

NON-COMPETE AGREEMENTS: WEIGHING THE INTERESTS OF PROFESSION AND FIRM

I. INTRODUCTION

Non-compete agreements have been the subject of much discussion and litigation over the years. On one hand, the departing professional argues that she should be able to continue to earn a living doing what she is trained to do. On the other hand, the firm or practice inherently loses money and clients when a partner leaves and asserts a right to protect its interests. Losing valuable partners can have a large impact on a firm's "good will value and future earnings potential."¹ Firms also claim that restrictions are justified to keep new members from leaving after gathering experience and a good client base.² As a protective measure, such firms began including covenants not to compete in partnership agreements. As will be explained more fully below, absolute prohibitions on competition are frowned upon and sometimes forbidden. The more complicated issue, however, is that of indirect restrictions which operate to prevent a partner from pulling his interest and clients from the firm and entering into a competing practice. This Comment examines first the law in general throughout the country and then addresses the differing rules applicable to legal, physician, and accounting practices. This Comment concludes with a focus on Alabama law and some recent cases that might affect the area of non-compete agreements in the aforementioned professions.

1. GEOFFREY C. HAZARD, JR. & WILLIAM HODES, 2 THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 5.6:202, at 822 (2d ed. Supp. 1993).

2. See, e.g., *Howard v. Babcock*, 863 P.2d 150, 157 (Cal. 1993); *McLean v. Michaelowsky*, 458 N.Y.S.2d 1005, 1006 (Sup. Ct. 1983) ("The firm argues that it would be unfair to permit young associates to use a firm's long-established good reputation, have the firm cover all overhead and then, having built their own reputation, without incurring the start-up costs associated with developing expertise and reputation, leave. . .").

II. NATIONAL SURVEY OF NON-COMPETE AGREEMENTS

A. Lawyers

1. Direct Restrictions: The Per Se Rule

Historically, the legal profession received the same treatment as other professions when a partner wished to leave the firm and practice elsewhere. Courts used a reasonableness test to analyze the right of the departing lawyer to compete with his former firm.³ This test involved consideration of three factors: the geographic area involved, the length of time stated, and the interests intended to be protected.⁴ This changed drastically with an opinion by the American Bar Association (ABA) in 1961, which prohibited non-compete agreements in law firms.⁵ To solidify the stance, the ABA adopted Disciplinary Rule (DR) 2-108(A) of the Model Code in 1969, and Rule 5.6 of the Model Rules of Professional Conduct in 1983 which established the per se rule "restricting the rights of partners to practice after leaving a firm."⁶ The ban was imposed because of the limits that these agreements place on an attorney's professional freedom as well as the restrictions they place on the client's right to choose any attorney he wishes.⁷ Rule 5.6 effectively separated law firms from the group of professions included under the reasonableness analysis for covenants not to compete.

One notable and explicit exception in the Model Rules, and its predecessor the Model Code, was the area of retirement benefits. The *Miller v. Foulston* court allowed a partnership agreement to condition payment of certain retirement benefits on the retiring attorney no longer engaging in the practice of law.⁸ The provision was considered within the retirement benefits exception found in DR 2-108(A).

The scope of the rule was unclear. Thus, a body of case law has developed further supporting and explaining DR 2-108(A), or Model Rule 5.6, as it is now known. The first major case was *Dwyer v. Jung*, where the partnership agreement involved a provision for dissolution in which the clients were divided equally and each partner was not to

3. Russell C. Buffkin, *Non-Competition Clauses in Law Firm Partnership Agreements: How Far Can Partnership Agreements Control Future Conduct of Lawyers?*, 23 J. LEGAL. PROF. 325, 326-27 (1999).

4. Serena L. Kafker, *Golden Handcuffs: Enforceability of Noncompetition Clauses in Professional Partnership Agreements of Accountants, Physicians, and Attorneys*, 31 AM. BUS. L.J. 31, 33 (1993).

5. *Id.* at 42 (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 300 (1961)).

6. *Id.* (citing MODEL RULES OF PROF'L CONDUCT R. 5.6 (1995)).

7. Buffkin, *supra* note 3, at 327.

8. 790 P.2d 404 (Kan. 1990).

work with the other partners' clients for a term of five years.⁹ The court drew a distinction between restrictive covenants in law firm partnership agreements, and general employee restrictive covenants.¹⁰ The latter was permissible, if first deemed reasonable, because the court viewed them as "a legitimate business device to protect the business and good will of an employer against various forms of unfair competition."¹¹ Such an agreement was considered reasonable if it "protect[ed] the legitimate interests of the employer, impose[d] no undue hardship on the employee, and [was] not injurious to the public."¹² However, the court refused to apply the same reasonableness standard to restrictive covenants between lawyers, basing its decision on DR 2-108(A) and the public policy consideration of permitting a client to choose any lawyer he wishes.¹³

2. Indirect Restrictions

Following *Dwyer*, firms realized that if they wished to protect their interests when a partner exited, they would have to fashion contractual terms that looked facially permissible, yet had the indirect result of restricting the leaving partner's right to compete. Courts saw through the creative contractual terms, however, and consistently refused to permit even indirect restrictions on the practice of law. The resulting line of cases used the same reasoning for indirect restrictions as was used for direct non-compete agreements. The clear Rule 5.6 prohibition on direct restrictions was expanded to include less obvious provisions such as financial disincentive clauses.¹⁴ These provisions took on two primary themes: forfeiture of benefits upon withdrawal if the partner competed and a restriction on the client base.¹⁵ The latter concept involved reducing benefits upon a partner's exit, by a specified sum, for each client the partner took with him.¹⁶

Gray v. Martin was the primary case dealing with forfeiture of benefits upon a partner's withdrawal.¹⁷ The partnership agreement provided that clients could choose to stay with the firm or go with the

9. 336 A.2d 498, 499 (N.J. Sup. Ct. Ch. Div. 1975).

