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## Cohen v. Lord, Day & Lord: A Partnership Agreement's Impermissible Restriction on the Practice of Law

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*COHEN v. LORD, DAY & LORD*: A PARTNERSHIP AGREEMENT'S IMPERMISSIBLE RESTRICTION ON THE PRACTICE OF LAW

After several years as partner at law firm ABC, X decides to switch to another firm in the same city. Upon leaving the firm, X requests the compensation he earned but has not yet collected, and is denied. Law firm ABC points to the partnership agreement X signed which states that an attorney's unpaid compensation is forfeited in the event that attorney leaves without consent to join a competing firm. Is X bound by the partnership agreement's forfeiture clause? A divided New York Court of Appeals recently held that such a provision is in violation of the New York Code of Professional Responsibility, Disciplinary Rule 2-108(A) as an impermissible restriction on the practice of law.

I. COVENANTS NOT TO COMPETE

Freedom of contract is a right guaranteed by the Constitution<sup>1</sup>

<sup>1</sup> U.S. CONST. art. I, § 10, cl. 1. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." *Id.* The contract clause by its terms applies only to the states, but a similar rule has been held applicable to the federal government by the fifth amendment's due process clause. *See Lynch v. United States*, 292 U.S. 571, 579 (1934) (contracts between government and private individuals are considered "property" within meaning of fifth amendment and rights arising out of contract are protected under Constitution); *Armstrong v. Fairmont Community Hosp. Ass'n*, 659 F. Supp. 1524, 1533 (D. Minn. 1987) (Contract "clause does not apply to the federal government. However, a flagrant impairment of contract by a federal governmental body would be forbidden by due process clause of the fifth amendment . . ."). *Cf. Federal Land Bank of Wichita v. Story*, 756 P.2d 588, 590 (Okla. 1988) (meaning of contract clause has been extended beyond its original purpose of preventing states from passing debtor relief laws).

The purpose of the contract clause is to regulate agreements to which a state government is a party, as well as agreements between private parties, so as to encourage "confidence in the stability of contractual obligations." *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 15-17 (1977) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 427-28 (1934)). State economic legislation affecting private contracts may be subject to contract clause attack in certain circumstances. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 248-51 (1978) (Minnesota law unconstitutionally impaired private company's contractual obligations to its employees under pension plan). *But see El Paso v. Simmons*, 379 U.S. 497, 516-17 (1965) (contract clause does not prohibit certain state remedial legislation affecting land titles).

The contract clause is limited by the police power of the states. *See Spannaus*, 438 U.S. at 241 (discussing state power to interfere with existing contractual obligations if public good is served); *United States Trust Co.*, 431 U.S. at 25 ("an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose"). *See also Clarke, The Contract Clause: A Basis for Limited Judicial Review of State Economic Regulation*, 39 U. MIAMI

that enables parties to create and assent to terms of their own choosing without judicial interference.<sup>2</sup> Nevertheless, certain contractual provisions are held unenforceable because of overriding societal interests.<sup>3</sup> One such interest that courts have long recog-

L. REV. 183, 187 (1985) ("contract clause promotes a specific and beneficial national policy and . . . can be applied in a way that furthers that policy without unduly interfering with state attempts to deal with changing economic problems"). For an overview of the contracts clause, see generally H. HUNTER, MODERN LAW OF CONTRACTS ch. 25 (1986) (discussion of contract law as essential part of individual freedom in capitalistic economy); R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 11.8 (1986) (general discussion of contract clause); L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8.1-10.1 (1978) (general discussion of contractual liberties and impairments); Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512, 512-18 (1944) (scope and limitations of contract clause); Sterk, *The Continuity of Legislatures: Of Contracts and the Contract Clause*, 88 COLUM. L. REV. 647 (1988) (examines contract clause jurisprudence and cases for study of theories of legislative continuity).

<sup>2</sup> See *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) (citing *Printing & Numerical Registering Co. v. Sampson*, L.R. 19 Eq. 462, 465 (1875)) ("The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts."); *NLRB v. Nash-Finch Co.*, 211 F.2d 622, 626 (8th Cir. 1954) (noting Supreme Court's approval, court relied on *Sampson* language); *Printing & Numerical Registering Co. v. Sampson*, L.R. 19 Eq. 462 (1875). Traditional freedom of contract principles were stated by Master of the Rolls Jessel as follows:

It must not be forgotten that you are not to extend arbitrarily these rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.

*Id.* at 465. See also D. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS §§ 1-4 (3d ed. 1987). Different theories on foundation of contract law and courts' strong commitment to upholding freedom to contract include "a) sovereignty of the human will b) the sanctity of promise c) private autonomy d) reliance e) needs of trade." *Id.* However, the modern day trend is inconsistent with unrestricted freedom of contract. *Id.* at §§ 1-3. Contracts are burdened with numerous legislative restrictions, especially in employment contracts and insurance contracts. *Id.*; E. FARNSWORTH, CONTRACTS § 5.1, at 325 (1982) (courts have approved principle that contracts made voluntarily and between competent persons should be firmly upheld).

