

Notes

AN UNREASONABLE BAN ON REASONABLE COMPETITION: THE LEGAL PROFESSION'S PROTECTIONIST STANCE AGAINST NONCOMPETE AGREEMENTS BINDING IN- HOUSE COUNSEL

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ABSTRACT

In the vast majority of jurisdictions in the United States, a business may protect its confidential information and customer goodwill by conditioning employment on an employee's acceptance of a covenant not to compete. These covenants are beneficial to the marketplace because they allow employers to provide employees with necessary skills, knowledge, and proprietary information without any fear of misappropriation. Accordingly, noncompete agreements are upheld by courts so long as they pass a fact-specific "reasonableness" test.

Notwithstanding the widespread acceptance of reasonable noncompete agreements for all other professionals—including doctors and corporate executives—forty-eight states, following the American Bar Association's lead, prohibit all noncompete agreements among lawyers. This prohibition is purportedly designed to protect both an attorney's professional autonomy and a client's right to choose his counsel. Despite legal commentators' criticism of the prohibition, several state bar associations have recently extended it beyond the traditional law-firm context to agreements between companies and their in-house counsel. This expansion has transformed a questionable policy of professional self-regulation into an unjustifiable infringement on the legitimate interests of corporate

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employers. In addition to providing an analysis of the history and ethical norms that justify rejection of the ban's application to in-house counsel, this Note argues that bar committees that issue opinions supporting the ban's extension may be susceptible to antitrust liability under the Supreme Court's new Dental Board standard pertaining to state-action immunity.

Our duty to regulate the legal profession is not for the purpose of creating a monopoly for lawyers, or for their economic protection

*– Linder v. Insurance Claims Consultants*¹

INTRODUCTION

Since early English common law, it has been widely accepted that employers have a legitimate right to protect their confidential information, trade secrets, and customer goodwill from misappropriation.² To protect this right, an employer may lawfully condition employment on an employee's acceptance of a "covenant not to compete."³ A "noncompete" agreement is valid and enforceable as long as the covenant is no "greater than necessary to protect the [employer's] legitimate interests," does not "impose[] an undue hardship on the employee," and is not "injurious to the public interest."⁴ Courts routinely apply this "reasonableness" test when considering the enforceability of noncompete agreements governing virtually every employee and professional in the United States, including doctors, dentists, veterinarians, corporate executives, and, until the 1960s, lawyers.⁵

1. *Linder v. Ins. Claims Consultants, Inc.*, 560 S.E.2d 612, 617 (S.C. 2002).

2. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898) ("The inhibition against restraints of trade at common law seems at first to have had no exception.").

3. Throughout this Note, the commonly used terms "covenant not to compete," "noncompete agreements," "noncompete covenants," "noncompetes," "noncompetition agreements," and "restrictive covenants" are used interchangeably without any substantive change in implied meaning.

4. *E.g., Merrimack Valley Wood Prods. v. Near*, 876 A.2d 757, 762 (N.H. 2005).

5. *See, e.g., Estee Lauder Cos. v. Batra*, 430 F. Supp. 2d 158, 181–82 (S.D.N.Y. 2006) (applying the reasonableness test to noncompete agreements involving corporate executives); *Hicklin v. O'Brien*, 138 N.E.2d 47, 52 (Ill. App. Ct. 1956) (lawyers); *Karlin v. Weinberg*, 390 A.2d 1161, 1166 (N.J. 1978) (doctors); *Kaeser v. Adamson*, No. CA-773, 1982 WL 5602, at *8

Notwithstanding the widespread acceptance of *reasonable* noncompete agreements for other professionals, many within the legal community argue that noncompete agreements for attorneys should be held to a significantly different standard. This assertion dates back to a 1961 American Bar Association (ABA) Ethics Opinion, which held for the first time that *all* restrictive postemployment covenants for lawyers should be treated as *per se* unethical.⁶ The Opinion justified this special prohibition by explaining that “[t]he practice of law . . . is a profession, not a business,” “[c]lients are not merchandise,” “lawyers are not tradesmen,” and covenants are “an unwarranted restriction on the right of a lawyer to choose where he will practice and inconsistent with our professional status.”⁷ Over the last half century, the underlying justification has evolved, but the *per se* prohibition on attorney noncompetes has remained. Today, ABA Model Rule of Professional Conduct (*RPC*, Model Rule, or Rule) 5.6 reflects that prohibition:

A lawyer shall not participate in offering or making:
(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement⁸

The official Comments to the Model Rule explain that the prohibition is designed to protect lawyers’ professional autonomy and assure clients’ freedom to choose a lawyer.⁹ Although the Model Rules are only guidelines, forty-eight states have adopted some

(Ohio Ct. App. Dec. 14, 1982) (veterinarians); *Olson v. Hillsdale Dental, Ltd.*, 371 N.W.2d 429, 429 (Wis. Ct. App. 1985) (unpublished disposition) (dentists).

6. Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 488 (2008).