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

11. *Id.*

12. *Id.* at 500. (quoting *Solari Indus., Inc. v. Malady*, 264 A.2d 53, 56 (N.J. 1970)).

13. *Id.*

14. See, e.g., John D. Daniels, *Noncompetition Agreements Between Attorneys*, 27 WTR BRIEF 24, 25 (1998).

15. Daniels, *supra* note 13, at 25.

16. *Id.*

17. *Gray v. Martin*, 663 P.2d 1285 (Or. Ct. App. 1983).

withdrawing partner.¹⁸ The departing lawyer was to take the files of clients who had chosen to leave with him, bill to the firm any work done for those clients up to the date of withdrawal, and agree not to practice law in certain counties.¹⁹ The defendant took twenty clients with him when he left, some paying on an hourly rate basis and some paying on a contingent fee arrangement.²⁰ A dispute arose over those clients on a contingency fee and the court concluded first that the defendant must give the firm an accounting for fees collected when he withdrew from the firm.²¹ The court then looked to a clause concerning forfeiture for competition providing that a withdrawing partner forfeits certain financial benefits if he practices law in specified counties. Such a provision, in the court's opinion, was clearly a violation of the ABA disciplinary rule and the policy behind it because it was a restraint on the lawyer's right to practice law.²² In addition, the court refused to include the provision within the retirement benefits exception because of the danger in treating withdrawal and retirement in the same way; the rule prohibiting non-compete agreements would have no effect at all.²³

The *Gray* court was the only one to conclude that financial forfeiture provisions fell within the prohibitions in DR 2-108(A). For example, in *Cohen v. Lord, Day & Lord*, the court refused to allow a provision that forced a withdrawing partner to forfeit fees for services performed but not yet billed as of his departure if he engaged in competition with the firm.²⁴ The court concluded that the

significant monetary penalty [the clause] exacts . . . 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.²⁵

The court viewed the benefit forfeiture provision as limiting the departing lawyer's right to practice and refused to include it in the retirement benefits exception to DR 2-108(A). *Cohen* has been an influential and

18. *Gray*, 663 P.2d at 1286.

19. *Id.*

20. *Id.* at 1287.

21. *Id.* at 1287-88.

22. *Id.* at 1290.

23. Daniels, *supra* note 14, at 25.

24. 550 N.E.2d 410 (N.Y. 1989).

25. *Cohen*, 550 N.E.2d at 441.

often cited case standing for the proposition that indirect restrictions on both lawyers' freedom to practice and clients' freedom of choice are impermissible.²⁶

An important case regarding financial penalties in the form of client-based restrictions is *Matter of Silverberg*.²⁷ In that case, the partnership agreement provided that, upon dissolution of the partnership, partners were allowed to solicit clients of the firm only if they compensated the partner who represented the client prior to dissolution.²⁸ The court struck down the provision as a violation of the Code of Professional Responsibility.²⁹

Financial disincentives which are contingent on the exiting lawyer's representation of former clients have been struck down in other cases as well.³⁰ For example, courts have declined to enforce provisions in a buy-sell agreement requiring the departing attorney to pay the firm half of the billings to former clients of the firm.³¹ Clauses in partnership agreements requiring only exiting lawyers who performed services for former clients of the firm to pay the partnership (as opposed to departed lawyers who did not take clients with them) have also been declared unenforceable. For example, in *Denburg v. Parker Chapin Flattau & Klimpl*, New York's highest court used *Cohen* to strike down portions of a partnership agreement requiring a withdrawing partner to pay a specified sum to the partnership if that partner practiced law in the private sector.³² However, the provision did not apply to withdrawing partners whose previous year's profit allocation was below a certain point, provided they did not work for the firm's clients for a period of two years.³³ The court concluded that the overall effect was to "improperly deter competition and thus impinge upon clients' choice of counsel."³⁴ Courts are not uniform in this conclusion, though. For example, in *Meehan v. Shaughnessy*, the court upheld an agreement permitting withdrawing partners to take cases with them provided that they compensate the firm.³⁵ In that case, the client's right to choose legal representation was not limited, resulting in no violation of the ethical

26. See Kafker, *supra* note 4, at 45.

27. 427 N.Y.S.2d 480 (N.Y. App. Div. 1980).

28. *Silverberg*, 427 N.Y.S.2d at 480.

29. *Id.* at 482.

30. Mark W. Bennett, *You Can Take It With You: The Ethics of Lawyer Departure and Solicitation of Firm Clients*, 10 GEO. J. LEGAL ETHICS 395, 406 (1997).

31. Bennett, *supra* note 30, at 406-07 (citing *Hagen v. O'Connell, Govak & Ball, P.C.*, 683 P.2d 563 (Or. Ct. App. 1984)).

32. *Denburg v. Parker Chapin Flattau & Klimpl*, 624 N.E.2d 995, 997 (N.Y. 1993).

33. *Denburg*, 624 N.E.2d at 997.

34. *Id.* at 999.

