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Are We a Profession or Merely a Business? The Erosion of Rule 5.6 and the Bar against Restrictions on the Right to Practice

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THE EROSION OF RULE 5.6 AND THE BAR AGAINST
RESTRICTIONS ON THE RIGHT TO PRACTICE

Neil W. Hamilton†

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I. INTRODUCTION

The profession is experiencing a dramatic decrease in loyalty, both of law firm employers to lawyers and of associates and partners to the law firms. This decline in reciprocal loyalties has led to increasing lawyer mobility. Both sides, the departing lawyer and the law firm, have critical commercial interests at stake, and both sides are strongly motivated to protect them. Departing lawyers hope that their clients depart with them to provide the basis for a new practice, and the firms seek to retain clients with the firm. On one side, departing lawyers are exploring how far they can go to solicit clients before and after separation from the firm. On the other side, to prevent or inhibit departing lawyers from taking clients from the firm, many firms are experimenting with how far they can go to discourage competition for clients by departing lawyers. The objective is to let a firm’s lawyers know that there will be immediate and serious negative consequences if a lawyer leaves and goes into competition with the firm.

There is some evidence that many lawyers may not know about the Rules of Professional Conduct\(^1\) that apply to agreements that restrict the practice of departing lawyers,\(^2\) but in any event, the firms have very strong commercial incentives to push the outer edge of the envelope on these issues. This article focuses on how far firms can go to discourage competition for clients by departing lawyers. Given scarce prosecutorial resources, it appears that lawyer disciplinary authorities are likely to pursue only egregious violations involving actual prohibitions against a lawyer’s right to practice.\(^3\) They do not investigate indirect restraints on the right to practice. These are played out in the litigation that law firms and departing lawyers presently enjoy. Among the charges and countercharges will often be a

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1. Unless stated otherwise, textual references in this paper are to the MODEL RULES OF PROFESSIONAL CONDUCT (Rule) or to the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (DR).

2. A survey of 20 New York City law firms in 1988 indicated that while one-half have some form of direct or indirect noncompete agreement, only two of the twenty partners interviewed had heard of Rule 5.6 or its equivalent, DR 2-108(A). See Steven Brill, The Partner Breakup Follies, AM. LAWYER, March 1988, at 3.

3. Interview with Ken Jorgenson, Assistant Director of the Minnesota Lawyers Board of Professional Responsibility, in Minneapolis, Minnesota (Feb. 5, 1996).
claim that the law firm's withholding of a benefit to a departing lawyer is an indirect restraint on the right to practice. Since such litigation is exploding, Rule 5.6 is becoming more important. Part II of the article outlines first the current rule against restrictions on the right to practice and Part III then analyzes the policy rationale for this current rule. Part IV explores the degree to which the law governing lawyers permits agreements that indirectly inhibit or discourage competition. Part V looks at recent cases in California endorsing agreements discouraging competition by departing lawyers because the practice of law is held to be a business enterprise whose interests can be protected as other businesses are permitted to protect their interests. Parts VI and VII analyze the exceptions both for restrictions on the right to practice coupled with "benefits upon retirement," and for fee splitting pursuant to a separation agreement. Part VIII looks at Rule 1.17 and its permission for a restriction on the right to practice incident to the sale of a practice in its entirety. Part IX concludes by arguing in support of a bright-line rule prohibiting direct or indirect restrictions on the right to practice. The principal theme of this analysis is that the profession should not permit the battle among commercial interests of departing lawyers and law firms to compromise the profession's historic commitment to client choice as an overriding policy objective.

II. THE CURRENT RULE AGAINST RESTRICTIONS ON THE RIGHT TO PRACTICE

The Minnesota Rules of Professional Conduct Rule 5.6 on restrictions on the right to practice provides as follows:

A lawyer shall not participate in offering or making: (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.\(^4\)

The 1985 Comment adds the following:

An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients

\(^4\) MINN. RULES OF PROFESSIONAL CONDUCT Rule 5.6 (1996).
to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits from service with the firm.

Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.\(^5\)

The 1995 Comment adds further that “This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.”\(^6\)

Rules 1.5 on fees and 1.17 on the sale of law practice also relate to the issue of restrictions on the right to practice. Minnesota Rule 1.5(e) and 1.5(f) on fees provide the following:

(e) A division of fee 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.\(^7\)

(f) This Rule does not prohibit payment to a former partner or associate pursuant to a separation agreement.\(^8\)

Rule 1.17 on the sale of a law practice, effective in Minnesota on January 1, 1996, provides in relevant part:

(a) A lawyer shall not sell or buy a law practice unless: (1) The seller sells the practice as an entirety, as defined in paragraph (c) of this Rule, to a lawyer or firm of lawyers licensed to practice law in Minnesota; (2) The seller sends a written notification that complies with paragraph (d) of this Rule to all clients whose files are currently active and all clients whose inactive files will be taken over by the buying lawyer or firm of lawyers.

