partner's practice. See, e.g., Rash v. Toccoa Clinic Med. Assoc., 320 S.E.2d 170, 174 (Ga. 1984); Field Surgical Assoc., Ltd. v. Shadab, 376 N.E.2d 660, 664 (Ill. Ct. App. 1978); Gelder Med. Group v. Webber, 363 N.E.2d 573, 576 (N.Y. 1977). But see, e.g., Odess v. Taylor, 211 So. 2d 805, 810 (Ala. 1968) (finding that enforcement of a restraint on an otolaryngologist from practicing within a 50-mile radius would be adverse to the public interest); Duffner v. Alberty, 718 S.W.2d 111, 113-14 (Ark. Ct. App. 1986) (finding that a contractual provision prohibiting an orthopedic surgeon from practicing medicine unduly interfered with the public’s right of availability to that surgeon). For the last two decades, most courts addressing the issue of attorney noncompetition agreements have distinguished those agreements from similar agreements in other professions. See, e.g., Dwyer, 336 A.2d at 499. Yet, as more than one commentator has observed, there is little significant difference between the interests involved in medical partnership noncompetition agreements and legal partnership noncompetition agreements: physicians have personal and confidential relationships with their patients, just as attorneys have with their clients, and the “special trust patients place in their physicians merits as much if not more protection than that of the lawyer’s client.” Kafker, supra note 12, at 55-56. “The reasons for distinguishing lawyering from other professional activity are vague, and it is questionable whether the availability of choice for the client is any less critical when the professional engaged is a physician, for example, rather than a lawyer.” Hillman, supra note 1, § 2.3.3, at 2:45-46. In addition, “[i]t seems... unreasonable to distinguish lawyers from other professionals such as doctors... who also owe a high degree of skill and loyalty to their patients and clients. The interest of a patient in a doctor of his or her choice is obviously as significant as the interest of a litigant in a lawyer of his or her choosing.” Howard, 863 P.2d at 160. But see Ladd v. Hikes, 639 P.2d 1307, 1311 (Or. Ct. App. 1982) (Buttler, P.J., dissenting) (arguing that the per se rule should apply to physicians’ noncompetition agreements, and bitingly observing that “it is safe to say that the public need and demand for doctors is, generally, greater than the need and demand for lawyers”).
against applying ordinary commercial standards or the lower standards set by other professions.48

These unique standards have driven the per se rule's development.49 The genesis of the rule is a 1961 ABA Committee on Professional Ethics' formal opinion, which declared that post-employment restrictions on an attorney's right to practice law constituted a per se violation of legal ethics.50 The Committee continued to deal with the issue until 1969, when the ABA formally adopted a disciplinary rule, DR 2-108, as part of the Model Code of Professional Responsibility.51 The Committee issued several more opinions regarding these agreements until 1983, when the ABA adopted rule 5.6 as part of the Model Rules of Professional Conduct, the successor to the model code.52

D. Courts and the Per Se Rule

Although the ethical rules prohibit enforcement of noncompetition agreements, those barriers have not stopped law firms from demonstrating their creative drafting skills, and may even have encouraged them.53 Many firms continue to draft creative clauses restricting competition, insert non-compete covenants in partnership and employment agreements, and even seek enforcement of those covenants in order to protect their perceived interests.54 The courts, however, have not stood by idly.

48. Attorneys' ethics codes demand that the profession's members place the client and the legal system above the lawyers' own interests; this insistence on abrogating self-interest to favor the public good necessarily distinguishes a profession from a business. See Freeman v. Freeman, 311 N.E.2d 480, 483 (N.Y. 1974).


50. See supra note 17.

51. See supra note 17.

52. See supra note 17.


54. See Penasack, supra note 5, at 891-92. See generally Hillman, supra note 1, § 2.1.8. One commentator suggests that the reason restrictive covenants are not more common is simple neglect: it is not uncommon for attorneys to neglect their own interests, sometimes even to the point of not having a written partnership or
Beginning in the mid-1970s, courts explicitly relied on the ethical rules in fashioning a special per se rule prohibiting enforcement of these agreements. The first important case to interpret the model code was the 1975 New Jersey case, *Dwyer v. Jung.* That court refused, under model code DR 2-108(A), to enforce a clause in a partnership agreement that prohibited partners from representing the firm's clients for five years after the firm's dissolution. The court stressed that it must use the per se rule to evaluate these covenants, not commercial standards under the reasonableness test, because of the special nature of the attorney-client relationship. The clause directly restricted a client's right to choose counsel and, in the court's view, agreements that effectively interfered with clients' right to "their unlimited choice of counsel" were per se invalid as against public policy.

In 1980, the Appellate Division of the New York Supreme Court, in *In re Silverberg,* held that a client-based restriction in a partnership agreement amounted to a restrictive covenant and could not be arbitrated, because enforcement of the clause would violate the public policy prohibiting trafficking in clients. Client-based restrictive covenants seek to dampen competition, either by forcing an attorney who competes with the firm to forfeit some departure compensation, or by requiring that fees paid by firm clients subsequently represented by the departing attorney must be shared with that attorney's former partners. In *Silverberg,* the agreement required that the departing partner, who later represented a client brought to the firm by the other partner, pay eighty percent of the fees generated by the client for eighteen months. The court held that the restriction constituted a per se violation of model code DR 2-108 and

employment agreement in place. See Marks, *supra* note 5, at 509 n.3 (citing *Jewel v. Boxer,* 203 Cal. Rptr. 13, 15 (Cal. Ct. App. 1984)). The partners in *Jewel,* "contrary to the sound legal advice they undoubtedly always gave their partnership clients, . . . had no written partnership agreement." 203 Cal. Rptr. at 15; see also Douglas Linton, *Withdrawal Pains,* MANHATTAN LAW., July/Aug. 1991, at 1 (stating that the reason usually offered for the absence of restrictive covenants in law firm agreements is not lack of enforceability, but because attorneys often neglect to protect their own interests).