35. 535 N.E.2d 1255 (Mass. 1989).

rule.³⁶

Finally, the court in *Jacobs v. Norris, McLaughlin & Marcus* disallowed a provision that denied a withdrawing partner his full interest simply because some clients opted to leave with him.³⁷ The agreement distinguished between competitive and non-competitive departures and determined that termination compensation would not be paid in the event of a competitive departure.³⁸ The court characterized the provision as "a financial disincentive against a departing shareholder's retaining the firm's clients or soliciting its employees,"³⁹ and concluded that "[b]ecause the client's freedom of choice is the paramount interest to be served by the [Rules of Professional Conduct], a disincentive provision is as detrimental to the public interest as an outright prohibition."⁴⁰

3. Weakening of the Per Se Rule

As stated previously, the general rule in non-compete agreements between partners in law firms has been that they are unenforceable as contrary to both the Model Rules of Professional Conduct and public policy. However, in recent years some courts have shown signs of a movement away from the per se prohibition on such agreements, be they direct or indirect. Whereas the sole focus historically was on the restriction on the lawyer and the client, increasing consideration seems to be given to the interests of the firm. Clearly, the interests of the client and departing lawyer cannot be overlooked, but the firm has an argument on its side as well. The new analysis is a balancing approach weighing the ethical rule's requirements and the firm's need to protect its financial interests.⁴¹

The New Jersey appellate court in *Jacob v. Norris, McLaughlin & Marcus*⁴² was one of the first courts to question the idea that even indirect provisions like the agreement in *Cohen* are impermissible restrictions on a lawyer's right to practice.⁴³ Although eventually reversed, similar opinions have been rendered in other parts of the country.⁴⁴ In

36. *Meehan*, 535 N.E.2d at 1264.

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

38. *Jacob*, 607 A.2d at 145.

39. *Id.*

40. *Id.* at 149.

41. Kafker, *supra* note 4, at 46.

42. 588 A.2d 1287, 1292-93 (N.J. Super. Ct. App. Div. 1991), *rev'd*, 607 A.2d 142 (N.J. 1992).

43. *Jacob*, 588 A.2d at 1292-93.

44. See, e.g., *Haight, Brown & Bonesteel v. Superior Court*, 285 Cal. Rptr. 845 (Cal. Ct. App. 1991).

Jacob, the lower court concluded that the firm had a valid financial interest at stake because of the potential for client loss in the event of partner withdrawal.⁴⁵ The court saw the situation as one in which firm revenues were reduced because the withdrawing lawyer took clients with him.⁴⁶ Therefore, it seemed unjust to enforce a provision requiring the firm to pay that lawyer, thereby increasing the loss to the firm.⁴⁷ It was important to the court that in this case the lawyer's right to practice was not limited.⁴⁸ The only restriction involved removal of the firm's obligation to compensate the attorney upon withdrawal.⁴⁹ When the case reached the New Jersey Supreme Court, the balancing test used by the lower court was rejected in favor of a reaffirmation of *Dwyer* and a strict interpretation of the relevant ethics rule.⁵⁰

However, other jurisdictions have begun to see the situation as the New Jersey appellate court did. California is currently among the front-runners in terms of courts moving away from the historical *per se* rule. For example, in *Haight, Brown & Bonesteel v. Superior Court*, a California court addressed a partnership agreement that required a departing lawyer, who engaged in competition with the firm, to forfeit any financial rights he might otherwise have had.⁵¹ The court concluded that the California Rules of Professional Conduct, which followed the language of the Model Rules, only bar agreements that absolutely prohibit an attorney from engaging in the practice of law.⁵² Thus, the Rules permitted a provision requiring the withdrawing partner to compensate the firm for any clients he took with him.⁵³ In addition, the court used the California Business and Professions Code section 16602⁵⁴ to conclude that prohibiting representation of former clients of the firm was a permissible restriction that protected the firm's interests.⁵⁵ The court balanced the interests of the withdrawing attorney in representing clients who chose his services against the firm's interest in maintaining the firm's financial structure.⁵⁶ Interestingly, the court relied on earlier cases involving similar financial forfeiture provisions with regard to

45. 588 A.2d at 1290.

46. *Jacob*, 588 A.2d at 1290-91.

47. *Id.* at 1291.

48. *Id.*

49. *Id.* at 1290.

50. 607 A.2d 142 (N.J. 1992).

51. *Haight, Brown & Bonesteel v. Superior Court*, 285 Cal. Rptr. 845, 846.

52. *Haight*, 285 Cal. Rptr. at 847-48; *see also Daniels, supra* note 14, at 27.

53. *Haight*, 285 Cal. Rptr. at 850.

54. CAL. BUS. & PROF. CODE § 16602 (West 1988) (permitting non-compete agreements in business settings).

55. *See Haight*, 285 Cal. Rptr. at 848.