7. ABA Comm. on Prof’l Ethics, Formal Op. 300 (1961).

8. MODEL RULES OF PROF’L CONDUCT r. 5.6 (AM. BAR ASS’N 2013).

9. *Id.* cmt. 1 (“An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer.”). Recent ethics opinions emphasize that client autonomy is the primary rationale for the rule. *See, e.g.*, Phila. Bar Ass’n Prof’l Guidance Comm., Op. 87-24 (1988) (“The purpose . . . is to ensure that clients may seek the legal advice of a lawyer of their choosing. Although law firms have a right to protect their legitimate business interests, including their client base, they may not do so to the exclusion of the client’s preference.”).

version of Rule 5.6 or its substantially similar predecessor, ABA Model Code of Professional Responsibility DR 2-108.¹⁰

Violation of these professional-conduct rules and opinions may be enforceable by professional sanctions, but they are not designed for court enforcement.¹¹ Nevertheless, courts regularly rely on these pronouncements as persuasive authority and “in the case of lawyer noncompete covenants, [they] have relied almost completely on the ABA’s approach to the issue.”¹²

The vast majority of opinions discussing and enforcing Rule 5.6’s per se ban have only considered the Rule as it applies to lawyers who leave a law firm in order to practice at another law firm.¹³ These opinions have been met with a litany of justifiable academic criticisms, which primarily assert that law firms invest substantial time and resources into training and developing attorneys and should therefore be allowed to protect these legitimate interests with reasonable noncompete agreements.¹⁴ Critics also point out that it is nonsensical to create a special exception for the legal profession based on public-policy objectives of safeguarding “client choice,” when we readily enforce reasonable noncompetes in the medical profession (and *every other* profession).¹⁵ Despite staunch academic criticism,¹⁶ these cries for reform have largely fallen on deaf ears. Only

10. MODEL CODE OF PROF’L RESPONSIBILITY DR 2-108 (AM. BAR ASS’N 1980); see Linda Sorenson Ewald, *Agreements Restricting the Practice of Law: A New Look at an Old Paradox*, 26 J. LEGAL PROF. 1, 6 & n.11 (2002) (listing which states have adopted the rule).

11. See MODEL RULES OF PROF’L CONDUCT pmbll., para. 20 (AM. BAR ASS’N 2013) (“Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.”).

12. Barton, *supra* note 6, at 489. For an overview of the small minority of courts that has rejected the ABA’s approach, see *infra* Part II.C.

13. Barbara C. Bentrup, Note, *Friend or Foe: Reasonable Noncompete Restrictions Can Benefit Corporate In-House Counsel and Protect Corporate Employers*, 52 ST. LOUIS U. L.J. 1037, 1037–38 (2008).

14. E.g., Wm. C. Turner Herbert, Comment, *Let’s Be Reasonable: Rethinking the Prohibition Against Noncompete Clauses in Employment Contracts Between Attorneys in North Carolina*, 82 N.C. L. REV. 249, 266–67 (2003) (discussing law firms’ “interest in minimizing competition”).

15. *Id.* at 278 (“Nor does any substantive distinction between the medical and legal professions justify the latter’s prohibition from the reasonable use of noncompetition agreements.”); Barton, *supra* note 6, at 490 (“The distinction between lawyers and other professionals is quite difficult to defend. . . . In fact, the choice of a doctor seems much more personal and much more likely to have serious and life-changing ramifications than the choice of a lawyer.”).

16. For an example of this criticism, see Roy Ryden Anderson & Walter W. Steele Jr., *Ethics and the Law of Contract Juxtaposed: A Jaundiced View of Professional Responsibility*

two states—California and Arizona—have abandoned the per se prohibition.¹⁷

Although the blanket prohibition on noncompete agreements in the law-firm context is well established, there has been limited attention to the prohibition as it relates to such agreements between corporate in-house counsel and their employers.¹⁸ In fact, the most formal pronouncement on the subject comes from a state ethics opinion, rather than a court. In July 2006, the New Jersey Supreme Court Advisory Committee on Professional Ethics addressed the issue directly and announced that the flat prohibition on restrictive covenants applicable to outside counsel is equally applicable to in-house counsel.¹⁹

In the ten years since the New Jersey Opinion was issued, the demand for in-house counsel has continued to grow, and lateral movement by in-house counsel has triggered a number of cases involving the misappropriation of trade secrets by in-house attorneys for the gain of direct competitors.²⁰ Yet surprisingly little attention

Considerations in the Attorney–Client Relationship, 4 GEO. J. LEGAL ETHICS 791, 846 (1991). Anderson and Steele posit:

Whether the fulcrum for balancing interests of clients over those of their lawyers is a narcissistic concept of ourselves as paragons of professional propriety—as super-fiduciaries—or the absurdly conflicting notion that good lawyers are hard to find, we wonder how much longer these outmoded, unrealistic concepts can be used to deny attorneys fair access to the norms of the marketplace, restricted only by the same rules applicable to doctors, to ministers, to accountants, and to all other fiduciary-based professions.

Id.

17. *Fearnow v. Ridenour*, Swenson, Cleere & Evans, P.C., 138 P.3d 723, 729 (Ariz. 2006) (en banc) (“[Restrictive covenants between lawyers], as is the case with restrictive covenants between other professionals, should be examined under the reasonableness standard.”); *Howard v. Babcock*, 863 P.2d 150, 157 (Cal. 1993) (“[W]e can see no legal justification for treating partners in law firms differently in this respect from partners in other businesses and professions.”). This concept is discussed *infra* Part II.C.