56. *Id.* at 500-01.
57. *Id.* at 499-501.
58. *Id.* at 501. Most attorney partnership agreements after *Dwyer* were drafted to avoided direct restraints on a client's right to choose counsel, and instead were modeled on forfeiture-for-competition restrictions, which courts have upheld against other professionals. See Kafker, *supra* note 12, at 43; see also *infra* note 63 (discussing forfeiture-for-competition clauses).
60. See Terry, *supra* note 5, at 1075-76.
ABA formal opinion 300, and was therefore unenforceable.62

Three years later, the Oregon Court of Appeals refused to enforce a partnership agreement clause that required a withdrawing partner to forfeit departure compensation if that partner competed against the firm within a three-county area.63 Finding that the restrictive clause on its face violated the public policy concerns underlying model code DR 2-108(A), the court found that any agreement requiring an attorney to relinquish benefits otherwise due likely would dissuade him from representing former clients, thus restricting his right to practice.64 The drafters of the clause argued that because the clause was a condition to payment of retirement benefits, the departing partner was not actually restricted; he only forfeited certain benefits if he continued to practice.65 The court rejected this contention, saying that if the clause were read that broadly, every withdrawal would be a “retirement” and DR 2-108(A) would be meaningless.66

The 1989 New York Court of Appeals' opinion in Cohen v. Lord, Day & Lord has been perhaps the most influential decision on financial forfeiture clauses.67 Lord, Day & Lord's partnership agreement contained a

62. Id. at 482.
63. See Gray v. Martin, 663 P.2d 1285, 1290 (Or. Ct. App. 1983). The type of partnership agreement clause at issue in Gray is a forfeiture-for-competition clause, which reduces the total reimbursement normally paid to departing attorneys for their capital contributions to the firm, payment of uncollected salary, and pro rata payments for accounts receivable and work in progress, if they represent clients of the former firm or compete with the firm for new clients. Id. at 1289-90. These types of clauses permit competition, but at a cost; courts distinguish them from restrictive covenants and often uphold them against physicians, veterinarians, dentists, and accountants. See Mark H. Epstein & Brandon Wisoff, Winding Up Dissolved Law Partnerships: The No-Compensation Rule and Client Choice, 73 CAL. L. REV. 1597, 1598 (1985); Hillman, supra note 19, at 536; Kafker, supra note 12, at 43.
64. Gray, 663 P.2d at 1290-91.
65. Id. at 1290.
66. Id. The court stated:
Paragraph 25 fits squarely within the prohibition contained in DR 2-108(A). . . . The agreement is not a condition to payment of retirement benefits as plaintiffs claim. 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 also Hackett v. Milbank, Tweed, Hadley & McCloy, No. 10341/91, 1991 WL 292576, at *1 (N.Y. Sup. Ct. Aug. 7, 1991) (finding that a substantial monetary penalty for failing to retire from the practice of law on withdrawal from a firm is an impermissible restriction on the attorney's right to practice law).
67. 550 N.E.2d 410 (N.Y. 1989); see also Penasack, supra note 5, at 906. The approach to noncompetition agreements articulated in Cohen has been adopted by a number of state courts. See Penasack, supra note 5, at 906.
clause that made payment of earned but uncollected fees contingent on a departing partner's forbearance from competing with the firm. Cohen, a senior partner of the firm and head of its tax department, withdrew from the firm and crossed Wall Street to join another firm; several clients and a Lord, Day & Lord associate went with Cohen. Cohen's former partners refused to pay Cohen his $285,000 share of profits due under the agreement because, they claimed, he violated the clause by continuing to practice law in competition with the firm. Cohen sued, claiming that the clause violated the per se rule under DR 2-108(A). The court, in a strong opinion, struck down the forfeiture-for-competition agreement, because those agreements "functionally and realistically discourage and foreclose" attorneys from representing clients, interfere with clients' choice of counsel, and are the equivalent of restrictive covenants. By putting a price on a partner's competition with the firm, the clause violated DR 2-108(A) and thus was unenforceable.

Most courts have followed Cohen and apply the per se rule essentially to thwart law firms' attempts to contract around the ethical prohibitions on restrictive covenants. These courts have affirmed the policies underlying the per se rule: a client's right to choose counsel is unchecked by the economic interests of law firms and attorneys; restrictive covenants are unenforceable whether they seek to impose partial or total restraints on competition; an attorney's right to practice law may not, implicitly or explicitly, be restricted by contractual arrangements; and the reasonableness test used in commercial transaction or relationship settings may not be applied to evaluate attorney post-employment noncompetition agreements. Still, law firms, undaunted by Cohen, continue to include restrictive covenants in their partnership and employment agreements, and they

68. Cohen, 550 N.E.2d at 410; see also Brill, supra note 1, at 3 (relating a delightfully droll but depressing recount of Cohen).
70. See Brill, supra note 1, at 3.
72. Id.
73. Id.; see also Denburg v. Parker Chapin Flattau & Klimpl, 624 N.E.2d 995, 1002 (N.Y. 1993) (reaffirming that court's earlier holding in Cohen).
persist in litigating the enforceability of these clauses.\textsuperscript{75}

\textit{E. The Reasonableness Test and Abandonments of the Per Se Rule}

Several courts recently have taken a startlingly different course by reintroducing the reasonableness test to legitimize attorney noncompetition agreements as instruments that protect firms' interests in their clients.\textsuperscript{76} Balancing firms' economic interests against clients' interests in freedom of choice and attorneys' interests in professional autonomy,\textsuperscript{77} these courts interpret the ethical rules as permitting enforcement of indirect restrictions on competition, so long as there is no absolute restraint on clients' or attorneys' interests.\textsuperscript{78} The courts use the reasonableness test to equate law firms with corporations, rather than differentiating them as professional organizations.\textsuperscript{79} The use of the reasonableness test is central to these sharp departures from precedent.

Courts analyze most post-employment noncompetition agreements under the reasonableness test, which balances the interests of employers, employees, and the public. Under the reasonableness test's balancing analysis, a restrictive covenant is a reasonable restraint of trade if, under the circumstances, it is necessary to protect the legitimate interests of the promisee, not unduly harsh to the promisor, and not likely to injure the public.\textsuperscript{80} Because analysis under the reasonableness test is largely subjective and the circumstances of each case must be carefully scrutinized, the test has been vigorously criticized as lacking predictability and precision.\textsuperscript{81}

\textsuperscript{75.} See Terry, supra note 5, at 1075-76.
\textsuperscript{77.} The Jacob court characterized the noncompetition agreement at issue as one that "allow[s] for the interplay of legitimate financial considerations." 588 A.2d at 1291.
\textsuperscript{78.} See Howard, 863 P.2d at 157; Haight, 285 Cal. Rptr. at 848; Jacob, 588 A.2d at 1291.
\textsuperscript{79.} See Howard, 863 P.2d at 154-56; Haight, 285 Cal. Rptr. at 847-48, 850; Jacob, 588 A.2d at 1299-93.
\textsuperscript{80.} See \textit{Restatement (Second) of Contracts} § 188 (1981); see also \textit{supra} notes 33-35 and accompanying text.
\textsuperscript{81.} E. Allen Farnsworth's criticism is particularly biting. In Farnsworth's view, the reasonableness test is inevitably imprecise and leaves cases to be resolved on their particular facts, including general economic conditions. Courts view a promise in the light of its potential as well as its actual effects . . . . A restraint that is reasonable and therefore enforceable in some circumstances may be unreasonable and therefore unenforceable in others . . . . Nowhere has judicial paternalism in the service of public policy been more at war with judicial laissez faire in the name of freedom of contract.
Jacob v. Norris, McLaughlin & Marcus was the first case to question the application of the per se rule to forfeiture-for-competition clauses. In Jacob, a law firm’s termination agreement provided that departing partners would not receive added compensation over and above their equity interest in the firm if they competed with the firm. Although the opinion was reversed by the New Jersey Supreme Court, the lower court applied the rule of reason test to balance rule 5.6’s requirements against the withdrawals’ impact on the firm’s economic interests. The court concluded that the termination agreement was reasonably limited, did not restrict the withdrawing attorneys’ rights to practice, and properly truncated the firm’s obligation to pay departure benefits.