<sup>3</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 178 (1979). Section 178 provides in pertinent part that "a promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." *Id.* There are many kinds of illegal contracts, ranging from those which are explicitly barred by statute to those which are rendered illegal by judicial decisions because they violate public policy. See 15 U.S.C. § 1 (1988) (contracts restraining commerce prohibited); 15 U.S.C. § 8 (1988) (contracts intended to restrain trade and free competition, or increase market price in United States prohibited). See also *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) (release-dismissal agreements not sufficient threat to public interest to justify per se unenforceable rule). The Court stated "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy

nized is the public policy against restricting a person's livelihood.<sup>4</sup>

### A. Reasonableness Standard

Traditionally, courts view covenants not to compete as suspect and will not enforce them unless they are shown to impose reason-

harmful by enforcement of the agreement." *Id.*; *California Pac. Bank v. Small Business Admin.*, 557 F.2d 218, 224 (9th Cir. 1977) (adopted Restatement position that illegal contracts are unenforceable only when statute expressly provides for voidness or where any interest in contract's enforcement is outweighed by public policy); *Cotton States Mut. Ins. Co. v. Neese*, 254 Ga. 335, 338, 329 S.E.2d 136, 138 (1985) (insurer's contract provision excluding accident coverage where insured attempted to avoid apprehension or arrest unenforceable as matter of public policy); *Beehive Medical Elecs., Inc. v. Industrial Comm'n*, 583 P.2d 53, 61 (Utah 1978) ("impairment of obligation" provision of Constitution does not "establish a right of parties to make contracts which are illegal or against public policy").

New York law provides for automatic partnership dissolution upon the withdrawal of any partner. *See* N.Y. PARTNERSHIP LAW § 60 (McKinney 1988); *Matter of Vann v. Kreindler, Relkin & Goldberg*, 54 N.Y.2d 936, 937, 429 N.E.2d 817, 818, 445 N.Y.S.2d 139, 139 (1981) (partnership dissolved pursuant to § 60 of N.Y. Partnership Law). In an effort to avoid this result, Lord, Day & Lord provided for the partnership's continuation and the foregoing of formal accounting to the withdrawing partner pursuant to N.Y. Partnership Law § 69. *See* *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95, 101, 550 N.E.2d 410, 413, 551 N.Y.S.2d 157, 160 (1989). The problem in *Cohen* was that the partnership agreement went too far when it provided for an informal accounting to the withdrawing partner consisting of "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 . . ." *Id.* at 103, 550 N.E.2d at 414, 551 N.Y.S.2d at 161 (quoting from Lord, Day & Lord partnership agreement). A withdrawing partner's right to payment for his portion of the firm's net profits was forfeited under the agreement. *Id.* The language of the agreement, in the context of *Cohen*, clashed with public policy embodied in DR 2-108(A) and subjected the forfeiture clause to judicial invalidation. *Id.* at 96, 550 N.E.2d at 410, 551 N.Y.S. 2d at 157.

<sup>4</sup> *See* *Flood v. Kuhn*, 407 U.S. 258, 287 (1972) (Douglas, J., dissenting) ("a contract which forbids anyone to practice his calling is commonly called an unreasonable restraint of trade"); *Rao v. Rao*, 718 F.2d 219, 223 (7th Cir. 1983) (noncompetition covenants considered initially suspect because they impair availability of service and interfere with competition); *Eaton Corp. v. Appliance Valves Corp.*, 526 F. Supp. 1172, 1182 (N.D. Ind. 1981) ("any restrictions on an employee's liberty of action in his business or trade are not favored by the law"); *Purchasing Ass'n v. Weitz*, 13 N.Y.2d 267, 272, 196 N.E.2d 245, 247, 246 N.Y.S.2d 600, 604 (1963) (strong public policy "militates against sanctioning the loss of a man's livelihood"); *see also* *Closius & Schaffer, Involuntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete - A Proposal For Reform*, 57 S. CAL. L. REV. 531, 540 (1984) (covenants not to compete "place a heavy burden upon the ability of agents to pursue their careers or practice their skills"). *See generally* RESTATEMENT (SECOND) OF CONTRACTS at §§ 186-188 (1979) (discussing noncompetition clauses as restraints of trade); 6A CORBIN, CONTRACTS § 1379 (1962 & Supp. 1989) (benefits of competition); *Kniffen, Employee Non-competition Covenants: The Perils of Performing Unique Services*, 10 RUT.-CAM. L.J. 25 (1978) (discussing whether uniqueness of employee's services should be factor in enforcing noncompetition clauses); Note, *Post Employment Restraints: An Analysis of Theories of Enforcement, and a Suggested Supplement to the Covenant Not to Compete*, 17 TULSA L.J. 155 (1981) (approaches to broad covenants not to compete).

able restrictions under the circumstances.<sup>5</sup> In general, courts apply a reasonableness test that balances the parties' interests to determine whether particular covenants not to compete are permissible.<sup>6</sup> Upon finding such a covenant impermissible, a court may invalidate the contract in whole or in part.<sup>7</sup> The reasonable-