18. Bentrup, *supra* note 13, at 1037–38; *see also* N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 858 (2011) (evaluating the legitimacy of a confidentiality agreement in an in-house attorney’s employment contract, and noting that previous decisions regarding Rule 5.6 occurred in a “quite different context[]” of law-firm partnership agreements, and therefore do not control the interpretation of an in-house attorney’s covenant not to compete).

19. N.J. Comm. on Prof’l Ethics, Formal Op. 708 (2006). As discussed *infra* Part II.D, several other state ethics committees have extended the per se ban to in-house counsel. The New Jersey Opinion is largely emblematic of the opinions of other jurisdictions that have taken this approach, and is the most explicit about its application and most thoroughly reasoned. Therefore, it will often be expressly mentioned in this Note.

20. Erik W. Weibust, Daniel P. Hart, Robyn E. Marsh & Andrew J. Masak, SEYFARTH SHAW LLP, *Lawyer Mobility and Trade Secrets Protection: Restrictive Covenant, Confidentiality, and Non-Disclosure Considerations in the Legal Profession*, at 2 (2014), <http://www.tradesecretslaw.com/files/2014/12/AIPLA-Paper.pdf> [<http://perma.cc/8NUB-CKHW>] (“A spike

has been paid to the New Jersey Opinion's adverse impact on businesses and their ability to enter into and enforce reasonable noncompete agreements against their former in-house counsel. Moreover, commentators posit that "it seems likely that" New Jersey's approach "will be adopted in all jurisdictions that have adopted a version of Rule 5.6."²¹

This Note contends that the *per se* prohibition against in-house noncompetes should be abandoned in favor of the same reasonableness test that has been applied to restrictive covenants involving other professions. First, the already-dubious justifications for the prohibition in the context of outside counsel—ranging from the special ethical obligations of law firms to the promotion of client choice in retaining existing legal representation—cannot be logically extended to in-house counsel. Unlike outside counsel, the in-house attorney only has one client at a time. As such, the in-house counsel voluntarily constrains his professional autonomy and effectively eliminates any concern regarding client choice. Second, as the in-house counsel provides both legal and business advice, the existing ethical rules on confidentiality are inadequate to protect a corporate employer's legitimate interests. Under Rule 1.9, a former in-house counsel may disclose and utilize his former corporate employer's confidential business information for the benefit of his new, competing corporate employer, *if* he obtained such confidential information while performing his nonlegal duties.²² Ultimately, the

in the number of recent cases [involving misappropriation of trade secrets by in-house counsel] has brought the issue of restrictive covenants in the legal profession into the limelight."); *see also* Melissa Maleske, *Why GCs Should Think Twice Before Signing a Noncompete*, LAW360 (Sept. 16, 2015, 2:22 PM), <http://www.law360.com/articles/702350/why-gcs-should-think-twice-before-signing-a-noncompete> [<http://perma.cc/8628-DSU3>] (providing examples of misappropriation of confidential information by in-house counsel).

21. Jessica Montello, *The Future of Non-Compete Agreements in In-House Practice*, ACC DOCKET, Nov. 2014, at 72, 80.

22. *See* N.J. Comm. on Prof'l Ethics, Formal Op. 708 (2006) (conceding that an "in-house lawyer could obtain confidential information and/or trade secrets which would not be protected by Rule 1.6, or the attorney-client privilege," and that it may be reasonable for a corporation to ask its lawyers to sign nondisclosure or confidentiality agreements to fill in these gaps in the ethical rules); *see also* MODEL RULES OF PROF'L CONDUCT r. 1.9 cmt. 3 (AM. BAR ASS'N 2013) (noting that "general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation"); *id.* r. 1.6 cmt. 3 ("The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."); *id.* r. 1.7 cmt. 6 ("[S]imultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients."); *id.*

legal profession should not let its steadfast refusal to adopt a reasonableness test in the law-firm context prevent it from adopting a reasonable exception for in-house counsel that is fair to corporate employers.

This Note is segmented into four Parts. Part I provides a historical overview of the prevailing common-law approach to enforcing restrictive employment covenants. Part II explores how restrictive covenants have been applied to the legal profession generally, and to in-house counsel specifically. Part III provides a critical analysis of proffered justifications for the per se ban, argues that the existing ethical obligations are insufficient to protect corporate interests, and asserts that the New Jersey standard should be replaced with a standard common-law reasonableness test in the context of in-house counsel. Part IV proposes that an antitrust lawsuit is an alternative route that could credibly be utilized to effectuate the suggested modification of the per se prohibition's applicability to in-house counsel in light of the Supreme Court's recent willingness to enforce the Sherman Act against state agencies. Specifically, Part IV asserts that reasonable noncompete agreements have long been understood to be efficiency enhancing, and therefore an outright ban on such agreements between corporate employers and in-house counsel is anticompetitive and a likely violation of the Sherman Act.