The New Jersey Supreme Court, taking a “dim view of restrictive covenants in employment agreements among lawyers,” reversed the decision. According to the supreme court, the agreement acted as a financial forfeiture covenant, which selectively withheld compensation to discourage competitive activities, and thus, under the per se rule, it constituted an unenforceable restriction on the attorneys’ rights to practice law. The court, however, hedged its bets, noting that while withdrawing partners could inflict substantial harm on the remaining firm members, firms could protect themselves without employing arbitrary, punitive measures discouraging competition. The firm could reduce the negative impact on firm goodwill, the court said, by adjusting the withdrawing partner’s equity interest.

FARNSWORTH, supra note 32, § 5.3, at 17; see also Arthur Murray Dance Studios v. Witter, 105 N.E.2d 685, 692-93 (Ohio Ct. C.P. 1952); CORBIN, supra note 34, § 98. “[T]he determination of [w]hether a restraining covenant . . . is equitable, fair, just, and reasonably requisite . . . is essentially an inquiry of fact and not a naked matter of law.” 14 WILLISTON, supra note 33, § 1638, at 108 (quoting Charles S. Wood & Co. v. Kane, 125 A.2d 872, 875 (N.J. Super. Ct. App. Div. 1956)).

82. Jacob, 588 A.2d at 1291.
83. Id. at 1289-90.
85. Jacob, 588 A.2d at 1290-92 (citing N.J. RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1984)).
86. Id. at 1292-93 (holding that the restrictions triggered by a withdrawal were “reasonably limited and plausibly related to preventing a double impact on the [firm’s] economic base from which the departing members’ termination benefits are to be drawn”).
87. Jacob, 607 A.2d at 148.
88. Id. at 150-51.
89. Id. at 151-52.
90. Id. at 152. The court explained that it would enforce a provision in a noncompetition agreement that deducted the law firm’s actual loss of goodwill from the withdrawing attorney’s departing compensation:

[I]f a partner’s departure will result in a decrease in the probability of a client’s return and a consequent decrease in prospective earnings, that
The next departure from the per se rule was led by California's court of appeal in *Haight, Brown & Bonesteel v. Superior Court*. The firm's partnership agreement contained a clause which required forfeiture of all withdrawal benefits if a withdrawing partner practiced in any area regularly practiced by the firm and, by doing so, represented any client of the firm within one year after withdrawal.

In rejecting the per se rule, the *Haight* court balanced the competing interests under the reasonableness rule and found that the ethics rules did not prohibit an attorney from compensating his or her former firm if he or she continued to represent that firm's clients. Interpreting a California statute together with the state's version of model rule 5.6, the court held that the partnership agreement clause was enforceable, because it was designed not to punish a withdrawing partner but rather to protect the firm's legitimate interests. In the court's view, the firm was entitled to "preserve [its] stability . . . by making available the withdrawing partner's share of capital and accounts receivable to replace the loss of the stream of income from the clients taken . . . to support the partnership's debts." The agreement did not operate as a total restraint on competition because a withdrawing partner still could practice anywhere in California. The court acknowledged the principle of client choice, but it refused to find that this policy required attorneys or their noncompetition agreements to be put "in a class apart from other business and professional partnerships."

Abandoning the weight of authority, the California Supreme Court in *Howard v. Babcock* bluntly repudiated the per se rule. In one of the clearest decisions challenging the per se rule, the *Howard* court refused to enforce a partnership agreement, under which partners forfeited withdrawal compensation if they competed against the firm in the firm's practice area with several specified counties. According to the court, the agreement "impos[ed] a reasonable toll on departing partners who com-

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| Id. | 92. *Id.* at 846. |
| Id. | 93. *Id.* at 848. |
| 96. *Haight*, 285 Cal. Rptr. at 848. | 97. *Id.* |
| 98. *Id.* | 99. *Id.* at 850. |
| 100. 863 P.2d 150, 151 (Cal. 1993). | 101. *Id.* |
pete with the firm." 102

Paralleling the Haight court’s interpretation of the relevant California statute and rule of professional conduct, 103 the Howard court declared that the agreement did not restrict the practice of law but, rather, reasonably “attach[e] an economic consequence to a departing partner’s unrestricted choice to pursue a particular kind of practice.” 104 The court remanded the case for analysis under the reasonableness rule, arguing that a balancing of interests is required because of the “sweeping changes” that necessitate judicial protection of the economic interests of law firms. 105

The Howard court also acknowledged the importance of a client’s right to choice of counsel but suggested that protecting a law firm’s interests was no less important. 106 To further minimize the need for a per se rule, the court asserted that, thanks to the “revolution in the practice of law” (as reflected by the decline in institutional loyalty and the modern realities of increased competition), “the general rules and habits of commerce have permeated the legal profession.” 107 Safeguarding a firm’s interest is necessary, the court concluded, because a firm “has a financial interest in the continued patronage of its clientele,” 108 and that the

102. Id.
103. See id. at 154-57; see also supra notes 94-96 and accompanying text.
104. Howard, 863 P.2d at 156 (“An agreement that assesses a reasonable cost against a partner who chooses to compete with his or her former partners does not restrict the practice of law.”). The attaching “economic consequence” is difficult to ignore: a departing partner is free to compete with his former firm, but only at a price, and he would have to compensate the firm for a loss of clients. See id. at 160. The Howard court’s reasoning is suspect: by definition, imposing an “economic consequence” restricts a departing partner’s “unrestricted” choice. See id. at 156.
105. Id. at 157. “Not the least of the changes rocking the legal profession is the propensity of withdrawing partners... to ‘grab’ clients of the firm and set up a competing practice.” Id. According to the dissent, the majority presumed “that the controlling partners of established law firms have a moral entitlement to protection from competition.” Id. at 165 (Kennard, J., dissenting).
106. Id. at 160. “We seek... a balance between the interest of clients in having the attorney of choice, and the interest of law firms in a stable business environment.” Id. The Howard court’s concern for clients’ or attorneys’ rights, the primary arguments made in support of the per se rule, is unclear; earlier in the opinion, the court dismissed these interests as “theoretical” because they are routinely circumscribed. Id. at 157-58. Howard took a more limited view of the principle of client choice than that of most courts. See id. at 158-59.
107. Id. at 159. But see Julie A. Harris, Why Anti-Competitive Clauses Should be Unenforceable in Law Partnership Agreements: An Argument for Rejecting California’s Approach in Howard v. Babcock, 8 GEO. J. LEGAL ETHICS 669, 681 (1995) (stating that the “metaphor of revolution... is inapt and misleading. A more accurate description of changes in the law profession would be a ‘correction.’”). What the Howard majority “described as client-grabbing and unprofessionalism might be better understood as natural responses to changing circumstances in many law firms.” Id.
108. Howard, 863 P.2d at 157 (citing Stephen E. Kalish, Covenants Not to Compete
“economic interests of law firms [must] be protected as they are in other business enterprises.”