<sup>5</sup> See *Muma v. Financial Guardian Inc.*, 551 F. Supp. 119, 123 (E.D. Mich. 1982) (restraints on insurance agents are not reasonable, therefore not permitted); *Carlo C. Gelardi Corp. v. Miller Brewing Co.*, 502 F. Supp. 637, 653 (D.N.J. 1980) (contract creating unreasonable restraint of trade not enforced). *But see Cullman Broadcasting Co. v. Bosley*, 373 So. 2d 830, 835-37 (Ala. 1979) (covenant restraining radio announcer from accepting employment with other stations found reasonable and enforceable); *Thompson v. Turner*, 245 N.C. 478, 481, 96 S.E.2d 263, 266-67 (1957) (business seller's promise not to open new business within "territory now covered" found reasonable and sufficiently definite for enforcement). See also RESTATEMENT (SECOND) OF CONTRACTS § 186 (1979) ("whether a restraint is reasonable [and thus enforced] is determined in light of the circumstances of the transaction"); 6A CORBIN, CONTRACTS §§ 1379-1384 (1962 & Supp. 1989) (discussing disapproval of covenants not to compete); *Closius & Schaffer*, *supra* note 4, at 539-40 ("restraints of trade" not favored by courts); *Krendl & Krendl, Non Competition Covenants in Colorado: A Statutory Solution?*, 52 DEN. L.J. 499, 499 (1975) (noncompetition covenants generally suspect).

Since the American economy is based on free competition, covenants not to compete are carefully scrutinized. See RESTATEMENT (SECOND) OF CONTRACTS § 186 (1979) (covenants unenforceable if found to be "unreasonably detrimental to the smooth operation of a freely competitive private economy"); *Closius & Schaffer*, *supra* note 4, at 541 (courts must take into consideration employee's interest (right to job mobility) and employer's interest (need to protect trade secrets, confidential information and good will)). Cf. *McCarthy, The Enforcement of Restrictive Covenants in France and Belgium: Judicial Discretion and Urban Planning*, 73 COLUM. L. REV. 1 (1973) (comparison of restrictive covenants in France, Belgium and United States).

<sup>6</sup> See *Middlesex Neurological Ass'n v. Cohen*, 3 Mass. App. 126, 132, 324 N.E.2d 911, 915 (1975) (two year noncompetition agreement between doctors upheld after balancing interests); *Gelder Medical Group v. Webber*, 41 N.Y.2d 680, 683, 363 N.E.2d 573, 576, 394 N.Y.S.2d 867, 870 (1977) (if noncompetition covenants are "reasonable as to time and area, necessary to protect legitimate interests, not harmful to the public and not unduly burdensome, they will be enforced") (emphasis added); *Kalish, Covenants Not to Compete and the Legal Profession*, 29 ST. LOUIS U.L.J. 423, 425 (1985) ("most . . . agree that the test is essentially a balancing test" which takes into account public interests, employer's interests and restricted party's interests).

<sup>7</sup> See *Welcome Wagon, Inc. v. Morris*, 224 F.2d 693, 701 (4th Cir. 1955) (restrictive covenants not severable and "must be judged as a whole and must stand or fall when so judged"); *Rector-Phillips-Morse, Inc. v. Vroman*, 253 Ark. 750, 753, 489 S.W.2d 1, 4 (1973) (court refused to enforce covenant because of unreasonable duration and "refused to engage in rewriting of contracts"); *Insurance Center v. Taylor*, 94 Idaho 896, 902, 499 P.2d 1252, 1256 (1972) (while recognizing propriety of modifying certain restrictive covenants, court invalidated entire covenant as matter of law); *Fox-Morris Ass'n v. Conroy*, 460 Pa. 290, 295, 333 A.2d 732, 735 (1975) ("we have repeatedly held that a court of equity may grant enforcement limited to those portions of the restrictions which are reasonably necessary for the protection of the employer").

Some courts limit the overbroad covenant in order to make it reasonable, rather than striking it down completely. See, e.g., *Eastern Distrib. Co. v. Flynn*, 222 Kan. 666, 679, 567 P.2d 1371, 1379 (1977) (court's reduction of geographical restriction rendered covenant

ness of a restriction is evaluated in terms of its geographic area, duration, and the activity it prohibits.<sup>8</sup>

### B. *Per Se Standard*

Due to the legal profession's unique role in serving the public,<sup>9</sup> covenants not to compete among lawyers are treated differently than those in ordinary employment relationships.<sup>10</sup> In determin-

reasonable); *Hodges v. Todd*, 698 S.W.2d 317, 320 (Ky. Ct. App. 1985) (noncompetition covenant enforceable because trial court supplied missing reasonable geographic limitations); *Bess v. Bothman*, 257 N.W.2d 791, 794 (Minn. 1977) (trial court properly added geographic and time limit to covenant and enforced it as such); *Solari Indus. v. Malady*, 55 N.J. 571, 574, 264 A.2d 53, 61 (1970) (court rejects "void per se rule" and allows for "partial enforcement of non-competition agreements"); *Karplinski v. Ingrasci*, 28 N.Y.2d 45, 45, 268 N.E.2d 751, 753, 320 N.Y.S.2d 1, 8 (1971) (with covenant silent as to essential terms, court upheld geographic area as not unduly large, but limited restriction to practice of oral surgery rather than dentistry in general, and supplied reasonable duration).