I. COMMON-LAW TREATMENT OF NONCOMPETE AGREEMENTS

Noncompete agreements present restraint-of-trade issues “that have been before courts for more than five centuries, and consequently, there is a wealth of authority on the subject.”²³ A handful of states, including California, Oregon, Texas, Colorado, and Florida, have enacted specific statutes to regulate noncompete

r. 1.9, cmt. 2 (providing that “a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client”).

23. Kenneth Engel, Note, *Should Minnesota Abandon the Per Se Rule Against Law Firm Noncompetition Agreements?*, 23 WM. MITCHELL L. REV. 133, 140 & n.28 (1997) (discussing *Arthur Murray Dance Studios v. Witter*, 105 N.E.2d 685, 687 (Ohio Ct. Com. Pl. 1952)). In regard to the range of authority, the *Arthur Murray* court observed, “[Covenants not to compete are] not one of those questions on which the legal researcher cannot find enough to quench his thirst. To the contrary there is so much authority it drowns him. It is a sea—vast and vacillating, overlapping and bewildering.” *Arthur Murray*, 105 N.E.2d at 687.

agreements.²⁴ In the vast majority of jurisdictions, the enforceability of covenants not to compete is still determined by common-law principles.²⁵

A. *The Common-Law Reasonableness Test*

Early English common law flatly prohibited noncompete restrictions on employees.²⁶ Thereafter, it “became apparent to the people and the courts that it was in the interest of trade that certain covenants in restraint of trade should be enforced.”²⁷ Thus, dating back to 1711, courts have permitted noncompete agreements ancillary to an employment relationship, subject to a fact-specific reasonableness test.²⁸

The reasonableness of a covenant is assessed with respect to the time that the contract was made, and the underlying question is a matter of law for the court to decide.²⁹ Most courts articulate this reasonableness inquiry in the form of a three-pronged test.³⁰ A restraint on employment is only reasonable if it (1) is no “greater than is necessary to protect the legitimate interests of the employer”; (2) does not “impose an undue hardship on the employee”; and (3) is not “injurious to the public interest.”³¹ If the covenant violates any of

24. See generally THOMSON REUTERS, *Non-Compete Agreements (Statutes)*, 0060 SURVEYS 23 (2014) (listing statutes that address the legality and enforceability of noncompete agreements in U.S. jurisdictions).

25. See RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. LAW INST. 1981) (providing an overview of each jurisdiction’s approach).

26. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279 (6th Cir. 1898) (“Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void, and were not enforced by the courts.”).

27. *Id.* at 280.

28. *Id.* at 279 (citing *Mitchel v. Reynolds* (1711) 24 Eng. Rep. 347; 1 P. Wms. 181).

29. *Tech. Aid Corp. v. Allen*, 591 A.2d 262, 265 (N.H. 1991). Courts assess each noncompete covenant based on the circumstances of the case. See, e.g., *Turner v. Robinson*, 107 S.E.2d 648, 650 (Ga. 1959) (evaluating a covenant not to compete based on the particular circumstances of the case); *Vendo Co. v. Stoner*, 245 N.E.2d 263, 273 (Ill. App. Ct. 1969) (same); *Iowa Glass Depot, Inc. v. Jindrich*, 338 N.W.2d 376, 382 (Iowa 1983) (same); *Becker v. Bailey*, 299 A.2d 835, 838 (Md. 1973) (same); *Bennett v. Storz Broad. Co.*, 134 N.W.2d 892, 899 (Minn. 1965) (same); *Greenwich Mills Co. v. Barrie House Coffee Co.*, 91 A.D.2d 398, 400–01 (N.Y. App. Div. 1983) (same); *Allright Auto Parks, Inc. v. Berry*, 409 S.W.2d 361, 363 (Tenn. 1966) (same).

30. See, e.g., *Tech. Aid Corp.*, 591 A.2d at 265–66.

31. *Id.*; see also *Merrimack Valley Wood Prods. v. Near*, 876 A.2d 757, 762 (N.H. 2005) (“Nonetheless, restrictive covenants are valid and enforceable if the restraint is reasonable, given the particular circumstances of the case.”); RESTATEMENT (SECOND) OF CONTRACTS

these prongs, the restriction is unreasonable and therefore unenforceable.³²

In the context of an employment agreement, it is generally accepted that an employer has a legitimate interest in restraining the employee from appropriating trade secrets, confidential information, and customer relationships to which the employee has had access “in the course of his employment.”³³ An employer generally cannot restrict a former employee from soliciting *new* clients or its existing clients with whom the employee had no actual contact.³⁴

§ 188 (AM. LAW INST. 1981) (stating that a non-compete agreement “is unreasonably in restraint of trade” if “the restraint is greater than is needed to protect the promisee’s legitimate interest, or . . . the promisee’s need is outweighed by the hardship to the promisor and the likely injury to the public”).

32. RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. LAW INST. 1981).

33. *Id.* cmt. b; *see also, e.g.*, Emerson Elec. Co. v. Rogers, 418 F.3d 841, 845 (8th Cir. 2005) (“Under Missouri law, covenants not to compete may be enforced, for ‘an employer has a proprietary right in his stock of customers and their good will.’” (quoting Mills v. Murray, 472 S.W.2d 6, 13 (Mo. Ct. App. 1971))); Minn. Mining & Mfg. Co. v. Kirkevold, 87 F.R.D. 324, 324 (D. Minn. 1980) (“Minnesota has [a] significant interest in protecting [its] corporations from loss of trade secrets and confidential information.”); Victoria’s Secret Stores, Inc. v. May Dep’t Stores Co., 157 S.W.3d 256, 260 (Mo. Ct. App. 2004) (“A restrictive covenant . . . is only valid and enforceable if it is necessary to protect trade secrets and customer contacts”); Easy Returns Midwest, Inc. v. Schultz, 964 S.W.2d 450, 453 (Mo. Ct. App. 1998) (“An employer may only seek to protect . . . its trade secrets and its stock in customers.” (citing Orchard Container Corp. v. Orchard, 601 S.W.2d 299, 303 (Mo. Ct. App. 1980))). For a sampling of cases enforcing covenants not to compete to protect trade secrets and confidential information, see Brockley v. Lozier Corp., 488 N.W.2d 556, 564 (Neb. 1992) (finding an interest in protecting the confidential information of the employer, but striking down the five-year duration of the covenant); Whitmyer Bros. v. Doyle, 274 A.2d 577, 583 (N.J. 1971) (“The doubtful nature of the employer’s claimed trade secrets or confidential information and the comprehensiveness of the verified denials by the former employees clearly point to the inappropriateness of any preliminary relief grounded on the suggested legitimate interests of the employer in its trade secrets or confidential information.”); Ingersoll-Rand Co. v. Ciavatta, 524 A.2d 866, 872 (N.J. Super. Ct. App. Div. 1987) (“[T]here is a legitimate interest of the employer to foster the free exchange of ideas by its employees without fear that the employees will use trade secrets or confidential information learned during such interchange to the employer’s disadvantage within a reasonable time following the termination of employment.”).

34. Many cases heavily emphasize the former employee’s customer contacts or lack thereof. *Compare* Wolf & Co. v. Waldron, 366 N.E.2d 603, 606 (Ill. App. Ct. 1977) (upholding an injunction that was limited to dealing with former clients), 4408, Inc. v. Losure, 373 N.E.2d 899, 903 (Ind. Ct. App. 1978) (upholding a restriction), *and* E. Distrib. Co. v. Flynn, 567 P.2d 1371, 1379 (Kan. 1977) (upholding the modification of a restriction to those countries and those sales activities in which the employee had been engaged), *with* Folsom Funeral Serv. v. Rodgers, 372 N.E.2d 532, 533–34 (Mass. App. Ct. 1978) (refusing to enforce restriction because customer contacts did not have a great impact on undertaking business), *and* Brewer v. Tracy, 253 N.W.2d 319, 322 (Neb. 1977) (refusing to enforce an area prohibition that included nine communities in which employee had not worked).

Of course, the existence of a legitimate business interest does not give the employer the unfettered authority to restrain competition. Rather, to be enforceable the covenant must be reasonable with respect to “time, territorial effect, [and] the capacity in which the employee is prohibited from competing.”³⁵

This common-law reasonableness test was designed to balance the conflicting interests of employers and employees, as well as the societal interest in open and fair competition.³⁶ “Employers have a legitimate interest in preventing unfair competition through the misappropriation of business assets by former employees.”³⁷ But employees have their own interest in economic mobility.³⁸ Meanwhile,

35. *Beckman v. Cox Broad. Corp.*, 296 S.E.2d 566, 598 (Ga. 1982); *see also, e.g., Capital One Fin. Corp. v. Kanas*, 871 F. Supp. 2d 520, 538 (E.D. Va. 2012) (enforcing a restrictive covenant, noting that “[t]he careful language . . . is neither ambiguous nor overbroad. Like its geographic and temporal limitations . . . the functional scope of the covenant [is] reasonable”); *Iron Mountain Info. Mgmt. v. Viewpointe Archive Servs., LLC*, 707 F. Supp. 2d 92, 106 (D. Mass. 2010) (“The reasonableness of a restrictive covenant is judged by the attendant facts and circumstances which include whether the business interests to be protected are legitimate, the temporal and geographic limitations imposed, and so forth.”); *Gordon Document Prods. v. Service Techs., Inc.*, 708 S.E.2d 48, 52–53 (Ga. Ct. App. 2011) (finding no error in the grant of summary judgment against an employer that sought to enforce a noncompete agreement that was overbroad with respect to its territory and covered activities); RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. d (AM. LAW INST. 1981) (“The extent of the restraint is a critical factor in determining its reasonableness. The extent may be limited in three ways: by type of activity, by geographical area, and by time.”); 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 891 (2009) (“When the restraint is for the purpose of protecting customer relationships, [most courts find that] its duration is reasonable only if it is no longer than necessary for the employer to put a new person on the job and for the new employee to have a reasonable opportunity to demonstrate his or her effectiveness to the customer.”). If the restraint is for the purpose of protecting the employee from disclosing confidential information or trade secrets, a longer duration tends to be reasonable. 54 AM. JUR. 2D, § 891. Likewise, the reasonableness of the territory and scope of activity encompassed by the noncompete covenant is entirely dependent on the circumstances of the particular case:

Among the facts to be considered [in assessing the reasonableness of the area of restriction] are the area assigned to the employee, the area in which the employee actually worked, the area in which the employer operated, the nature of the business, the nature of the employee’s duty, the employee’s knowledge of the employer’s business operation, and the type of position held by the employee.