56. *Id.*

physicians and accountants, and decided that there was "no reason to treat attorneys any differently from professionals such as physicians or certified public accountants, for example, by holding that lawyers may not enter into noncompetition agreements."⁵⁷

This decision differed from previous cases in several ways. First, the court did not view the financial forfeiture provision as a restriction on a lawyer's right to engage in the practice of law or on the client's right to choose representation.⁵⁸ This enabled the court to bypass the problem presented by the code of ethics that other courts could not hurdle. The more dramatic dissimilarity, though, involved the comparison of attorneys with physicians and accountants. The *Haight* court had no problem treating them equally in upholding the restriction.⁵⁹ However, this is a logical progression because the only reason for treating lawyers differently from other professionals is the code of ethics.⁶⁰

In *Howard v. Babcock*, the California Supreme Court reached a similar outcome, but used different reasoning than the court in *Haight*.⁶¹ The *Howard* court upheld a forfeiture provision requiring that the departing lawyers give up their share of accounts receivable on profits and on completed work that had yet to be billed.⁶² The departing lawyers were also to compensate the firm for any net profits gained from work done for former clients of the firm.⁶³ The court was faced with the problem, created by *Haight*, of clearing up split decisions among lower California courts.⁶⁴ The court concluded that the California Business and Professions Code section 16602 (and its provision that withdrawing partners may agree not to compete) was applicable to lawyers, because nothing in the language of the statute specifically exempted them and because law firms are comparable to businesses.⁶⁵ However, the court noted that it had the authority to impose a higher standard on the legal profession, if it so chose.⁶⁶ It refused to follow the court of appeals in concluding that the Rules of Professional Conduct set that higher standard.⁶⁷ The court said that "[a]n 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. Rather, it at-

57. *Id.* (quoting *Haight*, 285 Cal. Rptr. at 850).

58. *Id.* at 848.

59. *Id.* at 850.

60. Kafker, *supra* note 4, at 51.

61. *Howard v. Babcock*, 863 P.2d 150 (Cal. 1993); *cf.* *Haight*, 285 Cal. Rptr. at 845.

62. *Howard*, 863 P.2d at 160.

63. *Id.* at 151-52.

64. *Id.* at 154.

65. *Id.* at 155-59.

66. *Id.* (citing *In re Lavine*, 41 P.2d 161 (1935)).

67. *Howard*, 863 P.2d at 155.

taches an economic consequence to a departing partner's unrestricted choice to pursue a particular kind of practice."⁶⁸ Thus, in balancing the interests of the withdrawing attorney, the firm, and the client, the court decided that reasonable restrictions on departing lawyers who compete within a certain geographic area are not contrary to public policy.⁶⁹ Recognizing 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," the court allowed the restriction because no danger of affecting clients' freedom to choose counsel was present.⁷⁰ The court agreed with the *Haight* decision that lawyers should be treated the same way as physicians and accountants because they all owe a duty of loyalty to their clients.⁷¹

Emerging opinions, such as the previously discussed California decisions, represent a movement away from the per se rule against non-compete agreements between partners in law firms. Whether that movement will grow more prevalent is, of course, yet to be seen. The reasoning used by the California Supreme Court is founded in logic, in that partners in each of the three commonly-named professions owe similar duties to their clients and have similar interests in maintaining their freedom to practice. The standard set forth in *Howard*, that of a reasonableness test that balances the interests of the parties involved, holds attorneys to the same standard as physicians and accountants.⁷²

B. Accountants

Non-competition clauses in accounting firm partnership agreements are judged by the reasonableness standard used to analyze general employment agreements.⁷³ For non-competition agreements to be valid, they must (1) be reasonably necessary for the employer's protection, (2) not be unreasonably restrictive to the employee, and (3) not be contrary to public policy.⁷⁴ As with most professions—excluding the legal community—such agreements are permitted as long as the limitations imposed are reasonable.⁷⁵ In determining what is reasonable, several

68. *Id.* at 156.

69. *Id.* at 160.

70. *Id.* at 156-57.

71. *Id.* at 159.

72. Buffkin, *supra* note 3, at 335-36 (citing Daylon L. Welliver, *When the Laws Come 'Tumbling' Down: A Look at What Happens When Lawyers Sign Non-Competition Agreements and Break Them*, 29 IND. L. REV. 729, 733 (1996)).

73. See, e.g., Kafker, *supra* note 4, at 34.

74. Buffkin, *supra* note 3, at 325 (citing Arthur S. Hays, *Law Firms Use Various Tactics to Prevent Exodus of Partner*, WALL ST. J., Jan. 20, 1992, at B6).

75. *Id.* at 326.

factors are considered: the geographic area involved, the time period prohibiting competition, and the scope of the activity.⁷⁶ In accounting firm partnership agreements, both direct and indirect restrictions are judged by the reasonableness standard and are generally enforced by courts.⁷⁷ Still, this view that such agreements are generally enforceable only applies between partners. Courts are much less likely to enforce such restrictive agreements between the employer and employee.⁷⁸ The reasoning is generally that partners have more leverage as between each other, and have voluntarily signed the restrictive agreement, whereas employees do not have as much control or power. However, even employer-employee contracts can be deemed valid in certain situations.⁷⁹

These situations are best understood by looking at specific cases. In *Fuller v. Brough*, the Colorado Supreme Court allowed a non-compete agreement that prohibited a withdrawing partner from practicing within a certain area for five years.⁸⁰ The court viewed the restriction as a reasonable one and noted that it was a mutual decision between all the partners.⁸¹

As mentioned above, not all partnership non-compete agreements have been upheld. For example, *Peat, Marwick, Mitchell & Co. v. Sharp* was one of the first cases where a non-compete agreement in an accounting partnership was invalidated.⁸² In that case, the court was bothered by the lack of a specified geographic area and declared the restriction unreasonable because the firm in question had offices throughout the country.⁸³ Non-compete agreements have also been rejected where a partner was forced to withdraw. In *Derrick, Stubbs & Stith v. Rogers*, the court noted that the restriction against competition was only mentioned in the section of the agreement concerning voluntary withdrawals and therefore did not apply to involuntary withdrawals.⁸⁴

More recently, the South Carolina Court of Appeals addressed a liquidated damages clause in an accounting firm's partnership agreement.⁸⁵ The relevant provision allowed a withdrawing partner to do

76. *Id.* (citing *Young v. Van Zandt*, 449 N.E.2d 300, 304 (Ind. App. 1983); RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. d (1981)).