<sup>8</sup> See *Bess*, 257 N.W.2d at 794 (trial court properly supplied geographic and durational terms to render covenant enforceable); *Webber*, 41 N.Y.2d at 685, 363 N.E.2d at 577, 394 N.Y.S.2d at 871 (court enforced in its entirety physician's covenant not to compete within 30 miles for five years); *Karplinski*, 28 N.Y.2d at 45, 268 N.E.2d at 753, 320 N.Y.S.2d at 8 (geographic area reasonable, but court supplied limited restriction to practice of oral surgery rather than dentistry in general). See generally *Blake*, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960) (discussion of reasonableness standard for noncompetition covenants).

<sup>9</sup> See C. WOLFRAM, *MODERN LEGAL ETHICS* 20 (1986) ("[L]awyers . . . are uniquely qualified to bring their specialized knowledge to bear in diagnosing professional problems . . ."). But see *Kalish*, *supra* note 6, at 438 ("the law business is no different than many other service businesses").

<sup>10</sup> See *Gray v. Martin*, 63 Or. App. 173, 180, 663 P.2d 1285, 1290 (1983) (DR 2-108(A) imposes complete prohibition against attorney entering noncompetition agreement if attorney intends to remain in practice).

Before the 1960's, courts did not distinguish lawyers' noncompetition covenants from other covenants. See *Hicklin v. O'Brien*, 11 Ill. App. 2d 541, 546, 138 N.E.2d 47, 52 (1956) (court enforced reasonable covenant not to compete with sale of law practice and rejected legal ethics argument); *Toulmin v. Becker*, 69 Ohio App. 109, 113, 124 N.E.2d 778, 784-85 (1954) (court used reasonableness test to determine if noncompetition covenant between law firm and patent clerk was enforceable).

A new approach to attorneys' noncompetition covenants began in 1961 when the American Bar Association concluded that it is unethical for an attorney to include a restrictive covenant as part of an employment contract. See ABA Comm. on Professional Ethics, *Formal Op.* 300 (1961).

The special treatment given to attorney noncompetition covenants has caused some debate. See generally *Kalish*, *supra* note 6, at 450-57 (discussing reasons for not applying reasonableness test to lawyer noncompetition covenants); Note, *Attorneys-Professional Responsibility-Restrictive Covenants-Attorneys Must Not Enter Into Partnership Agreements Prohibiting Themselves From Representing Former Clients Upon Termination of the Partnership*, 4 *Fordham Urb. L.J.* 195 (1975) [hereinafter Note, *Attorneys*] (advocating use of reasonableness standard for attorneys); Note, *Competing Policies in Covenants Not to Compete*, 53 *Mo. L. REV.* 589 (1988) [hereinafter Note, *Competing Policies*] (discussing freedom to contract).

ing the enforceability of covenants not to compete within the legal profession, courts apply a rule that invalidates such provisions as violative of the Code of Professional Responsibility<sup>11</sup> or public policy, without regard to reasonableness.<sup>12</sup> As members of the legal profession, lawyers are held to ethical standards<sup>13</sup> and thus their restrictive covenants should be judged by ethical, rather than commercial standards.<sup>14</sup>

### II. ETHICAL BOUNDARIES

New York follows the ABA Model Code of Professional Re-

<sup>11</sup> See *Corlett, Killian, Hardeman, McIntosh & Levi v. Merritt*, 478 So. 2d 828, 833 (Fla. Dist. Ct. App. 1985) (lawyers practicing as professional corporation governed by ethical standards contained in Code of Professional Responsibility); *Gray*, 63 Or. App. at 180, 663 P.2d at 1290 (covenant violated DR 2-108(A) and was therefore unenforceable); *Hagen v. O'Connell, Goyak & Ball, P.C.*, 68 Or. App. 700, 701, 683 P.2d 563, 565 (1984) ("The disciplinary rule is designed to govern the relationship between attorneys for the protection of the public and is a flat prohibition against an attorney entering a noncompetition agreement if the attorney intends to remain in practice."); *In re Silverberg*, 75 App. Div. 2d 817, 819, 427 N.Y.S.2d 480, 482 (2d Dep't 1980) (since agreement violated Code of Professional Responsibility, it was void as against public policy and inconsistent with professional status of attorneys).

<sup>12</sup> See *Dwyer v. Jung*, 133 N.J. Super. 343, 345, 336 A.2d 498, 500 (1975) ("strong public policy considerations preclude [reasonableness test's] applicability"). See also *Mailman, Ross, Toyas & Shapiro v. Edelson*, 183 N.J. Super. 434, 435, 444 A.2d 75, 77-78 (1982) (reasonableness test applicable to accountants even though client relationship similar to attorneys); *Karlin v. Weinberg*, 148 N.J. Super. 243, 244, 372 A.2d 616, 618 (1977) (court refused to extend per se rule to medical profession). See generally *Kalish, supra* note 6, at 425-26 (1985) (examining difference in courts' treatment of attorney noncompetition covenants); Note, *Attorneys, supra* note 10, at 200-02 (discussing progression leading up to revision of ethical standards in 1969); ABA Comm. on Ethics and Professional Responsibility, *Informal Op.* 1072 (1968) (committee emphatically stated per se approach applies to restrictive covenants between law partners).