The results of Howard were difficult for the defendants: the $382,686 judgment they received from the trial court, affirmed by the court of appeal, was set aside, and they faced potentially substantial damages on remand to the trial court. What is potentially devastating for the legal profession is that Howard’s holding blunts the ethical rules’ purposes of protecting the public and restraining and guiding the conduct of attorneys, and it glorifies the financial interests of law firms as the paramount goal of the practice of law.

Minnesota’s sole examination to date of an attorney noncompetition agreement under model rule 5.6’s per se ban is the nearly brusque Barna, Guzy & Steffen, Ltd. v. Beens. Barna, Guzy & Steffen’s shareholder agreement provided that if Beens left the firm to practice law elsewhere, fifty percent of all fees Beens subsequently recovered in contingent fee cases he handled while at Barna, Guzy was to be paid to his former firm. After Beens left Barna, Guzy with nine contingent fee clients in tow, the firm sued to enforce the agreement. Beens argued the entire agreement was contrary to public policy and void because it violated rule 1.5 of the Minnesota Rules of Professional Conduct, which prohibited the sharing of legal fees by attorneys from different firms. In addition, he contended that the agreement’s fifty percent economic consequence clause violated rule 5.6 of the Minnesota Rules of Professional Conduct, since the clause was a financial disincentive that restricted Beens’ future practice of law and restrained a client’s right to counsel of her choice.

and the Legal Profession, 29 St. Louis U. L.J. 423, 438 (1985)).
109. Id. at 156.
110. See id. at 153, 160.
111. 541 N.W.2d 354 (Minn. Ct. App. 1995).
112. Id. at 355.
113. Id. at 355-56.
114. Id. at 356. Beens asserted that the agreement was unenforceable under rule 1.5(e) of the Minnesota Rules of Professional Conduct. Rule 1.5(e) provides:

A division of fees between lawyers who are not in the same firm may be made only if (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of the share that each lawyer is to receive and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable.

Minn. Rules of Professional Conduct Rule 1.5(e) (1990). Beens also argued that rule 1.5(f) did not apply in his case. See Barna, 541 N.W.2d at 356. Rule 1.5(f) “does not prohibit payment to a former partner or associate pursuant to a separation agreement.” Minn. Rules of Professional Conduct Rule 1.5(f) (1990).

115. Barna, 541 N.W.2d at 356-57. Rule 5.6 provides, in part: “A lawyer shall not participate in offering or making... a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship... .” Minn. Rules of Professional Conduct Rule 5.6 (1990); see also supra...
The Minnesota Court of Appeals wasted no time in dismissing Beens’ first argument. Without directly addressing why it believed the agreement did not violate rule 1.5(e), and despite its acknowledgment that a contract that offends “a value of great public importance” is void, the court gave only a hint why the shareholder agreement would be upheld: “[T]he enforcement of freely-made contracts is itself in the public interest.”\(^\text{116}\) Beens asserted that rule 1.5(f) did not apply, because the agreement’s plain language required a payment from the partner, while the rule required payment to a former partner.\(^\text{117}\) The court answered this with a circular policy argument that rule 1.5(f) was designed to “encourage law firms to carefully draft agreements in order to prevent disputes when partners or associates leave a firm.”\(^\text{118}\) To ensure there was no question regarding its agenda, the court noted — with no warning or cited authority — that public policy required law firms to be judicially insulated from instability.\(^\text{119}\)

The court’s analysis of Beens’ rule 5.6 argument covered two paragraphs.\(^\text{120}\) After acknowledging the unenforceability of law firm agreements restricting an attorney’s interest in professional autonomy,\(^\text{121}\) the court — claiming that its focus was on the client’s interest in freedom of choice\(^\text{122}\) and declaring that the situation could be distinguished from direct restraint cases\(^\text{123}\) — insisted that the fifty percent economic consequence clause did not restrict client choice because it did not “effectively

\(^\text{note 17.}\)

\(^{116.}\) *Barna*, 541 N.W.2d at 356.

\(^{117.}\) Id.

\(^{118.}\) Id. “Disputes such as this are best averted by properly drafted partnership and associate agreements.” *Id.* (citing La Mantia v. Durst, 561 A.2d 275, 279 (N.J. Super. Ct. App. Div. 1989)).

\(^{119.}\) Id. (“If such agreements cannot be enforced, law firms will face instability because attorneys will be motivated to leave firms when they receive lucrative contingent fee cases, and attorneys will be encouraged to battle over clients.”).

\(^{120.}\) Id. at 357.


\(^{122.}\) *Barna*, 541 N.W.2d at 357. Insisting that “[t]he focus of our decision is the client,” the court cited *Jacob v. Norris, McLaughlin & Marcus* for the proposition that the underlying purpose of rule 5.6 “is to ensure the freedom of clients to select counsel of their choice, despite its wording in terms of the lawyer’s right to practice.” *Id.*

\(^{123.}\) Id. Like *Barna*, the partnership clause in *Dwyer* was a direct restraint on a client’s right to choose counsel. The *Dwyer* court refused, under the per se rule, to enforce that clause, which prohibited partners from representing the firm’s clients for five years after the firm’s dissolution, because the clause directly restricted a client’s interest in freedom of choice. *See supra* notes 55-58 and accompanying text. Although it cited *Dwyer*, the *Barna* court failed to see the parallels between *Dwyer* and the case then before it.
penalize[] an attorney for continuing to represent certain clients."124 Failing to notice any impairment of client choice or attorney autonomy, the court held that there was no violation of rule 5.6 of the Minnesota Rules of Professional Conduct.125

III. THE COMPETING INTERESTS

A. The Client's Interest in Freedom of Choice

The client's right to her choice of counsel is one of the most basic and deeply rooted concepts in the practice of law.126 The protection of a client's freedom to choose her own attorney serves the public interest, and the ethics rules were drafted to protect and advance the client's interest.127 The client's interest in freedom of choice is also promoted by ethical prohibitions on restrictions of an attorney's right to professional autonomy, which were adopted primarily to prevent attorneys from entering into agreements that limit clients' freedom to choose counsel.128 The attorney-client relationship

124. Barna, 541 N.W.2d at 357. Beens, the court insisted, will still receive 50% of the contingency fee. . . . The agreement cannot serve as a financial disincentive because Beens would have received less than 50% . . . if he had remained at the firm. Because there is no incentive for him to terminate his representation of [the client], [the client's] interests are not affected. Id. However, an imposition of an economic consequence on competitive behavior can also work to dissuade, if not prohibit, reasonably competitive behavior. The cost to compete may be significant enough to encourage an attorney to give up a client, "thereby interfering with the lawyer-client relationship and, more importantly, with clients' free choice of counsel. Those provisions thus cause indirectly the same objectionable restraints on the free practice of law as more direct restrictive covenants." Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 148-49 (N.J. 1992).