77. *Kafker*, *supra* note 4, at 34.

78. *Id.* at 34 n.15 (citing *Smith, Batchelder & Rugg v. Foster*, 406 A.2d 1310 (N.H. 1979); *Mailman, Ross, Toyes & Shapiro v. Edelson*, 444 A.2d 75 (N.J. Super. Ct. Ch. Div. 1982)).

79. *See Alliance Metals, Inc., of Atlanta v. Hinely Indus., Inc.*, 222 F.3d 895 (11th Cir. 2000).

80. 411 P.2d 18 (Colo. 1966).

81. *Fuller*, 411 P.2d at 21.

82. 585 S.W.2d 905 (Tex. App. 1979).

83. *Peat*, 585 S.W.2d at 908.

84. 182 S.E.2d 724, 726 (S.C. 1971).

85. *J.W. Hunt & Co. v. Davis*, 437 S.E.2d 557 (S.C. Ct. App. 1993).

work for former firm clients, as long as he paid the firm liquidated damages calculated by a specified formula.⁸⁶ In reaching its decision, the court looked to other cases concerning accounting firms and similar agreements.⁸⁷ In several of the examined cases the partners were still free to practice and compete—at least technically.⁸⁸ The court used this to conclude that the liquidated damages clause in the agreement at issue did not directly prohibit withdrawing partners from competing.⁸⁹ There was no geographic limitation or a specified time period, and departing accountants were free to do work for former firm clients.⁹⁰ Therefore, the court concluded that the provision was not a non-compete agreement at all.⁹¹ The reasonableness test was deemed unnecessary and the court enforced the agreement as simply part “of an ordinary contract.”⁹²

By deciding the case outside the parameters of covenants not to compete, the court avoided addressing the two previous South Carolina decisions on point: *Almers v. South Carolina National Bank*⁹³ and *Wolf v. Colonial Life & Accident Insurance Co.*⁹⁴ In *Almers*, the South Carolina Supreme Court ruled that although the clause did not directly prohibit competition, it still qualified as a non-compete agreement because it had the same effect.⁹⁵ The court distinguished its reasoning from the majority approach, which did not view indirect restrictions on the right to practice as actual non-compete agreements because they did not have the same effect.⁹⁶ Both *Almers* and *Wolf* involved forfeiture provisions in employment contracts, not partnership agreements.⁹⁷ Therefore, the rule’s scope is unclear.⁹⁸

In terms of indirect restrictions on accounting firm partnership agreements, “courts have been especially willing to uphold non-competition clauses when the restriction on the accountant’s right to practice is not absolute and involves simply a forfeiture of money.”⁹⁹

86. *J.W. Hunt*, 437 S.E.2d at 558 & n.1.

87. *Id.* at 559.

88. See *Dixon, Odom & Co. v. Sledge*, 296 S.E.2d 512 (N.C. Ct. App. 1982); *Engel v. Ernst*, 724 P.2d 215 (Nev. 1986); *Francis v. Schlotfeldt*, 704 P.2d 381 (Kan. Ct. App. 1985).

89. *J.W. Hunt*, 437 S.E.2d at 559.

90. *Id.*

91. *Id.* at 560.

92. *Id.*

93. 217 S.E.2d 135 (S.C. 1975).

94. 420 S.E.2d 217 (S.C. Ct. App. 1992).

95. *Almers*, 217 S.E.2d at 140.

96. *Id.* at 137-38.

97. See *Almers*, 217 S.E.2d at 135-36; *Wolf*, 420 S.E.2d at 218-19.

98. Kevin R. Eberle, *Liquidated Damages Clause in Partnership Agreement Held Not Non-Competition Covenant*, 46 S.C. L. REV. 70, 72 (1994).

99. Kafker, *supra* note 4, at 36.

By most courts' standards, these valid provisions simply protect the firm's interests. For instance, in *McElreath v. Riquelmy*, a Texas court allowed a non-compete provision to stand against a withdrawing accountant, despite the fact that it specified no geographic area.¹⁰⁰ The court viewed the restriction as an indirect one that did not absolutely prohibit the accountant from practicing and saw the provision as "reasonably necessary to protect the good will and the going business asset of an existing partnership."¹⁰¹ The Supreme Court of Virginia likewise allowed a non-compete agreement that required a withdrawing partner who performed any work for former firm clients within a specified time to pay the firm a percentage of the earnings for three years.¹⁰² The court balanced the relevant interests and found the restriction necessary to protect the firm's legitimate interests.¹⁰³

C. Physicians

1. Common Law

Although similar to the reasonableness test used with partnership agreements in accounting firms, the analysis with physicians goes a little further and considers the public's need for medical services.¹⁰⁴ Despite this, most agreements are still deemed valid. The reasonableness analysis is often broken down into four questions: (1) whether the physician has a legitimate interest to be protected; (2) whether the non-compete agreement is reasonably designed to protect that interest; (3) whether the covenant poses an undue burden on the firm; and (4) whether the covenant is contrary to public policy.¹⁰⁵ The policy analyzes whether enforcing a provision will cause a shortage of physicians in that area.¹⁰⁶ For example, a New York court enforced an agreement that restricted a physician's right to practice within a specified area for five years.¹⁰⁷ Enforcing that provision was reasonable because there were other surgeons available in the area and the public would suffer no harm.¹⁰⁸

100. 444 S.W.2d 853, 855 (Tex. App. 1969).