<sup>13</sup> See *S&S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 443, 508 N.E.2d 647, 650, 515 N.Y.S.2d 735, 738 (1987) ("Code of Professional Responsibility establishes ethical standards that guide attorneys in their professional conduct, and its importance is not to be diminished or denigrated by indifference."); *Friedman v. State*, 24 N.Y.2d 528, 539, 249 N.E.2d 369, 381, 301 N.Y.S.2d 484, 494 (1969) (Canons of Ethics set guidelines for attorneys and judges); C. WOLFRAM, *MODERN LEGAL ETHICS* § 2.7 at 68-78 (1986) (discussion of ethics within legal profession). See generally *MODEL CODE OF PROFESSIONAL RESPONSIBILITY PREAMBLE* (1980) ("Lawyers as guardians of the law, play a vital role in the preservation of society. . . . A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.").

<sup>14</sup> See *Dwyer v. Jung*, 133 N.J. Super. 343, 345, 336 A.2d 498, 500-01 (1975) (DR 2-108(A) was basis for court's refusing to apply common law commercial standards to attorney restrictive covenants); H. DRINKER, *LEGAL ETHICS* 190 (1953) (lawyers' obligations and relations to other lawyers is "primarily what characterizes the practice of law as a profession as distinguished from a business"); Note, *Attorneys, supra* note 10, at 202-03 ("lawyer restrictive covenants should be judged by 'ethical' rather than 'commercial' standards").

sponsibility (Code),<sup>15</sup> which has been adopted with certain amendments by the New York State Bar Association, and is enforced by the appellate division.<sup>16</sup> Compliance with the Code's disciplinary rules is mandatory<sup>17</sup> and attorneys are subject to disciplinary action for any violations.<sup>18</sup> Disciplinary Rule 2-108(A) of the Code provides:

**Agreements Restricting the Practice of a Lawyer**

(A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition of the payment of retirement benefits.<sup>19</sup>

The policies underlying DR 2-108(A) are two-fold: 1) to preserve an attorney's right to job mobility and 2) to protect a client's right to choose an attorney.<sup>20</sup>

<sup>15</sup> ABA CODE OF PROFESSIONAL RESPONSIBILITY (1980).

<sup>16</sup> N.Y.S.B.A. CODE OF PROFESSIONAL RESPONSIBILITY (McKinney 1970); N.Y. CONST. art. 6, § 4(k) ("The appellate divisions of the supreme court shall have all the jurisdiction possessed by them . . . and such additional jurisdiction as may be prescribed by law . . ."); N.Y. JUD. LAW § 90 (1)(a), (2) (McKinney 1983) (providing appellate division with bar admission and removal power). See *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95, 105, 550 N.E.2d 410, 415, 551 N.Y.S.2d 157, 162 (1989) (Hancock, J., dissenting) (all four departments adopted DR 2-108(A)).

<sup>17</sup> See C. WOLFRAM, *supra* note 9, § 2.6.3, at 59. Disciplinary rules are "mandatory in nature" and state the "minimum level" of conduct for attorneys. *Id.* (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY (Preliminary Statement 1980)); Marks & Cathcart, *Discipline within the Legal Profession*, ETHICS AND THE LEGAL PROFESSION 65 (M. Davis & F. Elliston 1986) (disciplinary rules are mandatory).

<sup>18</sup> See *Rapoport v. Berman*, 49 App. Div. 2d 930, 931, 373 N.Y.S.2d 652, 655 (2d Dep't 1975) (if attorney "has violated ethical standards, has overstepped the bounds of propriety or has violated any of the canons of ethics . . . the matter should be referred to this court to ascertain whether disciplinary action is warranted").

<sup>19</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(A) (1980).

<sup>20</sup> See *Attorney Grievance Comm'n v. Hyatt*, 302 Md. 683, 684, 490 A.2d 1224, 1225 (1985) (clause in legal clinic's employment contracts prohibiting departing staff attorneys from establishing other clinics or contacting former clients violated DR 2-108(A)); *Hagen v. O'Connell, Goyak & Ball, P.C.*, 68 Or. App. 700, 701, 683 P.2d 563, 565 (1984) (covenant restricting client's choice of counsel void); *Gray v. Martin*, 63 Or. App. 173, 182, 663 P.2d 1285, 1290 (1983) (purpose of DR 2-108(A) is to "govern the relationships between attorneys for the protection of the public"); see also ABA Comm. on Ethics and Professional Responsibility, *Informal Op. 300* (1961); C. WOLFRAM, *supra* at note 9, § 16.2, at 885 ("One limitation is . . . the agreement may not contain a restrictive covenant limiting the right of any partner to practice law.").