(f) The transaction may include a promise by the selling lawyer that the selling lawyer will not engage in the practice of law for a reasonable period of time within a reasonable geographic area and will not advertise for or solicit clients within that area for that time.\(^9\)

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6. \textit{Id.}
III. POLICY RATIONALE FOR RULE 5.6

A. Freedom of Clients to Select Counsel of Choice

Despite the wording of Rule 5.6 in terms of the lawyer's right to practice, the history of the rule reveals that its purpose is to ensure the freedom of clients to select counsel of their choice. The rule is intended to serve the public interest by ensuring a client's maximum choice among lawyers. When a lawyer leaves a firm, the focus of the rule is that the affected clients have the right to decide for themselves which lawyer they wish to handle their affairs without interference by commercial arrangements among the lawyers. Both sets of lawyers must be able to compete openly for the business of the clients they once served. The wording of Rule 5.6 is similar to that of DR 2-108 in the American Bar Association's Model Code of Professional Responsibility. DR 2-108 provides as follows:

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

Because the language is so similar, cases interpreting DR 2-108(A) are relevant in interpreting Rule 5.6.

A secondary policy rationale for Rule 5.6 mentioned in the comment is that an agreement restricting lawyers' rights to practice also "limited their professional autonomy." This rationale of protecting a lawyer's professional autonomy is occasionally cited but is clearly secondary to the principle of the


freedom of clients to choose a lawyer. 13

B. Commercial Standards Relating to Restrictive Covenants Are Not Applicable in the Lawyer-Client Context

Lawyer restrictive covenants must be distinguished from both commercial noncompetitive covenants by the seller incident to the sale of an enterprise and the general category of agreements restricting post-employment competition by former employees. In both cases, the noncompetitive covenants are designed to protect the goodwill and business of the buyer of an enterprise or of the employer against various forms of competition. Historically, the seller's noncompetitive agreement was more freely enforceable than the employee restrictive covenant; the latter was subject to a stricter test of reasonableness under the circumstances. 14 An early New Jersey case on the issue of lawyer restrictive covenants, Dwyer v. Jung, 15 found that an employee's restrictive covenant "will generally be found to be reasonable where it simply protects the legitimate interests of the employer, imposes no undue hardship on the employee, and is not injurious to the public." 16

The Dwyer court further explains:

Commercial standards may not be used to evaluate the

13. See ABA Formal Opinion 94-381, Restrictions on Right to Practice (May 8, 1994) (considering restrictions on the right to practice of in-house counsel). But see Committee on Professional Responsibility, Association of the Bar of City of New York, Ethical Issues Arising When a Lawyer Leaves a Firm: Restrictions on Practice, 20 FORDHAM URB. L.J. 897, 909 (1993) (stating "[t]he major justification for the rule is to promote a lawyer's personal autonomy by allowing the lawyer some freedom of movement"). However, this article has not been cited by any court to date as authority for an exception to the principle of client choice as the primary policy underlying the ethical ban.

14. See B&Y Metal Painting, Inc. v. Ball 279 N.W.2d 813, 815 (Minn. 1979) (recognizing that courts use a stricter standard when looking at employment noncompete agreements than those of sellers); Bennett v. Storz Broadcasting Co., 270 Minn. 525, 555, 134 N.W.2d 892, 899 (Minn. 1965) (stating the concern in the employment cases is unequal bargaining power, thus a stricter standard); National Recruiters, Inc., v. Cashman, 323 N.W.2d 736, 740 (Minn. 1982) (expressing the opinion that courts look with disfavor upon restrictive covenants between employees and employer because of the partial restraint on trade).


reasonableness of lawyer restrictive covenants. Strong policy considerations preclude their applicability. In that sense lawyer restrictions are injurious to the public interest. A client is always entitled to be represented by counsel of his own choosing. ... The attorney-client relationship is consensual, highly fiduciary on the part of counsel, and he may do nothing which restricts the right of a client to repose confidence in any counsel of his choice. ... No concept in 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."17

These considerations have led to similar distinctions within the Rules of Professional Conduct, where restrictions on the right to practice of a former employee lawyer are held to a stricter test under Rule 5.6 than restrictions on the right to practice of a seller of a law practice under Rule 1.1718. Both rules articulate standards for lawyers substantially higher than general commercial standards. Both rules also recognize that client choice is not a factor in situations where the departing lawyer is no longer in practice in the jurisdiction, either through the sale of the entire practice or upon retirement from the practice. Restrictions on the right to practice permitted by Rule 1.17 and the Rule 5.6 exception for agreements upon retirement are discussed later.

IV. THE REACH OF RULE 5.6

A. Agreements Prohibiting Competition and Client Choice

Courts consistently find that Rule 5.6 and its precursor, DR 2-108(A), forbid outright prohibitions on the practice of law.19 Agreements allocating clients, geographic areas, or types of practice would all fall within this category. Contractual provisions that violate the Rules also violate public policy, and courts deem them void and unenforceable.20

17. Dwyer, 336 A.2d at 500.
19. Id. at 147-48.
20. Id. at 146.
B. Agreements Discouraging Competition and Client Choice

Can a firm discourage, rather than prohibit, competition for clients by departing lawyers? Responding to a dramatic decrease in reciprocal loyalties between firms and lawyers, and a corresponding increase in lawyer mobility, many firms have incorporated provisions into their employment agreements that impose financial disincentives on lawyers who compete with their former firm.\textsuperscript{21} Rich in drafting skills, firms are utilizing a dazzling variety of creative financial disincentive provisions that require a departing lawyer to forfeit all or a part of the earned departure, termination or deferred compensation that the lawyer would have received were he or she not leaving to compete with the firm. Firms are also adopting financial disincentives that require a departing lawyer to pay to the former firm a percentage of the fees received from clients who leave with the lawyer.\textsuperscript{22} This second option is discussed in Part VII below. Both of these types of provisions let a firm's lawyers know that there will be immediate negative consequences if the lawyer leaves and goes into competition with the firm.