125. Barna, 541 N.W.2d at 357.
126. See Dwyer, 336 A.2d at 500; see also supra note 42.
128. See Model Code of Professional Responsibility DR 2-108 (1969); Model Rules of Professional Conduct Rule 5.6 (1990); see also 2 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on The Model Rules of Professional Conduct 824 (2d ed. Supp. 1992); supra notes 5, 17 (explaining professionalism and the per se ban on noncompetition agreements). Although the ethics rules provide that, in limited situations, the principle of client choice yields to other interests, the policy of freedom to choose counsel remains paramount for virtually all courts. Compare Model Rules of Professional Conduct Rule 1.7 (1987) (conflict of interest), and id. Rule 1.9 (1987) (conflict of interest in same or substantially related matter), and id. Rule 1.16(b) (1983) (withdrawal from representation for non-payment or unreasonable financial burden), and id. Rule 1.17 (1990) (seller of firm may not compete with buyer), with
is a highly personal one, and the client's confidence in her attorney is vital to the attorney's ability to represent that client effectively. Insuring that counsel is available to clients protects clients' freedom to choose counsel. Moreover, the wider the pool of available, competent practitioners, the more effectively clients may choose representation meeting their legal and economic requirements.

B. The Attorney's Interest in Professional Autonomy

The same ethics rules that shield clients' interests in freedom to choose counsel also protect attorneys' interests in freedom of movement to practice law. Post-employment restrictions on an attorney's ability to practice his profession in terms of place, time, and/or clients unreasonably restrict the attorney's right to economic mobility and personal freedom to follow her interests. By limiting the autonomy of attorneys, these restrictions also circumscribe a client's interest in freedom of choice, because they narrow the number and availability of attorneys to clients and because they tend to unfairly weaken the attorney's bargaining position with prospective partners and employers.

Model Code of Professional Responsibility EC 2-26 (1977) ("A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment." (emphasis added)), and id. EC 2-28 (1977) ("The personal preference of a lawyer to avoid adversarial alignments does not justify his rejection of tendered employment."). See generally Hillman, supra note 1, § 2.7.

129. See Epstein & Wisoff, supra note 63, at 1604. The rationale for the client's interest in freedom of choice is rooted in "the unique role that attorneys play in counseling clients." Id.

130. See Geoffrey C. Hazard, Jr., Ethical Considerations in Withdrawal, Expulsion, and Retirement, Withdrawal, Retirement & Disputes: What You and Your Firm Need to Know 32 (Edward B. Berger ed., 1986) ("[R]estrictions limit the opportunity of present clients of the firm, and of prospective clients, to select the lawyer of their choice.").

131. See Model Code of Professional Responsibility DR 2-108 (1969); Model Rules of Professional Conduct Rule 5.6 (1990); see also 2 Hazard & Hodes, supra note 128, at 824; supra notes 5, 13-14, 17 (discussing the principles of both attorney choice and client choice).

132. See supra note 14.

133. See Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 411 (N.Y. 1989); see also Blake, supra note 15, at 627 (stating that these restraints "unfairly weaken the individual employee's bargaining position vis-à-vis his employer and, from the social point of view, clog the market's channeling of manpower to employments in which its productivity is greatest"); supra notes 127-29 and accompanying text (discussing the client's freedom to choose counsel); infra text accompanying notes 181-83 (discussing the client's freedom to choose counsel).
C. The Law Firm's Interest in Stability and Protection From Withdrawing Partners

The practice of law is not only a profession; it is a business operating in a competitive environment. As competition increases, law firms become increasingly volatile institutions. Since law firms are also commercial organizations, they have an interest in protecting their financial resources, which most importantly are their client bases. Courts recognize that firms have a financial interest in the continued patronage of their clients. If the law does not permit a firm to protect its interests, attorneys may have less incentive to promote the firm’s practice, an undesirable result as firm specialization increases. The firm, in turn, will be less inclined to invest capital in itself, making it less attractive to clients and to prospective partners which, in turn, will reduce the firm’s goodwill or anticipated revenue from clients, accelerating the firm’s instability. The greater the level of instability, the more likely it is that the firm ultimately will dissolve, thus limiting the number of firms in the legal services market from which clients may choose. Law firm instability already has had disastrous effects on clients. Any service firm that ignores the economic climate in which it operates will not long remain in existence to service clients.

The firm, through its partners and associates, represents the client, although the client also may have a relationship with a withdrawing part-

135. See HILLMAN, supra note 1, § 1:1, at 1:1:-3.
136. See Howard, 865 P.2d at 159-60. “Law firms have an affirmative obligation to the client to provide an atmosphere most conducive to the development of the attorney-client relationship and to the efficient, diligent completion of work.” Id. (citing Penasack, supra note 5, at 890-91).
137. See, e.g., id. at 157 (citing Kalish, supra note 108, at 438). This financial interest is recognized as goodwill, a property interest that inures to the firm. See Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 152 (N.J. 1992) (stating that goodwill is “[t]he probability of future patronage [that] can be translated into prospective earnings”).
138. See Howard, 863 P.2d at 160. “In an environment of pervasive lateral hiring, partners may be loath to financially or otherwise support the development of a colleague’s relations with particular clients because the colleague may later exclusively usurp the benefits of that relationship.” Penasack, supra note 5, at 891, quoted in Howard, 863 P.2d at 160.
139. However, some of the dissolving firm’s partners and market share are likely to be absorbed by other firms, while other partners will form new firms that serve some of the former firm’s clients as well as new clients. See Harris, supra note 107, at 679. Thus, dissolution may actually result in an increase in the range of client choice and a better overall allocation of market resources. See id.
140. See Howard, 863 P.2d at 159; Penasack, supra note 5, at 890-91.
ner. A client's interests are likely to be furthered when all members of the firm are available as needed. Noncompetition agreements give the firm the ability to assure that the client's and its own interests are properly protected.