101. *McElreath*, 444 S.W.2d at 856.

102. *Foti v. Cook*, 263 S.E.2d 430, 431 (Va. 1980).

103. *Foti*, 263 S.E.2d at 433.

104. *Kafker*, *supra* note 4, at 38.

105. Arthur S. Di Dio, *The Legal Implications of Noncompetition Agreements in Physician Contracts*, 20 J. LEGAL MED. 457, 458 (1999) (citing Paula Berg, *Enforcement of Covenants Not to Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense*, 45 RUTGERS L. REV. 1, 15-30 (1992)).

106. *Id.* at 463.

107. *Gelder Med. Group v. Webber*, 363 N.E.2d 573 (N.Y. 1977).

108. *Gelder*, 363 N.E.2d at 577.

The public policy issue is important enough to some courts that it becomes almost the only consideration. For example, an Arkansas court refused to enforce an agreement prohibiting a withdrawing partner from practicing within thirty miles of the office for one year.¹⁰⁹ The court concluded that the public interest should take precedence over all other considerations, and the restriction unduly affected the public's right to choose its medical provider.¹¹⁰

In *Rash v. Toccoa Clinic Medical Ass'n*, a Georgia court upheld a partnership agreement that prohibited a withdrawing physician to practice within a twenty-five mile radius of the city for three years.¹¹¹ The court stressed the differences between a partnership agreement and an employment agreement, saying partners do not suffer from inequality in the bargaining process, and all enter into the agreement mutually.¹¹² The court also found that the public interest would actually be served, not harmed, by enforcing the agreement, because it would give people in other areas the chance for medical care.¹¹³ While this line of reasoning is seemingly a stretch, it has nonetheless been adopted by at least one other court.¹¹⁴

2. Antitrust Laws

Nine states have specifically addressed non-compete agreements in their antitrust legislation.¹¹⁵ The remaining states simply use the common law reasonableness test.¹¹⁶ Of the nine states, Colorado, Delaware, and Massachusetts have statutes expressly prohibiting non-compete agreements between physicians.¹¹⁷ The remaining six states "prohibit covenants that restrict the practice of a 'profession.'"¹¹⁸ It is also possible to use the federal antitrust laws to challenge a non-compete agreement, but case law is severely limited in the area and success is

109. *Duffner v. Alberty*, 718 S.W.2d 111 (Ark. Ct. App. 1986).

110. *Duffner*, 718 S.W.2d at 114.

111. 320 S.E.2d 170, 171 (Ga. 1984).

112. *Rash*, 320 S.E.2d at 173.

113. *Id.*

114. *See, e.g., Field Surgical Assoc. v. Shadab*, 376 N.E.2d 660, 664 (Ill. App. Ct. 1978).

115. *Di Dio*, *supra* note 105, at 464 (citing *Berg*, *supra* note 105, at 11). *See* ALA. CODE § 8-1-1(a) (1993); CAL. BUS. & PROF. CODE § 16600 (West 1997); COLO. REV. STAT. ANN. § 8-2-113(3) (West 1994); DEL. CODE ANN. tit. 6, § 2707 (1999); FLA. STAT. ANN. § 542.33(1) (Harrison 1992); LA. REV. STAT. ANN. § 921 (West 1998); MASS. GEN. LAWS ch. 112, § 12X (1996); MONT. CODE ANN. § 28-2-703 (2001); N.D. CENT. CODE § 9-08-06 (1987).

116. *Di Dio*, *supra* note 105, at 464 (citing Margaret Rosso Grossman & Greg A. Scoggins, *The Legal Implications of Covenants Not to Compete in Veterinary Contracts*, 71 NEB. L. REV. 826, 866 (1992)).

117. *Id.*

118. *Id.* at n.47.

unlikely.¹¹⁹

Overall, non-compete agreements are generally permitted in physician partnership agreements. The common law reasonableness standard, even with the added public policy consideration, is fairly easy to satisfy. State antitrust laws could help withdrawing physicians, but few have addressed the issue (leaving a reasonableness standard). Federal antitrust laws are likewise of little help. For now at least, restrictive covenants among physicians will be enforced unless unreasonable.

D. *The General Minority View*

As mentioned previously, South Carolina is one state that seems to adopt the minority view on indirect prohibitions on competition and ruled in *Almers* that such clauses are still treated as non-compete agreements because they have the same effect.¹²⁰ Arguably, however, the South Carolina rule only applies to forfeiture clauses, because the only two cases on the subject involved such a scenario.¹²¹ Also, the question remains whether the rule applies only to employment contracts, partnership agreements, or both.¹²²

Similarly, the Texas Supreme Court followed the minority position. In *Peat Marwick Main & Co. v. Haass*, the court refused to enforce an agreement requiring a departing accountant to compensate the firm for any clients he took with him.¹²³ The court decided that the deterrent effect of the clause, although not an outright prohibition, functioned as if the agreement were an absolute bar to competition.¹²⁴

Nebraska is a third state that has reached similar results. In *Philip G. Johnson & Co. v. Salmen*, the state Supreme Court struck down a provision in a partnership agreement requiring a withdrawing partner to remit fees earned from work done for certain clients for three years.¹²⁵ The court refused to adopt the firm's argument that this was not a covenant not to compete.¹²⁶

This small group of rulings, as stated previously, still leaves many

119. *Id.* at 465. A physician wishing to use this route in challenging a restrictive provision must first get past the jurisdictional requirement that the activity be in interstate commerce or substantially affect it. *Id.* (citing Grossman & Scoggins, *supra* note 116, at 866). Second, the physician must prove that the agreement is an unreasonable restraint of trade. Di Dio, *supra* note 105, at 465.