Going into competition with the former firm requires capital. Hazard and Hodes emphasize the necessity for an immediate cash stream to launch a new firm.\textsuperscript{23} Modern practice is capital intensive and involves substantial cash flows. At any given time, a law firm has a substantial number of hours of time expended but not yet billed, and hours billed but not yet collected. Simultaneously, the firm must pay its current wages, rents, equipment costs and a host of other expenses.\textsuperscript{24} Newer lawyers with fewer overall assets will face the most significant cash flow problems. For this group of lawyers in particular, tradeoffs between loss of immediate cash because of financial disincentive provisions and the representation of clients that triggers the loss will be difficult.\textsuperscript{25}

In the leading case on agreements that discourage competi-

\footnotesize{21. See ROBERT HILLMAN, LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS § 2.3.4 (1995).}
\footnotesize{22. See ABA & BNA Lawyers' Manual on Professional Conduct (ABA & BNA) 51:1205 (1995).}
\footnotesize{23. HAZARD & HODES, supra note 10, at 822-23.}
\footnotesize{24. Id.}
\footnotesize{25. Id. at 823.}
tion and client choice, the law firm, Norris, McLaughlin and Marcus had a Service Termination Agreement that prohibited departing lawyers from collecting termination compensation if they continued to represent firm clients. The court held that the plain meaning of Rule 5.6 "indicates that any provision, whether direct or indirect, that operates so as to restrict a lawyer's post-termination practice will contravene the ethical rule."

Any provision penalizing an attorney for undertaking certain representation restricts the right of a lawyer to practice law within the meaning of [Rule 5.6].

By forcing lawyers to choose between compensation and continued service to their clients, financial-disincentive provisions may encourage lawyers to give up their clients, 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 . . . . Because the client's freedom of choice is the paramount interest to be served by the [rule], a disincentive provision is as detrimental to the public interest as an outright prohibition. Moreover, if we were to prohibit direct restraints on practice but permit indirect restraints, law firms would quickly move to undermine [Rule] 5.6 through indirect means.

The court emphasizes that the details of a provision affecting a departing lawyer are not the important question. The critical question is "the effect of the terms of payment on the lawyer's decision to decline or accept those clients who wish to choose him or her as counsel. If the agreement creates a disincentive to accept representation, it violates [Rule 5.6]." The focus of analysis has to be on the practical effect of the financial disincentive provision.

The New York Court of Appeals comes to a similar holding in another leading case, Cohen v. Lord, Day & Lord. The Lord,
Day and Lord (LD&L)

[P]artnership agreement included a provision protecting against automatic dissolution and recognized that withdrawing partners were entitled to a share of the firm profits representing unpaid fees, and fees for services performed but not yet billed, at the time of departure. In order to avoid the expense and bookkeeping complication of a detailed accounting, the agreement provided for departure payment, based on a formula, to be paid over a three-year period.

When Cohen requested his departure compensation, LD&L refused to pay, stating that Cohen had forfeited the money by electing to continue to practice law in competition with the firm. In support of its position, the defendant firm relied on the forfeiture-for-competition clause of the partnership agreement: "Notwithstanding anything in this Article * * * to the contrary, if a Partner withdraws from the Partnership and without the prior written consent of the Executive Committee continues to practice law in any state or other jurisdiction in which the Partnership maintains an office or any contiguous jurisdiction, either as a lawyer in private practice or as a counsel employed by a business firm, he shall have no further interest in and there shall be paid to him no proportion of the net profits of the Partnership collected thereafter, whether for services rendered before or after his withdrawal. There shall be paid to him only his withdrawable credit balance on the books of the Partnership at the date of his withdrawal, together with the amount of his capital account, and the Partnership shall have no further obligation to him."

We hold that while the provision in question does not expressly or completely prohibit a withdrawing partner from engaging in the practice of law, the significant monetary penalty it exacts, if the withdrawing partner practices competitively with the former firm, constitutes an impermissible restriction on the practice of law. The forfeiture-for-competition provision would functionally and realistically discourage and foreclose a withdrawing partner from serving clients who might wish to continue to be represented by the withdrawing lawyer and would thus interfere with the client's choice of counsel.33

A number of courts have similarly rejected indirect financial

33. Id. at 410-11.
incentives that discourage competition and limit choice.\textsuperscript{34}

There are no Minnesota appellate decisions directly considering financial disincentive provisions. However, in \textit{Barna, Guzy \& Steffen v. Beens},\textsuperscript{35} the Minnesota Court of Appeals recently considered a separation agreement that required a departing lawyer to pay to the former firm fifty percent of all fees eventually recovered in contingent fee cases the lawyer handled while at the Barna law firm.\textsuperscript{36} In the particular contingency fee case at hand, there was already a fee split with a third lawyer outside the Barna firm. The court properly found that

The focus of our decision is the client. As the court stated in \textit{Jacob}: The history behind [rule 5.6] and its precursors reveals