Withdrawing partners who are not constrained by noncompetition agreements may violate their fiduciary duties to clients and to the firm's partners. A partner negotiating to join another firm may reveal sensitive information regarding clients who are likely to follow that partner to the new firm. In addition, withdrawing from the firm without timely notice may put unreasonable pressures on the firm's economic resources, compromise logistical planning, and even leave the withdrawing partner little choice but to violate the duty to "tell the truth" if rumors about the withdrawal develop.

Many of the assumptions backing the ethical requirements no longer apply in the economic environment now facing law firms, and the law should recognize this problem. For example, there is no reason to differentiate between attorneys and other professionals, such as physicians or accountants, who also owe fiduciary duties to their clients and whose professional relationships with their clients are, likewise, confidential, intimate, and consensual. Law firms have the same legitimate interests in protecting their continued stability that other professional firms do, yet medical practices and accounting firms are not subject to a per se rule that prohibits them from maintaining their stability through noncompetition agreements. Noncompetition agreements levy reasonable costs on competition, and thus law firms should have the same right that other professional firms do to have reasonable noncompetition agreements upheld by the courts.

Firms must be able to limit the erosion of their economic interests that the per se rule causes. Noncompetition agreements that meet the reasonableness test should be permitted so long as those agreements do not prohibition competition outright. Furthermore, attaching an economic consequence, a reasonable cost to compete, to a withdrawing partner's decision to compete does not restrict competition, a client's choice


143. See id. at 160. But see Karlin v. Weinberg, 390 A.2d 1161, 1171 (N.J. 1978) (Sullivan, J., dissenting) (finding that both the doctor-patient and lawyer-client "relationships are consensual, highly fiduciary and peculiarly dependent on the patient's or client's trust and confidence in the physician consulted or attorney retained"); supra note 47 (explaining that an attorney's relationship with his client is distinguishable from other professional relationships).

144. See Howard, 863 P.2d at 160.
of counsel, or attorney autonomy. Restrictive covenants reasonably protect the firm against economic loss, especially in light of the financial burdens that a partner's competitive departure might impose on the firm and the remaining partners. Thus, efforts to protect law firm stability, such as protecting firms' interests in stable clients and protection from withdrawing partners, advance client choice, attorney autonomy, and public freedom from monopolistic activities.

D. The Public's Interest in Preventing Monopolies and Restrictions on Production

The public's need for legal services dictates that attorneys should not be unreasonably restricted from the practice of law. Prohibiting the enforcement of noncompetition agreements checks the commercialization of the profession. It also lessens the likelihood that ethical standards will erode further, an especially sensitive situation given that public perceptions of attorneys continue to worsen. Without such a limitation, a license to practice law may become nothing more than a permit to make money.

Restraints lessen competition by bullying potential competitors and clogging the dissemination of potentially valuable ideas, processes, and methods. Restraints also prevent market forces from channeling talent to areas where that talent's productivity will be maximized, and they tend to create monopolies whose access costs to the public are higher.

145. See id. at 156.
149. See Andrea Sachs, First, Kiss All the Lawyers, TIME, Aug. 16, 1993, at 39 ("[L]awyer bashing has become a beloved pastime."); Randall Samborn, Anti-Lawyer Attitude Up But NLJ/West Poll Also Shows More People Are Using Attorneys, NAT'L L.J., Aug. 9, 1993, at 1 ("[R]esentment of lawyers – ranging from lawyer-bashing jokes to outright vilification – is running at a fever pitch.").

It may be that both the medical and legal professions are progressing toward becoming nothing more than commercial enterprises and that a license to practice either profession is no more than a permit to make money by selling services, much as a fishmonger sells his wares. If that be the case, it is a doleful thought and the courts ought not accelerate the process.

Id.

151. See Blake, supra note 15, at 627.
IV. BALANCING THE COMPETING INTERESTS

The choices regarding the question of the enforceability of attorney noncompetition agreements narrow to only two: either all of these agreements are unenforceable under a per se rule; or some are enforceable while others are not, meaning that a rule of reason approach would be proper and a per se rule would be unnecessary. Under the second choice, unenforceable agreements would be those that impose disincentives large enough to discourage attorneys from representing clients of their former firm. The critical problem is deciding where to draw the line. Since Solomonic wisdom and discretion are rare commodities, the prudent approach is to employ the option that better promotes the legal profession's special responsibilities and ethical obligations, and is more likely to deliver predictability and precision: the per se rule.

A. Client and Attorney Interests are Superior to Firm Interests

Law firms have legitimate, protectable interests, but the interests of established firms are not superior to the interests of clients or attorneys. While attorneys owe fiduciary duties to their firms and partners, the fiduciary nature of the attorney-client relationship justifies elevating the rights of clients over the interests of firms. Law firms' legitimate interests in protecting client patronage and client confidences are adequately protected by the enforcement of anti-solicitation and anti-disclosure provisions of the model rules.

Although every noncompetition agreement operates in a unique factual context, each situation presents incentives to compete or not to compete. The imposition of "economic consequences" on competitive action may be equivalent to a prohibition on competition or an assessment of a reasonable cost against a withdrawing partner who decides to compete. This cost to compete may be large enough to encourage an attorney to give up a client, "thereby interfering with the lawyer-client relationship and, more importantly, with clients' free choice of counsel." An "eco-

152. The Cohen court recognized that protection of a law firm's economic health constitutes a legitimate interest, but it concluded that this interest cannot be protected by contracts for the forfeiture of income earned by withdrawing partners during their service at the firm. Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 413 (N.Y. 1989).

153. For example, a partner has special duties of loyalty and disclosure to fellow partners beyond that of others in the firm, because a partner stands in a special position of trust and confidence with his partners. See Blake, supra note 15, at 655; Marks, supra note 5, at 536-40.

154. See supra note 128 and accompanying text.


156. Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 148 (N.J. 1992),
nomic consequence" which requires the forfeiture of a significant percentage of profits from work already completed or yet to be performed may be onerous enough to dissuade many attorneys from the practice of law.157 Even if the cost imposed on a withdrawing partner to compete with his former firm does not effectively prohibit the attorney from representing a particular client, because the financial consequences do not make representation totally unfeasible, that imposed cost will reduce the attorney's expected profit from his work for that client. What arises, then, is a significant disincentive to represent the former firm's clients, even if they want to be represented by the withdrawing partner.158 Thus, client choice is diminished, attorney autonomy is restricted, and competition is unreasonably impeded.