120. See *Almers v. South Carolina Nat'l Bank*, 217 S.E.2d 135 (S.C. 1975); *Wolf v. Colonial Life & Accident Ins. Co.*, 420 S.E.2d 217 (S.C. Ct. App. 1992).

121. *Wolf*, 420 S.E.2d 217; *Almers*, 217 S.E.2d 135.

122. Eberle, *supra* note 98, at 72.

123. 818 S.W.2d 381, 383 n.3 (Tex. 1991).

124. *Peat Marwick Main & Co.*, 818 S.W.2d at 385.

125. 317 N.W.2d 900, 902-03 (Neb. 1982).

126. *Philip G. Johnson & Co.*, 317 N.W.2d at 903.

questions open. Although the reasoning seems sound, the holdings are limited and later courts seem unwilling to broaden or clarify the rules. For example, the *Davis* court dodged the issue by finding that the provision was not a non-compete agreement at all, and was not, therefore, subject to the reasonableness test.¹²⁷ Thus, while the minority rule does exist, it is far from well-developed.

III. ALABAMA'S POSITION

Alabama is one of several states prohibiting all non-compete agreements unless certain circumstances exist.¹²⁸ Section 8-1-1(a) of the 1975 Code of Alabama is a general prohibition on non-compete agreements and it expressly applies to professionals.¹²⁹ Alabama will enforce a covenant not to compete if it (1) falls within one of the statutory exceptions, and (2) is reasonable as to duration, geographic limit, and subject matter.¹³⁰ Exceptions are made for the sale of a business and for the dissolution of a partnership,¹³¹ but these exceptions do not apply to professionals.¹³² Alabama courts have said that partnership agreements must be viewed in light of the public policy disfavoring restrictive covenants.¹³³

In *Cherry, Bekaert & Holland v. Brown*, the Alabama Supreme Court admitted that the provision of a partnership agreement at issue was not an outright non-compete agreement.¹³⁴ However, the court found that "the requirements of the paragraph [were] tantamount to a covenant not to compete and operate[d] in the same manner."¹³⁵ The agreement required that if a withdrawing accountant/partner served former firm clients within three years, he was to pay the firm 150% of the fees charged by the firm to the client during the last twelve-month period when the firm served the client.¹³⁶ The court struck down the provision, stating that the requirements were "so harsh and punitive in nature that they virtually operate[d] to prevent the practice of accounting by the withdrawing partner totally."¹³⁷ Clearly, any provision that either directly or indirectly restricts a professional's ability to practice

127. *J.W. Hunt & Co. v. Davis*, 437 S.E.2d 557, 560 (S.C. Ct. App. 1993).

128. *Kafker*, *supra* note 4, at 34 (citing ALA. CODE § 8-1-1 (1984)).

129. *Cherry, Bekaert & Holland v. Brown*, 582 So. 2d 502, 505 (Ala. 1991).

130. *Nationwide Mut. Ins. Co. v. Cornutt*, 907 F.2d 1085 (1990).

131. ALA. CODE § 8-1-1 (1975).

132. *Cherry*, 582 So. 2d at 505.

133. *See, e.g., Cherry*, 582 So. 2d at 505; *DeVoe v. Cheatham*, 413 So. 2d 1141 (Ala 1982).

134. *Cherry*, 582 So. 2d at 506.

135. *Id.*

136. *Id.*

137. *Id.*

is enforceable.

Similarly, in *Pierce v. Hand, Arendall, Bedsole, Greaves & Johnston*, the Supreme Court invalidated a clause in a law firm partnership agreement because it was a non-compete agreement and violated Alabama's general prohibition on such contracts under section 8-1-1.¹³⁸ The court only declared the non-compete provision invalid and enforced the remainder of the agreement, which required that the firm pay the withdrawing partner deferred compensation.¹³⁹ The firm maintained that the ethical rules guiding a lawyer's behavior were an exception to the general policy disfavoring non-compete agreements and contended that the agreement should fall within the retirement benefits exception.¹⁴⁰ The court disagreed, siding with *Cohen* and its progeny, and concluded that economic forfeiture clauses violated the "strong public policy against contracts that limit the right of professionals to compete."¹⁴¹ Furthermore, the court also disagreed with the firm on the retirement benefits exception basing its finding on *Cohen* and Alabama partnership law.¹⁴²

Cases involving physicians have had similar outcomes. For example, in *Anniston Urologic Associates, P.C. v. Kine*, the Alabama Supreme Court struck down part of an agreement restraining a doctor from practicing within twenty-five miles of his former office for one year.¹⁴³ Once again, the court looked to section 8-1-1 and concluded that the agreement "require[d] him to forfeit \$20,000 in order to pursue the practice of medicine in that county within that period of time. It is a restraint on the exercise of a lawful profession . . . and is therefore void."¹⁴⁴

More recently, the Alabama Supreme Court addressed a specific physician recruitment agreement between a hospital and physician.¹⁴⁵ In *Walker Regional Medical Center, Inc. v. McDonald*, a hospital agreed to lend a physician money to complete his residency on the condition that the physician promise to practice solely in Jasper, Alabama for at least forty-eight consecutive months upon completion of his residency.¹⁴⁶ The physician executed promissory notes which required him

138. 678 So. 2d 765 (Ala. 1996).