\textsuperscript{34} See Whiteside v. Griffis \& Griffis, P.C., 902 S.W.2d 739, 744 (Tex. Ct. App. 1995) (an agreement under which attorney is given an indirect financial disincentive to practice law violates the Professional Responsibility Code Provision that bars agreements restricting right of attorney to practice law and is void as against public policy); Leonard \& Butler, P.C. v. Harris, 653 A.2d 1193, 1198 (N.J. Super. Ct. App. Div. 1995) (holding indirect financial disincentive should be closely scrutinized because of the potential for interference in the attorney-client relationship); Denburg v. Parker Chapin Flattau \& Klimpl, 624 N.E.2d 995, 998 (N.Y. 1993) (holding financial disincentives are restrictions on the practice of law and are objectionable because they interfere with the client's choice of counsel); Minge v. Weeks, 629 So.2d 545, 547 (La. Ct. App. 1993) (indirect financial disincentives, even though not directly restrictive, violate Rule 5.6); Anderson v. Aspelmeier, Fisch, Power, Warner \& Engberg, 461 N.W.2d 598, 601 (Iowa 1990) (recognizing the transparency of the distinction between an indirect financial disincentive and a restrictive covenant); Judge v. Bartlett, Potiff, Stewart \& Rhodes P.C., 197 A.D.2d 148, 149 (N.Y. 1994) (the primary reason that indirect financial disincentives are objectionable is the interference they pose to a client's choice of counsel); Weiss v. Carpenter, Bennett \& Morrissey, 646 A.2d 473, 479 (N.J. Super. Ct. App. Div. 1994) (agreeing with previous courts that held indirect financial disincentives are unenforceable as against public policy); Katchen v. Wolff \& Samson, 610 A.2d 415, 419 (N.J. Super Ct. App. Div. 1992) (holding if a financial disincentive has the effect of discouraging competitive activities, even if indirectly, such a provision violates rule 5.6 of the rules of professional conduct); Gray v. Martin, 663 P.2d 1285, 1290 (Or. Ct. App. 1983) (holding that forfeiture of retirement benefits affects the withdrawing partner's right to practice in violation of the rule of professional responsibility); Hagen v. O'Connell, Goyak \& Ball, P.C., 683 P.2d 563, 565 (Or. Ct. App. 1984) (a forty percent reduction in stock redemption price affects the departing lawyer's right to practice law and is unenforceable); Spiegel v. Thomas, Mann \& Smith, P.C., 811 S.W.2d 528, 530 (Tenn. 1991) (forfeiture of deferred compensation by prior agreement is unenforceable as against public policy); In re Silverberg, 427 N.Y.S.2d 480, 481-82 (N.Y. 1980) (eighty percent of fees from ex-clients of other lawyer in dissolving firm for eighteen months after termination is void as it violates the rules of professional conduct and is contrary to public policy).


\textsuperscript{36} Id. at 355.
that the [rule’s] underlying purpose 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. 37

The court distinguished the Barna separation agreement

[F]rom one in which a separation agreement effectively penalizes an attorney for continuing to represent certain clients. Under the shareholder agreement, Beens will still receive 50% of the contingency fee. As the Barna firm points out, the agreement cannot serve as a financial disincentive because Beens would have received less than 50% of the contingency fee if he had remained at the firm. 38

The court found there was no incentive for the departing lawyer to terminate representation of clients subject to this fee splitting agreement. 39

The Minnesota Court of Appeals uses the correct analytical framework focusing on the effect of the terms of payment on the departing lawyer’s decision to decline or accept those clients who choose the lawyer as counsel. However, the court does not properly apply the analysis to the facts. The court fails to analyze the market reality of splitting a fee under the circumstances. A simple example clarifies the point. Assume that the case at issue is expected to settle at $100,000, that the contingency fee is thirty percent, and that there is no third lawyer to split the fee. The contingency fee will be $30,000, and the Barna firm had incurred approximately $6,700 in attorney time on the case at the time Beens left the firm. The critical missing element in the court’s analysis is how much more time the case will take before settlement. If the case is expected to require $23,000 more in attorney time, then the Barna firm will get $15,000 less $6,700 in attorney time for a net profit of $8,300, and Beens will get $15,000 but invest $23,000 in attorney time for a net loss of $8,000. Thus, Beens would not take the case because of the financial disincentive. If Minnesota courts continue to conclude that there is no disincentive to choose a client simply because a departing lawyer receives at least as much as the lawyer would have under the partnership agreement, the courts are essentially permitting firms to adopt a type of “no extra compensation rule” from partnership law in the partner-

37. Id. at 357.
38. Id.
39. Id.
The agreements will provide that a departing lawyer can earn only their partnership interest on cases taken from the firm. This will be a severe disincentive for departing lawyers to take the client in some cases because the compensation does not reflect the cost of the case.

If the focus of Rule 5.6 is on the client’s freedom to select counsel of choice, then the analysis of fee splitting in separation agreements must be more nuanced to ensure client choice. The incentive for firms to create a financial disincentive for departing lawyers is enormous. General commercial standards of liquidated damages or the “no extra compensation rule” of partnership law will not be appropriate to achieve the purpose of protecting client choice.

V. THE PRACTICE OF LAW AS A BUSINESS AND THE EROSION OF RULE 5.6

A. The California Supreme Court Endorses Agreements Discouraging Competition

In Howard v. Babcock, the partnership agreement for the law firm of Parker, Stanbury, McGee, Babcock & Combs provided that if an attorney withdrew from the firm prior to age sixty-five and thereafter within a period of one year practices insurance defense work in Los Angeles or Orange County, the attorney would forfeit all rights to withdrawal benefits other than capital. The agreement provided that a partner who withdraws from the firm and does not compete would be paid a sum equal to the share in the net profit of the firm that the withdrawn partner would have received if he or she had remained at the firm during the twelve month period. After several partners left the firm to handle among other cases, insurance defense work in Los Angeles, the firm tendered payment to the departing lawyers for their share of the capital of the firm, but

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40. 863 P.2d 150 (Cal. 1993).
42. Howard, 863 P.2d at 151.
refused to compensate them for the accounts receivable or work in progress of the law firm. The California Supreme Court held that "an agreement among law partners imposing a reasonable toll on departing partners who compete with the firm" is enforceable. It remanded to the trial court to determine whether under the facts of this case, the terms of the agreement are reasonable.