Id. § 895 (footnotes admitted).

36. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898) (explaining the interplay between the competing interests of employers, employees, and the public).

37. Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 115 (2008).

38. *See id.* at 115 (“[E]mployees have a countervailing interest in their own mobility and marketability.”); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. c (AM. LAW INST. 1981) (“In the case of a post-employment restraint, the harm caused to the employee may

society has an interest in maintaining clear channels of competition and fostering a marketplace that properly incentivizes innovation and employment.³⁹ Given these competing interests, courts permit employee noncompete agreements, but the reasonableness test imposes significant safeguards to assure that the agreements benefit the marketplace and do not overly burden employees.⁴⁰ A helpful shorthand is that noncompete agreements are allowed for the purpose of protecting legitimate business interests and not for the purpose of punishing the departing employee.⁴¹

B. The Common-Law Reasonableness Test Applied to Nonattorney Professionals

Outside the legal profession, this reasonableness test governs covenants not to compete for every business and professional in the United States—including doctors, ministers, accountants, neurosurgeons, veterinarians, engineers, and *all* other fiduciary-based professionals.⁴² In fact, courts often recognize that it is especially important to uphold reasonable covenants not to compete in

be excessive if the restraint inhibits his personal freedom by preventing him from earning his livelihood if he quits . . .”).

39. See, e.g., *Reed, Roberts Assocs. v. Strauman*, 353 N.E.2d 590, 593 (N.Y. 1976) (“[O]ur economy is premised on the competition engendered by the uninhibited flow of services, talent and ideas.”).

40. See, e.g., *id.* (“[N]o restrictions should fetter an employee’s right to apply to his own best advantage the skills and knowledge acquired by the overall experience of his previous employment.”).

41. *Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 611 (Mo. 2006) (en banc).

42. *Anderson & Steele*, *supra* note 16, at 846; *Barton*, *supra* note 6, at 487; see also *Hulsenbusch v. Davidson Rubber Co.*, 344 F.2d 730, 736 (8th Cir. 1965) (upholding an engineer’s nationwide covenant not to compete because of knowledge of trade secrets); *Schott v. Beussink*, 950 S.W.2d 621, 625–27 (Mo. Ct. App. 1997) (upholding an accountant noncompete agreement); *Concord Orthopaedics Prof’l Ass’n v. Forbes*, 702 A.2d 1273, 1276 (N.H. 1997) (upholding a noncompete agreement that prevented an orthopedist from practicing in a twenty-five-mile radius for two years); *Moore v. Dover Veterinary Hosp., Inc.*, 367 A.2d 1044, 1048 (N.H. 1976) (upholding a restrictive covenant that restricted a veterinarian from practicing in a twenty-mile radius for five years); *Cmty. Hosp. Grp., Inc. v. More*, 869 A.2d 884, 887 (N.J. 2005) (finding that a neurosurgeon restrictive covenant was not per se unreasonable, but concluding that the broad geographic restriction was injurious to public health and required a narrowing of scope); Paula Berg, *Judicial Enforcement of Covenants Not to Compete Between Physicians: Protecting Doctors’ Interests at Patients’ Expense*, 45 RUTGERS L. REV. 1, 14–23 (1992) (covering cases upholding doctor noncompetes).

professional employment.⁴³ In *Scott v. Gillis*,⁴⁴ the Supreme Court of North Carolina explained the rationale for the policy:

Few professional men would take assistants and [e]ntrust them with their business, impart to them their knowledge and skill, bring them in contact with their clients and patients, unless they were assured that the knowledge and skill imparted and the friendships and associations formed would not be used, when the services were ended, to appropriate the very business such assistants were employed to maintain and enlarge.⁴⁵

Although courts emphasize their willingness to enforce noncompete covenants involving professionals, they also assign a public value to the services these professionals provide. Their concern for the public welfare produces keen “judicial scrutiny of restraints on . . . ‘professionals’ because of the actual or perceived value of their services to the community.”⁴⁶ The lifeblood of the reasonableness test, however, is an individualized examination into the factual circumstances surrounding the specific covenant.

*Bauer v. Sawyer*⁴⁷ is a typical noncompete case involving medical professionals. In *Bauer*, a noncompete provision within a medical-partnership agreement obligated the withdrawing doctor to refrain from practice within a twenty-five-mile radius for five years.⁴⁸ The Supreme Court of Illinois recognized that the public had an interest in ensuring “adequate medical protection,” and acknowledged that, if the requested enforcement injunction were granted, the number of doctors in the area “of course . . . [would] be reduced.”⁴⁹ Since seventy doctors served the city at issue, the court was “unable to say that the reduction of this number by one will cause such injury to the public as

43. See, e.g., *Lareau v. O’Nan*, 355 S.W.2d 679, 681 (Ky. 1962) (“There is no basic public policy against such covenants, particularly when they invoke professional services. In fact, the policy of this state is to enforce them unless very serious inequities would result.” (citing *Bradford v. Billington*, 299 S.W.2d 601, 604 (Ky. 1957))).