139. *Pierce*, 678 So. 2d at 770.

140. *See id.* at 769.

141. *Id.* (citing *Anderson v. Aspelmeier*, 461 N.W.2d 598 (Iowa 1990); *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142 (N.J. 1992); *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410 (N.Y. 1989); *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528 (Tenn. 1991)).

142. *Id.* at 770.

143. 689 So. 2d 54, 57-58 (Ala. 1997).

144. *Id.* at 57.

145. *Walker Reg'l Med. Ctr., Inc. v. McDonald*, 775 So. 2d 169 (Ala. 2000).

146. *Walker Reg'l Med. Ctr.*, 775 So. 2d at 170.

to repay the loans, plus interest, on October 1, 2002.¹⁴⁷ The agreement provided that if the physician practiced in Jasper upon completion of his residency, then the loans would be forgiven by the end of the four-year period.¹⁴⁸ However, if the physician failed to meet the terms of the agreement, each loan would become immediately due.¹⁴⁹ The physician subsequently failed to practice in Jasper and refused to repay the money he received from the hospital, and Walker Baptist filed suit.¹⁵⁰ The Alabama Supreme Court concluded that the agreement implicated section 8-1-1(a) of the Alabama Code, which "places a broad general ban on every contract that restrains anyone from exercising a lawful profession."¹⁵¹ The court acknowledged that there are two exceptions, but decided that neither applied to the case.¹⁵² This would seem to lead to the conclusion that the physician recruitment agreement violated section 8-1-1. However, the court went on to state that "by a rule of statutory construction, specific provisions relating to specific subjects are understood as exceptions to general provisions relating to general subjects."¹⁵³ It looked to code sections requiring repayment of student loans and concluded that the legislature did not intend the ban in section 8-1-1(a) to apply to the situation at issue.¹⁵⁴ The agreement was not an illegal restraint on the physician's profession, nor was it contrary to public policy.

IV. CONCLUSION

Alabama falls in the minority of states because of its statutory construction of the rule governing non-compete agreements. A consistent rule, which treats all professionals alike (even lawyers), could successfully avoid some of the problems facing the rest of the nation. Granted, it does not address the firm's interest in protecting itself, which seems to be the direction the rest of the nation is headed. However, this might not matter if there is no need for a balancing test at all. Because Alabama relies solely on section 8-1-1 and the state's general policy disfavoring non-compete agreements, the balancing test never comes into play. There is no need to analyze the interests of the parties involved. In addition, the statute enables Alabama to avoid the debate about whether one profession should be treated differently than another.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 171.

151. *Walker Reg'l Med. Ctr.*, 775 So. 2d at 171.

152. *Id.*

153. *Id.* (citing *Murphy v. City of Mobile*, 504 So. 2d 243, 244 (Ala. 1987)).

154. *Id.* at 172.

Again, because of section 8-1-1, there is no need for lawyers to argue that they should be treated specially by virtue of their rules of professional conduct.

Nationwide, the scene is confusing. Lawyers still have the ethical rule to deal with. Some argue that it should be abandoned allowing lawyers to be held to the same standard as other professionals—the reasonableness standard.¹⁵⁵ Still others posit that physicians and other professionals should be elevated to the standard used with lawyers.¹⁵⁶ Some are of the opinion that the balancing approach is the correct way to go. For example, one writer says that:

[i]n this era of frequent and constant lateral movement by lawyers, the rules must be changed to provide direction for both departing lawyers and departed firms and to prevent the tension and disputes that arise and often have negative effects on the public's perception of, and confidence in, their personal lawyers and the legal profession generally.¹⁵⁷

This line of reasoning, though, holds to the belief that continued case law on the subject will be insufficient due to differing opinions from jurisdiction to jurisdiction. Instead, it would require a change in the Model Rules themselves.¹⁵⁸ This change would have to be one that considers the interests of the client primarily, but also the firm and departing lawyer.¹⁵⁹

The national scene could become further confused by several factors in today's society. With the increasing globalization in businesses around the world, due to the Internet and a growing trend in "one-stop shopping," lines are sure to become blurred. In terms of the reasonableness test, geographic limits will be difficult to determine because a firm in Birmingham, Alabama can easily serve a client many states away. Likewise, with accounting firms, banks, and insurance companies all offering similar services in an effort to better serve the consumer, the issue of defining what constitutes competition with the former firm arises. There comes a point at which a firm has become so wide-reaching in its breadth of services that a withdrawing partner cannot engage in virtually any profession, let alone the one in which he has the most experience. These issues will likely become hot topics as case

155. See, e.g., Buffkin, *supra* note 3, at 336.

156. See Di Dio, *supra* note 105, at 477.

157. Bennett, *supra* note 30, at 414.

158. *Id.* at 415; see also Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 122-44 (1988).

159. *Id.*

law continues to develop nationally and may pose a great difficulty for the reasonableness test.

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