The leading case advocating abandonment of the per se rule proclaimed that its application of the reasonableness test reached "a balance between the interests of clients in having the attorney of choice, and the interest of law firms in a stable business environment."159 However, the Howard court gave no indication of how it balanced clients' interests against the firm's interest in retaining its clients. Without articulation of a clear, predictable standard of how clients' interests are accommodated, the only reasonable conclusion - given the court's emphasis on the commercial revolution in the practice of law160 - is that Howard inappropriately favored the firm's interest in the balancing.161

Given how interrelated the policy principles of client choice and attorney autonomy are, the elevation of firms' financial interests over attorneys' interests may produce particularly undesirable effects. For example, a productive partner whose departure from a firm saddled with unproductive partners would otherwise be justified,158 might be precluded under

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157. See Howard, 863 P.2d at 159.
158. See Harris, supra note 107, at 681.
159. Howard, 863 P.2d at 160.
160. See Hillman, supra note 19, at 547.
161. See Howard, 863 P.2d at 156-60. "[A] revolution in the practice of law has occurred requiring economic interests of the law firm to be protected as they are in other business enterprises." Id. at 156. But see Harris, supra note 107, at 681 (suggesting the majority's revolution metaphor in Howard is "inapt and misleading").
162. One commentator dryly observed that the Howard decision was "a Jurassic Park effort to protect the dinosaurs." Victoria Slind-Flor, Non-Compete Clauses Approved: California Goes Own Way, NAT'L L.J., Dec. 20, 1993, at 3 (quoting Paul W. Vapnik, author of amicus brief filed in the case for the California State Bar). See generally Hillman, supra note 19, at 533.
163. In fact, partners often have good cause to leave a firm, such as: frustration with the size of the organization, differences over management goals or style, lack of satisfactory advancement opportunities, and personality clashes between part-
the reasonableness test from leaving the firm so she could make a living.\textsuperscript{164} A firm's reasonable expectancy of court-awarded superior interests in clientele over the competing claims of withdrawing partners would tend to discourage withdrawal and to diminish client choice and lawyer autonomy.\textsuperscript{165} Moreover, a client's loyalty to a firm often results from a relationship with and efforts by a particular partner, rather than from the environment provided by the firm.\textsuperscript{166} Enforcing noncompetition agreements would allow a firm unreasonably to prevent a willing client from employing a willing attorney.

If courts spurn the per se rule and instead analyze these agreements under the rule of reason, litigation will increase, because withdrawing partners will be forced to assert their only argument: that the agreement is a penalty rather than a reasonable restriction on competition.\textsuperscript{167} The per se rule, as a bright line test, establishes certainty and reduces the likelihood of litigation, freeing attorneys to attend to clients' needs.

The assertion that firms have an economic interest in the continuing patronage of their clientele actually describes the interests of the partners of the firm, rather than the interests of the economic entity distinct from its constituents.\textsuperscript{168} "Protecting the firm's interest" actually favors the inter-

\textsuperscript{164} See Harris, supra note 107, at 685 ("[D]eparting partners may simply be rationally responding to a variety of recent developments and trends in law firm practice."). "Justice Joyce Kennard's dissent [in Howard] echoed similar sentiments by remarking that rules that limit competition unfairly enrich members of a firm who are maybe less productive than departing partners." \textit{Id.} at 685.

\textsuperscript{165} See \textit{Howard}, 863 P.2d at 163-66 (Kennard, J., dissenting).

\textsuperscript{166} See \textit{id.} at 166. In the dissenting opinion, Justice Kennard explained:

Clients remain loyal to a firm for many reasons that have no connection to existing partners' capital. The labor and efforts of attorneys and other employees of law firms contribute much more to the recruitment, retention, and development of clients than the capital of a law firm. Indeed, if a client chooses to be represented by a departing attorney rather than the law firm, that choice is generally based on the client's trust and confidence in the withdrawing attorney.

\textit{Id.}

\textsuperscript{167} See Caiaccio, supra note 148, at 835. The \textit{Howard} court held that a restrictive covenant may be reasonable under the rule of reason test if it is considered to be a liquidated damages clause. See \textit{Howard}, 863 P.2d at 160. But "[a]n amount disproportionate to the anticipated damages is termed a 'penalty.' A contractual provision imposing a 'penalty' is ineffective, and the wronged party can collect only the actual damages sustained." \textit{Id.} (citing \textit{Perdue v. Crocker Nat'l Bank}, 702 P.2d 503, 515 (Cal. 1985)).

\textsuperscript{168} See \textit{Howard}, 863 P.2d at 157; Hillman, supra note 19, at 550-51.
ests of partners who remain over those partners who withdraw.\textsuperscript{169}

This allows firms to commandeer, at the withdrawing partner’s expense, the value that the market attaches to a withdrawing partner with a loyal following of clients. To argue that law firm stability is improved through the enforcement of postemployment noncompetition agreements actually only caters to one group of attorneys over others without any improvement in firm stability.\textsuperscript{170} Furthermore, claims that the clients’ fortunes are tied to the stability of their attorneys’ firms lack foundation.\textsuperscript{171} There is no evidence to support the charge that law firm instability has had a “disastrous impact” on clients.\textsuperscript{172}

Any incentive for a firm to correct the internal conditions which drive attorneys away will be reduced if barriers to departure are established through the enforcement of these agreements. Institutional loyalty continues to diminish as the legal profession adjusts to internal pressures and market conditions.\textsuperscript{173} By favoring partners who stay over those who withdraw, enforcement of noncompete agreements only “treats the symptoms rather than the causes of firm instability.”\textsuperscript{174}

\textsuperscript{169.} See Harris, \textit{supra} note 107, at 679-81. One commentator notes that the departure of law partners who are responding to declining systems within their firm should act “as a catalyst for change that improves competitive, efficient, and functional behavior within the firm.” Id. at 679. Often, however, changes do not occur, because the remaining partners at the firm are more interested in adopting “practices designed to prevent further partner departures,” such as noncompetition agreements, which protect the firm’s client base rather than addressing the reasons for the firm’s declining institutional systems. \textit{Id.} at 680 n.83.

\textsuperscript{170.} See \textit{id.} at 681. Faced with the financial burdens the agreement would impose upon exit from the firm, many attorneys might be inclined to stay within their present but unsatisfactory firm. \textit{See id.} The firm’s structural problems will likely remain unexamined and unchecked, and the firm – whose governing partners see no reason for alarm – remains insulated from change. “Stability” – here the lack of change and growth – is promoted, but the cost is potentially prohibitive. \textit{See id.}

\textsuperscript{171.} See Hillman, \textit{supra} note 19, at 548, 550. “Experience suggests . . . that law firm instability is far more a concern of lawyers than their clients.” \textit{Id.} at 548.

\textsuperscript{172.} See Howard, 863 P.2d at 166 n.2 (Kennard, J., dissenting) (questioning the majority’s assertion that jurisdictions prohibiting restrictive covenants harm law firms and doubting that “such evidence exists”). Penasack offered only speculation, rather than evidence, for the claim that the decline in institutional loyalty has had a “disastrous impact” on clients. See Penasack, \textit{supra} note 5, at 890-91.