A. *New York's Per Se Approach in Cohen v. Lord, Day & Lord*

In *Cohen v. Lord, Day & Lord*,<sup>21</sup> the New York Court of Appeals applied a per se standard to invalidate a noncompetition clause as an impermissible restriction on the practice of law.<sup>22</sup> The plaintiff, Richard G. Cohen, was a partner in the defendant law firm, Lord, Day & Lord (LD&L)<sup>23</sup> for nearly twenty years, and served as head of its tax department before leaving<sup>24</sup> in 1985 to become a partner in another New York City law firm, Winthrop, Stimson, Putnam and Roberts.<sup>25</sup> When Cohen requested his departure compensation from LD&L, the firm refused to pay, relying on the forfeiture-for-competition clause of the partnership agreement.<sup>26</sup> Cohen sued for approximately \$285,000 in earned but uncollected profits.<sup>27</sup> On LD&L's motion to dismiss and Cohen's cross-motion for summary judgment, the trial court ruled that the clause was unenforceable as violative of DR 2-108(A).<sup>28</sup> The Appellate Division, First Department, unanimously reversed and stated that the clause was valid as a "financial disincentive" to competition and did not seek to *prevent* plaintiff from practicing law in New York or any other jurisdiction.<sup>29</sup> The court of appeals granted plaintiff leave to appeal the appellate division's order<sup>30</sup> and reversed, holding that the partnership agreement's forfeiture-for-competition clause was unenforceable as against the public

<sup>21</sup> 75 N.Y.2d 95, 550 N.E.2d 410, 551 N.Y.S.2d 157 (1989).

<sup>22</sup> *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95, 96, 550 N.E.2d 410, 410, 551 N.Y.S.2d 157, 157 (1989). *See also* Dwyer v. Jung, 133 N.J. Super. at 345, 336 A.2d at 500-01 (court refused to apply reasonableness standard, but instead held covenant per se void for public policy reasons); *Gray*, 63 Or. App. at 180, 663 P.2d at 1290 (restrictive covenant per se invalid because it violated DR 2-108(A)).

<sup>23</sup> *Cohen v. Lord, Day & Lord*, 144 App. Div. 2d 277, 277, 534 N.Y.S.2d 161, 161 (1st Dep't 1988) (with subsequent Lord, Day & Lord merger, firm name became Lord Day Lord & Barrett, Smith), *rev'd*, 75 N.Y.2d 95, 550 N.E.2d 410, 551 N.Y.S.2d 157 (1989).

<sup>24</sup> *Cohen*, 75 N.Y.2d at 96, 550 N.E.2d at 410, 551 N.Y.S.2d at 157.

<sup>25</sup> *Cohen*, 144 App. Div. 2d at 277, 534 N.Y.S.2d at 161.

<sup>26</sup> *Cohen*, 75 N.Y.2d at 97, 550 N.E.2d at 410, 551 N.Y.S.2d at 157.

<sup>27</sup> *Cohen*, 144 App. Div. 2d at 278, 534 N.Y.S.2d at 162. Cohen had two causes of action: one to recover approximately \$285,000 representing his portion of uncollected firm earnings, and another to recover \$1,875 as reimbursement for pension fund contributions. *Id.* at 279, 534 N.Y.S.2d at 162.

<sup>28</sup> *Cohen*, 75 N.Y.2d at 97, 550 N.E.2d at 411, 551 N.Y.S.2d at 158.

<sup>29</sup> *Cohen*, 144 App. Div. 2d at 279, 534 N.Y.S.2d at 163.

<sup>30</sup> *Cohen v. Lord, Day & Lord*, 74 N.Y.2d 605, 541 N.E.2d 427, 543 N.Y.S.2d 398 (1989).

policy reflected in DR 2-108(A).<sup>31</sup>

### B. Three Approaches to Cohen Problem

The *Cohen* court reasoned that the provision in question "does not expressly or completely prohibit a withdrawing partner from engaging in the practice of law, [but] the significant monetary penalty it exacts . . . constitutes an impermissible restriction on the practice of law" and was therefore in violation of DR 2-108(A).<sup>32</sup> Judge Bellacosa's majority opinion approached the application of DR 2-108(A) to *Cohen's* facts pragmatically and concluded that such a significant financial forfeiture would "realistically discourage and foreclose" such a partner from serving clients wanting representation.<sup>33</sup> The majority noted that its holding was tailored to *Cohen's* facts and should not be given a broader interpretation.<sup>34</sup>

Judge Hancock, in his dissent, stated that the majority's invalidation of the clause was an "unwarranted interference with the right of members of a partnership to establish reasonable contractual terms covering the withdrawal of a partner."<sup>35</sup> According to Judge Hancock, the provision was not a restrictive covenant<sup>36</sup> since it did not entirely prohibit the plaintiff from practicing law since he could, and did, continue to practice law by acceding to the financial penalty.<sup>37</sup> Ultimately, Judge Hancock reasoned, the majority's reliance on DR 2-108(A) and its public policy was mis-

<sup>31</sup> *Cohen*, 75 N.Y.2d at 98, 550 N.E.2d at 411, 551 N.Y.S.2d at 158.