Rule 1-500 of the California Rules of Professional Conduct is similar to Rule 5.6. It provides that a lawyer shall not participate in offering or making an agreement that restricts the right to practice law, except that the rule does not prohibit an agreement which requires payments upon a lawyer's retirement from the practice of law.

The California Supreme Court interpreted this rule in light of "our recognition that 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." Noting (1) the decline of the loyalty of lawyers to the law firm (but not the decline of firm loyalty to lawyers), (2) the increasing propensity of withdrawing lawyers to set up competing practices and to take clients of the firm, and (3) the increasing use of noncompetition clauses in partnership agreements "in defiance of the consistent holding of many courts across the nation that a noncompetition clause violates the rules of professional conduct . . .," the court concluded that "these agreements address important business interests of law firms that can no longer be ignored." "Recognizing these sweeping changes in the practice of law, we can see no legal justification for treating partners in law firms differently in this respect from partners in other businesses and professions." Further the court states, [T]he contemporary changes in the legal profession to which we have already alluded make the assertion that the practice

43. Id. at 152.
44. Id. at 160.
45. Id. at 161. The case was remanded a second time to the trial court to consider further evidence on whether the agreement was reasonable. Howard v. Babcock, 46 Cal. Rptr.2d 907, 913 (Cal. Ct. App. 1995).
47. Id. However, the rule noted three exceptions to this rule. See id.
49. Id. at 157.
50. Id.
of law is not comparable to a business unpersuasive and unreflective of reality. Commercial concerns are now openly recognized as important in the practice of law . . . . [A]s in other businesses, lawyers may now advertise their services . . . . Thus the general rules and habits of commerce have permeated the legal profession.51

A number of commentators join in endorsing the reasoning of the California courts in Howard v. Babcock or the earlier Haight, Brown & Bonesteel v. Superior Court52 decisions. A principal theme of this commentary is that the courts should recognize the competing interests of the client, the law firm and the withdrawing lawyers and balance them in a reasonableness test as courts do in analyzing agreements discouraging competition in other professions. The legal profession is becoming more of a business, and there is no distinction between the legal professions and other professions.53

B. Maine Subjects Agreements Restricting the Right to Practice Only to the Commercial Law Limitations on Such Restrictions

Maine has gone further and did not adopt the Rule 5.6 or DR 2-108 into its ethics rules. A Maine law firm may require its lawyers to agree not to compete with the firm upon departure subject only to commercial law limitations on such restrictions.54

51. Id. at 159.
VI. AGREEMENTS CONCERNING "BENEFITS UPON RETIREMENT" UNDER RULE 5.6

Minnesota Rule 5.6 provides that "A lawyer shall not participate in offering or making: (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement."

Firms seeking to circumvent Rule 5.6 may label departure or deferred compensation as a retirement benefit, and thus claim that the rule does permit restrictions on a departing lawyer's right to practice as a condition to the payment of the retirement benefit. Courts have generally rejected these attempts to categorize as "retirement" the departure of lawyers who leave to practice elsewhere.

Courts recognize that the retirement exception must be narrow and should not apply when lawyers withdraw to take up practice elsewhere. However, decisions considering the definition of "an agreement concerning benefits upon retirement" do not clearly identify the factors that should guide the determination. The phrase "benefits upon retirement" is itself not clearly defined in Rule 5.6. However, "retirement" literally means withdrawal from service, business or active duty usually after many years of service or upon reaching a certain age. Given the rule's policy rationale to protect the freedom of clients to select counsel of choice, the phrase must mean upon withdrawal from the active practice of law anywhere. There is no issue of client choice if a lawyer is withdrawing from active practice, and the restriction upon practice for retiring lawyers encourages firms to

57. See generally Graubard Mollen Horowitz etc. v. Moskovitz, 565 N.Y.S.2d 672, 676 (N.Y. App. Div. 1990) (holding that "a firm may... require an attorney not to represent its clients or not to practice law at all while receiving retirement benefits, but if the attorney decides to forgo those benefits, then he may practice and clients may freely avail themselves of his services."); Levy v. Baumeister, 566 N.Y.S.2d 275 (N.Y. App. Div. 1991) (holding that law partnership agreement that obligated withdrawing partners to pay retiring partner value of receivables at retiring partner's retirement date did not constitute impermissible restriction on practice of law); Miller v. Foulston, Sieffkin, Powers etc., 790 P.2d 404 (Kan. 1990) (holding that provisions of law partnership agreement that provided that an expelled partner is entitled to retirement benefit payment as long as the expelled partner does not practice law and does not impermissibly restrict the right to practice law).
be generous with older lawyers who suffer a substantial drop in income after leaving the practice.