44. *Scott v. Gillis*, 148 S.E. 315 (N.C. 1929).

45. *Id.* at 317.

46. Richard A. Lord, 6 WILLISTON ON CONTRACTS § 13:6 (4th ed. 2010); see also, e.g., *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1282–86 (Ariz. 1999) (considering the public interest in the context of a physician’s restrictive covenant, likening the physician–patient relationship to that of a lawyer and client, and, although not banning restrictive covenants between physicians, ruling that they should be strictly construed for reasonableness and holding the particular covenant unenforceable).

47. *Bauer v. Sawyer*, 134 N.E.2d 329 (Ill. 1956).

48. *Id.* at 331.

49. *Id.*

to justify us in refusing to enforce this contract.”⁵⁰ In its enforcement of the covenant, the court also concluded that, in view of “modern methods of transportation and communication” as of 1956, the territorial restraint was not unduly burdensome on the doctor.⁵¹

In contrast, in *Iredell Digestive Disease Clinic, P.A. v. Petrozza*,⁵² the court refused to enforce a covenant that restricted a gastroenterologist from practicing within a specific twenty-mile radius for three years.⁵³ If enforced, only one gastroenterologist would practice in a forty-five-mile radius.⁵⁴ Presented with extensive evidence that such shortage would create “critical delays in patient care and treatment,”⁵⁵ and could cause potential life-threatening conditions in emergency situations, the court declined to enforce the covenant in the interest of public welfare.⁵⁶

These are just two examples of countless cases involving nonlegal professionals. They are in no way extraordinary.⁵⁷ To the contrary, they represent typical examples of how restrictive postemployment covenants have been balanced against the public interest in cases involving a wide array of professionals (including attorneys until the 1960s) for the last three hundred years—based on the reasonableness of the restrictive terms in light of the specific factual circumstances.

50. *Id.*

51. *Id.*; see also *Cogley Clinic v. Martini*, 112 N.W.2d 678, 682–83 (Iowa 1962) (enforcing the covenant in a territory with over sixty other doctors in the community); *Foltz v. Struxness*, 215 P.2d 133, 137–40 (Kan. 1950) (enforcing territorial restrictions in the covenant as reasonable); *Wilson v. Gamble*, 177 So. 363, 366 (Miss. 1937) (“[T]he number of physicians in Greenville is amply sufficient . . . [N]o monopoly was either contemplated by the contracts or will result from their enforcement.”).

52. *Iredell Digestive Disease Clinic, P.A. v. Petrozza*, 373 S.E.2d 449 (N.C. App. 1988), *aff’d per curiam*, 377 S.E.2d 750 (N.C. 1989).

53. *Id.* at 455.

54. *Id.* at 453.

55. *Id.*

56. *Id.* at 455; see also *Dick v. Geist*, 693 P.2d 1133, 1136–37 (Idaho Ct. App. 1985) (invalidating a covenant when presented with extensive evidence that the neonatal unit would suffer greatly without defendants’ services, even though the community would still have five pediatricians); *Ellis v. McDaniel*, 596 P.2d 222, 225 (Nev. 1979) (denying enforcement against an orthopedic specialist who was the only such physician in his small community).

57. For examples of similar cases, see *supra* notes 51, 56.

II. THE LEGAL PROFESSION'S PER SE BAN

Notwithstanding the widespread enforcement of noncompete agreements against corporate executives, doctors, engineers, psychiatrists, and all other business employees, lawyers have collectively refused to submit to the restraints of such agreements. They have instead asserted that it would be an *ethical* violation and sanctionable offense for an attorney to consent to any agreement that limits prospective employment.⁵⁸ This blanket prohibition has been applied consistently to attorneys since a series of advisory ABA Ethics Opinions addressed the issue in the early 1960s.⁵⁹ Interestingly, a historical analysis of the per se ban on attorney noncompete agreements reveals a dramatic shift in the prohibition's articulated policy justifications.⁶⁰

Although the noncompete prohibition's original justification focused primarily on preserving the professional autonomy of attorneys,⁶¹ the prevailing rationale given by courts today is to provide *existing* clients with the freedom to continue to be represented by a departing attorney.⁶² Courts typically supplement this justification of "client choice" by explaining that law-firm employers, unlike corporations, have an ethical obligation to subordinate profit motives in favor of client service, so the legal profession does not need to concern itself with promoting a rule designed to thoroughly protect law-firm economic interests.⁶³ As discussed below, multiple bar ethics committees (but no courts) have used these justifications to extend the prohibition to in-house counsel.

A. *The Original Justification for the Prohibition Focused on Protecting the Attorney's Right to Practice Law*

The initial rationale for implementing a per se ban on attorney noncompete agreements was based entirely on concerns with the right of an attorney to practice law, rather than a client's right to choose counsel. Specifically, the path toward today's per se ban began with the issuance of Formal Opinion 300 by the ABA Committee on

58. Ewald, *supra* note 10, at 6–7.

59. *Id.*

60. For an excellent analysis of the shift from professional-autonomy justifications to client-centric justifications, see *id.* at 6–12.