<sup>32</sup> *Id.*; see also *Gray v. Martin*, 63 Or. App. 173, 180, 663 P.2d 1285, 1290 (1983) (provision effectively prohibiting legal practice within county).

<sup>33</sup> *Cohen*, 75 N.Y.2d at 98, 550 N.E.2d at 411, 551 N.Y.S.2d at 158; see *Hagen v. O'Connell, Goyak & Ball, P.C.*, 68 Or. App. 700, 701, 683 P.2d 563, 565 (1984) (financial penalty was against "public policy of making legal counsel available, insofar as possible, according to the wishes of a client").

<sup>34</sup> *Cohen*, 75 N.Y.2d at 102, 550 N.E.2d at 413, 551 N.Y.S.2d at 160.

<sup>35</sup> *Id.* at 102, 550 N.E.2d at 414, 551 N.Y.S.2d at 161 (Hancock, J., dissenting). Cf. *Kalish*, *supra* note 6, at 456 (covenants not to compete "permit firms and persons to agree to order their affairs in a particular way"); Note, *Attorneys*, *supra* note 10, at 208 ("*Dwyer's* blanket rejection of all lawyer restrictive covenants may also have the effect of discouraging partnerships between willing attorneys involving willing clients.").

<sup>36</sup> See *Cohen*, 75 N.Y.2d at 106, 550 N.E.2d at 416, 551 N.Y.S.2d at 163 (Hancock, J., dissenting).

<sup>37</sup> *Id.* at 110, 550 N.E.2d at 418, 551 N.Y.S.2d at 165 (Hancock, J., dissenting).

guided.<sup>38</sup> Chief Judge Wachtler concurred with Judge Hancock's reasoning yet dissented separately, adding that while DR 2-108(A) applied,<sup>39</sup> *Cohen's* facts fit within the "retirement benefits" exception to the rule.<sup>40</sup>

### C. Analysis

It is submitted that the majority's opinion is both the most practical and professionally responsible approach. Disciplinary Rule 2-108(A) expressly prohibits agreements that "restrict" attorneys from practicing law.<sup>41</sup> The majority's broad interpretation of "restrict" effectuates the policies underlying DR 2-108(A),<sup>42</sup> primarily to ensure the public an unencumbered choice of counsel.<sup>43</sup> Therefore, "restrict" should not be limited to a complete prohibition of practicing law, but rather should include the significant financial forfeiture sought by Lord, Day & Lord in *Cohen*.<sup>44</sup> The majority's broad interpretation of "restrict" is further supported by Canon 7 which provides: "Efforts, direct or indirect in anyway to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the Bar."<sup>45</sup> The majority reasoned that if financial penalties were not restraints within the meaning of the rule, there would be no need to exempt the specific category when dealing with retirement benefits, an argument that undermines Chief Judge Wachtler's dissent.<sup>46</sup> Chief Judge Wachtler's approach is problematic in that it eliminates any dis-

<sup>38</sup> *Id.* at 110, 550 N.E.2d at 419, 551 N.Y.S.2d at 166 (Hancock, J., dissenting).

<sup>39</sup> *Id.* at 111, 550 N.E.2d at 419, 551 N.Y.S.2d at 166 (Wachtler, C.J., dissenting).

<sup>40</sup> *Id.* at 112, 550 N.E.2d at 419, 551 N.Y.S.2d at 166-67 (Wachtler, C.J., dissenting). *Cf.* Gray v. Martin, 63 Or. App. 173, 180, 663 P.2d 1285, 1290 (1983) ("retirement" exception would have no meaning).

<sup>41</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(A) (1980).

<sup>42</sup> *See Cohen*, 75 N.Y.2d at 98, 550 N.E.2d at 411, 551 N.Y.S.2d at 158; Note, *Attorneys*, *supra* note 10, at 207 (broad interpretation of DR 2-108(A) used in *Dwyer*).

<sup>43</sup> *See Cohen*, 75 N.Y.2d at 98, 550 N.E.2d at 411, 551 N.Y.S.2d at 158; Kalish, *supra* note 6, at 431 n. 46 (one rationale of Formal Opinion 300 is to protect clients' freedom to choose attorneys).

<sup>44</sup> *See Cohen*, 75 N.Y.2d at 98, 550 N.E.2d at 411, 551 N.Y.S.2d at 158.

<sup>45</sup> *See* ABA CANONS OF PROFESSIONAL ETHICS No. 7 (1908) (original Canon 7 forbade attorney from encroaching on business of another attorney).

<sup>46</sup> *Cohen*, 75 N.Y.2d at 100, 550 N.E.2d at 412, 551 N.Y.S.2d at 159. *But see id.* at 111, 550 N.E.2d at 419, 551 N.Y.S.2d at 166 (Wachtler, C.J., dissenting) ("payment of retirement benefits can be conditional on a restriction of the lawyer's right to practice law after termination of the partnership relationship").

inction between a "retiring" attorney and a "withdrawing" attorney.<sup>47</sup> It is submitted that, in effect, any attorney who withdraws from a firm would be "retiring."