If a firm can define retirement to mean the same thing as withdrawal or departure, the court in *Gray v. Martin*\(^58\) recognized that the disciplinary rule would have 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."\(^59\)

There are several critical factors that must be met for a restriction on the right to practice to fall within the Rule 5.6 exception for "an agreement concerning benefits upon retirement." First, the lawyer must be withdrawing from the active practice of law anywhere and second, the agreement must contain a minimum age and/or service requirement. Secondary factors indicating an agreement concerning benefits upon retirement would be an extended time period over which the payments are made (indicating a true retirement), and the existence of provisions dealing independently with withdrawal for purposes of retirement and withdrawal for other reasons.\(^60\)

**VII. PAYMENTS TO FORMER PARTNERS OR ASSOCIATES PURSUANT TO A SEPARATION AGREEMENT UNDER RULE 1.5(F)**

Under commercial standards set forth in the Uniform Partnership Act (UPA),\(^61\) partners may enter into whatever arrangement they like concerning the distribution of capital and income after a partner's withdrawal and the partnership's dissolution. In the event the partners make no provision, the UPA's default policy is the "no extra-compensation" rule, whereby the departing partner is paid no more than the normal partnership share of fees for the work done on matters or cases involving the winding up of the partnership business.\(^62\)

\(^{58}\) 663 P.2d 1285 (Or. Ct. App. 1983).

\(^{59}\) Id. at 1290.

\(^{60}\) See generally ROBERT HILLMAN, LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWAL AND LAW FIRM BREAKUPS, § 2.3.5 (1995) (discussing true retirement versus more "departure" payments); HAZARD & HODES, supra note 10, at 824 (discussing covenants not to compete and restrictions on lawyers leaving a firm).

\(^{61}\) UNIFORM PARTNERSHIP ACT § 18 (1949) (establishing default rules for distribution of capital and income in the absence of an express agreement among the partners).

\(^{62}\) See generally Grossman v. Davis, 34 Cal.Rptr.2d 355 (Cal. Ct. App. 1994) (holding that bad faith action was part of winding up, requiring fee allocation to former
The UPA does not supplant the Rules of Professional Conduct and several provisions of the Rules are applicable to the departing lawyer situation. A division of fees between lawyers who are not in the same firm is subject to Rule 1.5(e), which requires that (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 each lawyer is to receive and does not object; and (3) the total fee is reasonable. The Rules of Professional Conduct make no provision concerning the division of fees within a firm. This division will occur according to the partnership agreement.63

Rule 1.5(f) focuses on the division of fees when a lawyer is departing from a firm. It provides that, "This Rule does not prohibit payment to a former partner or associate pursuant to a separation agreement."64 In other words, Rule 1.5(e) does not govern with respect to a division of fees in a separation agreement with a departing lawyer.

Rule 5.6 prohibiting restrictions on the right to practice is clearly still applicable to any separation agreement with a departing lawyer. Rule 1.5(f) provides only that "this rule," meaning 1.5(e), does not prohibit payments to a departing lawyer.

The division of fees on existing client matters that remain with the firm or that go with the departing lawyer must not impose financial disincentives on the departing lawyer or on the firm that contravene the policy of Rule 5.6. The critical question again is the effect of the terms of payment on either a departing lawyer's or the firm's decision to decline or accept those clients who wish to choose the lawyer or the firm as counsel. The terms

partners); Smith v. Daug, 365 N.W.2d 816 (Neb. 1985) (holding that fees for winding up are to be distributed according to the agreement during the life of the partnership); Jewel v. Boxer, 203 Cal.Rptr. 13 (Cal. Ct. App. 1984) (holding that fees received by former partners were to be shared according to their right in the former partnership); Resnick v. Kaplan, 434 A.2d 582 (Md. Ct. Spec. App. 1981) (holding that fees collected in winding up should be allocated according to percentages in partnership agreement); Howard v. Babcock, 863 P.2d 150 (Cal. 1993) (holding that law firm partners may impose reasonable costs on departing partners who compete with the law firm in a limited geographic area).

63. UNIFORM PARTNERSHIP ACT § 18(a) (1949) (providing that in absence of an agreement to the contrary, each partner has a right to share equally in profits).
64. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(f) (1996) (emphasis added).
of payment must be client choice neutral for each client. If the separation agreement creates a disincentive to accept representation, it violates Rule 5.6.

Several courts and state ethics opinions have condemned separation agreements that require the departing lawyer to give up too substantial a portion of the fees for work done on matters for clients who chose the departing lawyer. The terms of payment in such agreements have a negative effect on the lawyer's decision to accept or to decline those clients who wish to choose him or her as counsel.65

In contrast, the California Supreme Court in Howard v. Babcock66 cites with approval the commercial "no extra compensation rule" of partnership law. The court recognized that compensating departing lawyers for winding up unfinished partnership business according to their partnership interest "may be just as much of a disincentive on the withdrawing partner to continue to represent clients of the firm as an anticompetitive penalty, and yet this is not considered to be a violation of Rule 1-500 [California's version of Rule 5.6]."67 This is a commercial reasonableness standard.

A Michigan decision, McCroskey, Feldman v. Waters,68 also fails to apply the Rule 5.6 and its policy rationale of protecting client choice to separation agreements allocating fees. The departing lawyer's employment contract provided for a division of fees to the firm ranging from twenty-five to seventy-five percent (depending upon the stage of litigation of the file) on clients who maintained a professional relationship with the departing lawyer. The court upheld an arbitrator's decision, finding that the contract provisions were "not so overreaching

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66. 863 P.2d 150.