\textsuperscript{173.} See Harris, \textit{supra} note 107, at 681-82 (discussing recent challenges to a “bigger is better” firm mentality).

\textsuperscript{174.} Hillman, \textit{supra} note 19, at 553; see also Harris, \textit{supra} note 107, at 684 (noting that the majority’s decision in Howard “may end up offering protection to those who need it least”).
B. The Ethical Rules Mandate a Higher Standard for Attorneys Than for Other Professionals

The practice of law remains a profession despite the challenges facing the legal business environment. Even if the law is more of a business now than when the ethics rules were promulgated—a claim that has been successfully challenged—clients' and attorneys' rights and interests have not changed. The objective of setting legal ethical standards is not to "achieve consensus at the level of the lowest common denominator." The longstanding, well-established rules of legal ethics should not be abrogated simply because other professions have set less demanding standards. These rules exist not for the attorney's or law firm's protection, but rather for the protection of the client, whose interests the attorney and firm are hired to represent. Requiring that noncompetition agreements be subject to the rule of reason neglects the superior, competing interests of clients and attorneys.

Furthermore, allowing the conditions now facing law firms to override traditional ethical requirements likely will promote further erosion of legal ethics and law practice. At a time when public perceptions of attorneys remain embarrassingly grim, courts should have no patience for

175. See Phillip J. Nexon, The Business of the Law in the 1990s, 45 S.C. L. REV. 1063 (1994) (examining the historical development of the practice of law since the 19th century, but focussing primarily on the post-World War II period). Nexon makes a strong case for the assertion that the business of law as it is conducted in the 1990s is not essentially different from what it was in the 1940s and 1950s:

[T]he essential character of the private practice of law in the nineties as conducted by [private practice] law firms is not qualitatively different from what it was in the "good old days," which for present purposes means the world of lawyers in practice forty to fifty years ago. The "essential character" to which I refer is the commercial—money getting—attribute of private practice, and the thesis advanced in these pages is that the practice of law in the areas addressed is a business today, and it was a business in the good old days.

Id. at 1064.

176. Howard, 863 P.2d at 166 (Kennard, J., dissenting) ("[A]ttorneys should strive to, and should be required to, meet the highest ethical standards.").

177. See supra note 43.

178. See Howard, 863 P.2d at 166 (Kennard, J., dissenting).

179. See id. at 164 (Kennard, J., dissenting). As Justice Kennard explained, "A profession has ideals and objectives beyond economic success." Id.

It would be idle to assert that there is nothing of selfishness in the pursuit of a profession. But its ideal is not one of individual success in competitive acquisitive activity. And because ideals operate powerfully to shape action, professional activity, even at its worst, is restrained and guided by something better than the desire for money rewards.

Roscoe Pound, What is a Profession? The Rise of Legal Profession in Antiquity, 19 NOTRE DAME 203, 205 (1944)).
anything that allows ethical standards to deteriorate further.180

C. Client Interests are Best Protected by the Per Se Rule

The symbiotic relationship between clients’ interests and attorney autonomy justifies the regulation of attorneys under the ethical rules.181 Neither law firms nor attorneys have a superior financial or any other proprietary interest in clients.182 The ethical basis for the per se rule – that attorneys should not barter in clients because clients are not merchandise – protects clients by assuring that their interests are properly represented.183 This requirement also protects the practice’s desirable status as a profession. Compensating a firm for losses from competition does not accommodate the interests of clients. The “disastrous impact” of firm instability on clients’ interests is ephemeral. In fact, the willingness of large numbers of clients to follow their attorneys from firm to firm indicates that problems of firm instability may expand client choice through increased movement of partners between competing firms.184 Defensive management policies prompted by firm instability may also enhance client choice, because partners may believe those policies are inconsistent with clients’ interests.185

D. The Attorney’s Interests in Professional Autonomy Better Protect Clients’ Interests

There is no fundamental right to restrictions on competition. Since

180. See Howard, 863 P.2d at 166 (Kennard, J., dissenting) (“If the practice of law is to remain a profession and retain public confidence and respect, it must be guided by something better than the objective of accumulating wealth.”).

181. The availability of counsel promotes clients’ freedom to choose counsel: the greater number of available professionals, the more effectively clients may exercise that choice. Conversely, limitations on attorneys’ right to practice limits their autonomy, which in turn limits the pool of practitioners available to be considered by a client. See supra notes 126-33 and accompanying text.

182. See Kelly v. Smith, 611 N.E.2d 118, 122 (Ind. 1993) (“Although the firm may refer to clients of the firm as ‘the firm’s clients,’ clients are not the ‘possession’ of anyone, but, to the contrary, control who will represent them.”).


184. See Hillman, supra note 19, at 549-50.

185. See id. “[C]onflict-of-interest considerations and attendant incompatibilities of clients within the firm or . . . personality differences that have led to discord and undermined the ability of firm members to respond to the needs of their clients . . . may serve the needs of the clients affected.” Id. (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1987)).
covenants not to compete restrict competition, they must be narrowly tailored even under the application of the reasonableness test in the ordinary business context. \(^{186}\)

The right at issue here is the attorney's freedom to compete. Removing restrictions on an attorney's professional autonomy enhances her economic mobility and personal freedom to follow her interests. Furthermore, an attorney stands in a better bargaining position with prospective employers and partnerships when there is broader competition for the attorney's skills. The achievement of these policy goals in turn encourages client freedom of choice. The reciprocal interests of client and attorney established under the ethical standards are best protected by the predictability and certainty of the per se rule.

V. CONCLUSION

Three courts sharply split from thirty years of precedent recently, in holding that postemployment noncompetition agreements between attorneys and law firms are enforceable. In trying to address the problems of the decline in institutional loyalty and the increase in law firm instability, these courts abandoned the ethically-based per se rule and instead applied the lower, commercial standards of the ordinary reasonableness test, which seeks to balance the competing interests of clients, attorneys, law firms, and the public.

The reasonableness test, as employed by these courts, unreasonably favors the interests of law firms at the expense of clients' freedom of choice, attorneys' freedom of autonomy, and the public's interest in preventing monopolies. The reasonableness test also provides no relief for the causes of the problems now facing law firms, and instead merely treats the symptoms of those problems. The current ethics rules require that a higher standard be applied to attorney noncompetition agreements: agreements that preclude lawyers from representing clients violate the reciprocal interests of clients and attorneys.

Protection of client, attorney, and public interests are the considerations that inspire and steer the per se rule. In light of the purposes that energize the ethical rules, the balancing of the competing interests is best served by Minnesota courts interpreting attorney noncompetition agreements under the per se rule.

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\(^{186}\) See *supra* notes 32-42 and accompanying text.