Courts may rely on applicable statutes, caselaw, or public policy as a means to decide issues before them.<sup>48</sup> It is submitted that the lack of legislation and caselaw does not render the majority's use of DR 2-108(A) as a basis for invalidating the forfeiture clause "an unwarranted interference." Disciplinary Rule 2-108(A) is an illustration of the public policy to protect a client's right to choose an attorney.<sup>49</sup> Lawyers are bound by this disciplinary rule and can not be permitted to contract out of its obligations.<sup>50</sup>

### CONCLUSION

In keeping with the spirit embodied in the New York Code of Professional Responsibility Disciplinary Rule 2-108(A), the New York Court of Appeals in *Cohen v. Lord, Day & Lord* correctly invalidated the forfeiture-for-competition clause as an impermissible restriction on the practice of law. Judge Bellacosa's majority opinion aptly recognized that the clause conditioned a withdrawing partner's compensation upon his refraining from the practice of law, prior to retirement. This discouragement of a partner from serving clients was so significant as to "restrict" the lawyer's practice and interfere with the client's choice of counsel which contradicts the language of, and purpose behind DR 2-108(A). Although the *Cohen* court expressly limited its holding to the facts before it, practitioners should not ignore the strong message concerning the

<sup>47</sup> *Cohen*, 75 N.Y.2d at 112, 550 N.E.2d at 419, 551 N.Y.S.2d at 166-67 (Wachtler, C.J., dissenting). Cf. *Gray v. Martin*, 63 Or. App. at 173, 180, 663 P.2d 1285, 1290 (1983) ("[e]very termination of a relationship between law partners would be a retirement, and agreements restricting the right to practice would always be allowed").

<sup>48</sup> See *Holy Trinity Church v. United States*, 143 U.S. 457 (1892) (decision based on interpretation of statute); *Cotton States Mut. Ins. Co. v. Neese*, 254 Ga. 335, 338, 329 S.E.2d 136, 138 (1985) (provision unenforceable as a matter of public policy); *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1963) (decision based on prior caselaw).

<sup>49</sup> See *Hagen v. O'Connell, Goyak & Ball, P.C.*, 68 Or. App. 700, 701, 683 P.2d 563, 565 (1984) (interferes with attorney availability); *Koehler v. Wales*, 16 Wash. App. 304, 315, 556 P.2d 223, 236 (1976) ("clients are not merchandise"); *Kalish*, *supra* note 6, at 431 n.46 (freedom of client in choosing attorney).

<sup>50</sup> See MODEL CODE OF PROFESSIONAL RESPONSIBILITY PREAMBLE (1980) ("disciplinary rules are mandatory in nature").

legal profession's ethical boundaries in drafting and enforcing partnership agreements.

Christine Ardita

“ . . . AND JUSTICE FOR ALL”? — THE BAR, THE INDIGENT AND MANDATORY PRO BONO

“ ‘Membership in the bar is a privilege burdened with conditions’ . . . . [A lawyer is] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice . . . . He might be assigned as counsel for the needy, in causes criminal or *civil*, serving without pay . . . . All this is undisputed.”<sup>1</sup>

INTRODUCTION

*Pro bono publico* literally means “for the public good.”<sup>2</sup> The history of pro bono work can be traced back to the Roman era.<sup>3</sup> The United States pro bono tradition is deeply rooted in English common law.<sup>4</sup> Proposals to make pro bono obligatory have raised is-

<sup>1</sup> *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928) (emphasis added). See also O'Connor, *Legal Education and Social Responsibility*, 53 *FORDHAM L. REV.* 659, 661 (1985). “Implicit in all [pro bono programs] is the concept that lawyers have moral and social responsibilities in such instances and that those responsibilities need to be discharged by the Bar, willingly, and some would say, even unwillingly.” *Id.*

<sup>2</sup> *BLACK'S LAW DICTIONARY* 1203 (6th ed. 1990).

<sup>3</sup> Maguire, *Poverty and Civil Litigation*, 36 *HARV. L. REV.* 361, 385 (1923) (Roman bar advocated legal service without recompense). See *United States v. Dillon*, 346 F.2d 633, 636 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966). A lawyer is subject to certain obligations “imposed upon him by the ancient traditions of his profession and as an officer assisting the courts in the administration of justice” which include legal services to the indigent. *Id.* But see *Cunningham v. Superior Court*, 177 Cal. App. 3d 336, 343, 222 Cal. Rptr. 854, 858 (Cal. Ct. App. 1986). “A careful examination of the ‘deeply rooted’ and ‘ancient tradition’ reveals a custom far more honored in its breach than in its observance.” *Id.*; Shapiro, *The Enigma of The Lawyer's Duty to Serve*, 55 *N.Y.U. L. REV.* 735, 749 (1980) (claims reliance on Roman history is misplaced).

<sup>4</sup> Tudzin, *Pro Bono Work: Should It Be Mandatory or Voluntary*, 12 *J. LEGAL PROF.* 103, 119 (1987). “Historically lawyers were considered to be ‘officers of the court.’ The term was used in England originally to express the view that special responsibilities and duties at-