67. Howard, 863 P.2d at 159 n.8. Justice Kennard in dissent notes that the withdrawing partners had to pay 82.5% of the profits derived from the work the withdrawing lawyers performed after the termination of the partnership. This restricts the attorney's right to practice in any meaningful sense. Id. at 163.

that they amount to an actual restriction on defendant's right to practice law. Defendant's argument that the contract violates MRPC 5.6 because his payments to the plaintiff decrease his new firm's cash flow and thus impair its ability to service its clients is unpersuasive."\textsuperscript{69} This is a commercial reasonableness standard. The court does not address the critical question of the practical effect of the terms of payment on the lawyer's decision to decline or accept those clients who wish to choose him or her as counsel.

The Minnesota Court of Appeals in \textit{Barna, Guzy \& Steffen v. Beens},\textsuperscript{70} discussed earlier in Part IV.B., correctly focused on the effect of the terms of payment on the departing lawyer's decision to decline or accept those clients who choose the lawyer as counsel. However, the court did not properly apply the analysis to the facts as explained earlier.

The critical focus of analysis must be whether the division of fees when a lawyer is departing from a firm under Rule 1.5(f) is client choice neutral \textit{for each client}. Clearly, when lawyers divide fees on client files, they have fiduciary duties to account for the fees and the fee division on each file separately, not on an aggregate grouping of files. Even though voluntary settlements between a law firm and departing lawyers are to be encouraged, the voluntary fee settlement should not aggregate files in a way that may not be client choice neutral. The lawyers' fiduciary duties to each client should trump the lawyers' commercial interests in simplifying calculations for a voluntary fee settlement. Each client must be considered separately to determine the impact of the division of fees on client choice. Departing or remaining lawyers are entitled to a portion of the fee on each file based on the reasonable value of services rendered or responsibility assumed.

\textbf{VIII. Restrictions on the Right to Practice of a Seller of a Law Practice Under Rule 1.17}

Rule 1.17(f) provides that when a lawyer sells his or her

\textsuperscript{69} Id. at 828. \textit{See} Kelly v. Smith, 588 N.E.2d 1306, 1313 (Ind. Ct. App. 1992) (focusing on adverse impacts on the firm in terms of lost client base as a result of a lawyer's departure in approving a fee division under the UPA requiring the departing lawyer to pay 80% of the fees received on removed matters to the firm).

\textsuperscript{70} 541 N.W.2d 354 (Minn. Ct. App. 1995). \textit{See also supra} text accompanying note 27 (discussing other aspects of the \textit{Barna, Guzy \& Steffen} noncompete agreement).
practice as an entirety, "the transaction may include a promise by the selling lawyer that the selling lawyer will not engage in the practice of law for a reasonable period within a reasonable geographic area and will not advertise for or solicit clients within that area for that time."71 The conditions of notification and fee ceilings to protect clients that Rule 1.17 requires for a sale of a law practice are substantially higher than general commercial standards. Rule 1.17(f), following the policy of Rule 5.6(a) regarding benefits upon retirement, recognizes that client choice is not a factor in situations where the departing lawyer is no longer in practice in the jurisdiction. Essentially, Rule 1.17 requires that a lawyer selling a practice "stay retired." The purpose of this restriction, according to Hazard and Hodes, "is to ensure that the sale is a genuine transfer of the goodwill associated with the selling lawyer's client base, and to prevent a lawyer from cultivating a series of client bases for the purpose of selling them off consecutively."72

IX. CONCLUSION

When a lawyer leaves a firm, there is disruption for the client, the lawyer and the firm. The incidence of disruption is dramatically increasing because of declining reciprocal loyalties between firms and lawyers and the consequent increase in lawyer mobility.

To protect their commercial interests, some firms are experimenting with how far they can go to discourage competition by departing lawyers. The firms are using a variety of creative financial disincentive provisions to let a firm's lawyers know that there will be immediate negative consequences if the lawyer leaves and goes into competition with the firm.

The major argument for these financial disincentives is that the legal profession is at least in part, a commercial enterprise. At a minimum, the law firm's legitimate interest in stability as an enterprise and returns on its investments should be reasonably balanced against the client's and departing lawyer's interests.

Although the practice of law is a commercial enterprise in the sense that an attorney earns a living by practicing law, it is

72. HAZARD & HODES, supra note 10, at 824.1.
also and foremost a client-oriented profession. The Minnesota Attorney Oath of Admission and the Minnesota Rules of Professional Conduct emphasize that we are a profession committed first to clients and to the court. The 1995 ABA report, Teaching and Learning Professionalism, reaches back to the traditional concept of professionalism. "As one noted scholar has stated: 'profession' comes from the Latin, professionem, meaning to make a public declaration. The term evolved to describe occupations that required new entrants to take an oath professing their dedication to the ideals and practices associated with a learned calling." The Minnesota Attorney Oath of Admission provides:

I swear that I will support the Constitution of the United States and that of the State of Minnesota, and will conduct myself as an attorney and counselor at law, in an upright and courteous manner, to the best of my learning and ability, with all good fidelity as well to the court as to the client, and that I will use no falsehood or deceit, nor delay any person's cause for lucre or malice, so help me God.

The Minnesota Rules of Professional Conduct begin with the statement that "A lawyer is a representative of clients, an officer of the legal system and public citizen having special responsibility for the quality of justice." The first seven paragraphs of the Preamble emphasize each of these roles, but especially the duties of a lawyer as a representative of clients. The only reference to the practice of law as a commercial enterprise in the Preamble is in the middle of paragraph eight. "Virtually all difficult ethical problems arise from conflict between a lawyer's responsibility to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living."

The legal profession has its own standards, differing from those of other professions, deriving from the profession's role in the justice system. In this justice system, the lawyer client relationship is intensely personal; for the system to work, the

74. See AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION & ADMISSION TO THE BAR PROFESSIONALISM COMMITTEE, TEACHING & LEARNING PROFESSIONALISM, 6-7 (1995) (hereinafter TEACHING AND LEARNING PROFESSIONALISM).
75. MINN. RULES OF PROFESSIONAL CONDUCT, Preamble (1996).
76. Id.
lawyer in the role of counselor and advocate must enjoy the maximum possible trust and confidence of the client.\textsuperscript{77} The client must have free choice of counsel who enjoys the client's maximum trust and confidence. Our society's goal that our adversary system results in our best approximation of justice depends upon the trust in the lawyer client relationship. Lawyers act as the alter ego of the client to effectuate justice in our adversary system. The importance of the role of the lawyer-client relationship in securing justice for the society is why the judge in \textit{Dwyer v. Jung} emphasizes, "[t]he attorney-client relationship is consensual, highly fiduciary on the part of counsel, and he [or she] may do nothing which restricts the right of a client to repose confidence in any counsel of his [or her] choice . . . . No concept in the practice of law is more deeply rooted."\textsuperscript{78} While the client in other professional relationships like the doctor patient relationship may benefit personally from trust with the service provider, there is not the same overarching societal goal of justice and system justification in those relationships.

There are clearly forces within the society that are pushing the legal profession towards being more profit-centered than client-centered. The monetization of professional values continues to erode the ethics of the profession.\textsuperscript{79} This erosion must be reversed.

For these reasons, the focus of analysis concerning disruption by an attorney leaving a law firm should not be upon the battle among commercial interests of the law firm or the departing attorney, but rather upon the client. The focus of analysis must be whether commercial arrangements among the lawyers are client choice neutral. If the agreement between the law firm and the lawyer in practical effect creates a disincentive for a lawyer to accept or continue representation, it violates Rule 5.6.

The greatest threat to client choice is clearly to the client who may wish to choose the departing lawyer as counsel. While the partnership or employment agreement could, in theory,

\begin{itemize}
\item \textsuperscript{79} See \textit{TEACHING AND LEARNING PROFESSIONALISM}, supra note 74, at 4.
\end{itemize}
influence the client choice of either the departing lawyer or of the lawyers remaining in the firm, the practical reality is that established firms draft these financial disincentive provisions to serve their interests by discouraging competition and reducing client choice.

There may be a subset of situations where the firm has incurred such high fixed costs of mutually incurred debt and the departing lawyer will take so many clients, that the firm would, for financial reasons, choose to withdraw from representation of an existing client. This does not seem a realistic probability.

There may also be situations where the firm, in computing a withdrawing partner’s equity interest, should be able to account for the effect of a partner’s departure on the firm’s value. In Jacob v. Norris, McLaughlin & Marcus, the New Jersey Supreme Court noted that “Although the departing attorneys always have a right to receive the value of their capital accounts, in computing the value of any additional interest they have in the firm, the value they contributed can be offset by the decrease in the firm’s value their departure causes.” Although the New Jersey court apparently endorses accounting for decreases in prospective business from specific clients, this approach may create disincentives for the departing lawyer to take specific clients. The focus of the analysis should be whether such provisions are client choice neutral. The computation of the effect of a departure on firm goodwill will not prejudice client choice if it is not based on particular clients, but rather on an aggregate or average like the average loss of goodwill from partner withdrawals.

Far more likely is the situation where the departing lawyer

81. In Hackett v. Milbank, Tweed, Hadley & McCloy, the firm’s agreement provided several types of payments to departing partners: repayment of capital, distribution of undistributed net profits, and supplemental payments upon withdrawal or death of a multiple of the withdrawing partner’s percentage of the firm’s profits. Hackett v. Milbank, Tweed, Hadley & McCloy, 680 N.Y.S.2d 274, 276 (N.Y. 1995). The supplemental payments were, “reduced dollar for dollar to the extent that the withdrawing partner’s annual earned income, from any source, exceed[ed] $100,000.” Id. at 277. The arbitrator found that the purpose of the reduction in supplemental payments was not anti-competitive but rather the provision of a safety net for lawyers who leave for lower income positions. The New York Court of Appeals, giving much deference to the arbitrator, endorsed the arbitrator’s finding that the provision is “competition neutral,” because the provision did not discriminate based on competition. Id. at 280. Client choice neutral would be a better criterion than “competition neutral.”
is faced with all the costs of starting a new firm, and the financial disincentives for competition with the old firm created by the partnership, employment, or separation agreement create a dilemma whether to decline or accept a client. In most cases, given the difference in asset base between the established firm and the departing lawyer, delay and litigation will deter competition and play into the hands of the established firm.

If courts adopt a balancing of interests approach or a commercial rule of reason approach to restrictions on the right to practice, they will cause further erosion of the freedom of clients to select counsel of their choice. Courts must be vigilant to prevent this erosion. Such an approach will also increase rather than decrease litigation as firms explore the outer edge of the envelope of "reasonableness" in trying to restrict competition from departing lawyers. A simple rule with clear lines will best prevent erosion of client choice and more litigation. The critical question is the practical effect of the terms of payment on the lawyer's decision to decline or accept those clients who wish to choose him or her as counsel. If an agreement creates any disincentive to accept representation, it violates Rule 5.6. In cases of doubt, public policy should prevail against the financial disincentive.