61. See *infra* Part II.A.

62. See *infra* notes 87–96 and accompanying text.

63. See *infra* Part III.A.3.

Professional Ethics in 1961.⁶⁴ In ABA Formal Opinion 300, the ABA Committee was asked to evaluate whether a law firm could “include as part of the employment contract a restrictive covenant prohibiting the [attorney] from practicing law in the city and county for two years after the termination of employment.”⁶⁵ The Committee acknowledged the common use of restrictive covenants in business transactions, but held that restrictive covenants for attorneys were unethical because they were an “unwarranted restriction on the right of a lawyer to choose where he will practice and inconsistent with [their] professional status.”⁶⁶ The Committee made no reference at all to maintaining a client’s freedom to choose legal counsel.⁶⁷

This concern over the right of a lawyer to practice, rather than a client’s freedom to choose counsel, was directly reinforced the next year in ABA Informal Opinion 521.⁶⁸ In this ruling, the ABA addressed whether the analysis in Formal Opinion 300 would also prohibit similar restrictions in a partnership agreement.⁶⁹ Focusing solely on lawyers’ interests instead of clients’, the ABA Committee postulated that a restrictive covenant in a partnership agreement would be permissible.⁷⁰ It explained that in negotiating a partnership agreement, “the parties are dealing on an equal footing and [the ABA Committee] believes restrictive covenants within reasonable and legal limits as between the partners do not involve any questions of ethics.”⁷¹

In short, the ethical suitability of an attorney covenant not to compete “was viewed in these early advisory opinions as dependent upon the relative bargaining power of the lawyers and issues of fairness among lawyers, rather than upon any articulated potential for harm to the clients.”⁷² According to the ABA’s 1962 Informal Opinion, a restrictive covenant entered into by lawyers with equal

64. See Ewald, *supra* note 10, at 5 (explaining that the prior lack of concern for noncompetes in the legal profession “all changed in 1961 when the ABA issued Formal Opinion 300 declaring unethical the use of traditional restrictive covenants—those prohibiting a departing lawyer from practicing in the community for a stated period”).

65. ABA Comm. on Prof’l Ethics, Formal Op. 300 (1961).

66. *Id.*

67. See *id.* (failing to reference a client’s freedom to choose legal counsel in opinion).

68. ABA Comm. on Prof’l Ethics, Informal Op. 521 (1962).

69. *Id.*

70. *Id.*

71. *Id.*

72. Robert M. Wilcox, *Enforcing Lawyer Non-Competition Agreements While Maintaining the Profession: The Role of Conflict of Interest Principles*, 84 MINN. L. REV. 915, 926 (2000).

bargaining power would be analyzed under the same reasonableness standard applied to a restrictive covenant in any other profession or occupation.⁷³

Six years later, the ABA did a dramatic about-face and explicitly overruled Informal Opinion 521 with its issuance of Informal Opinion 1072.⁷⁴ This 1968 Informal Opinion held that the per se prohibition on attorney noncompetes applied equally to employment agreements and partnership agreements.⁷⁵ The ABA Committee asserted,

The right to practice law is a privilege granted by the State, and so long as a lawyer holds his license to practice, this right cannot and should not be restricted by such an agreement. The attorneys should not engage in an attempt to barter in clients, nor should their practice be restricted. The attorney *must* remain free to practice when and where he will and to be available to . . . clients who might desire to engage his services.⁷⁶

Although the Committee's primary justification for the rule still appears to have been based on the professional autonomy of the lawyer, Informal Opinion 1072 provides the first endorsement of prohibiting attorney noncompete agreements based partially on the justification that clients have a right to select the attorney of their choice.⁷⁷

In 1969, the ABA adopted this reasoning into its first official ethics code, the ABA Model Code of Professional Responsibility DR 2-108.⁷⁸ The restriction remained in effect through 1983, at which point the new Model Rules of Professional Conduct codified the restriction in Rule 5.6(a).⁷⁹ The Comments to the Model Rule provide two specific justifications for prohibiting attorney noncompete agreements: (1) "limiting [lawyers'] professional autonomy" and (2) "limiting the freedom of clients to choose a lawyer."⁸⁰

73. ABA Comm. on Prof'l Ethics, Informal Op. 521 (1962).

74. ABA Comm. on Prof'l Ethics, Informal Op. 1072 (1968).

75. *Id.*

76. *Id.* (emphasis added).

77. Ewald, *supra* note 10, at 6–12.

78. MODEL CODE OF PROF'L RESPONSIBILITY DR 2-108(A) (AM. BAR ASS'N 1980).

79. Rule 5.6(a) states, "A lawyer shall not participate in offering or making . . . [an] agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement." MODEL RULES OF PROF'L CONDUCT r. 5.6(a) (AM. BAR ASS'N 2013).

80. *Id.* r. 5.6 cmt. 1.

B. The Primary Justification Has Shifted to Protecting a Client's Right to Choose Counsel

Despite the initial focus on preventing a restriction on an attorney's right to practice law, the prevailing and current justification for the prohibition is preserving the client's right to choose counsel.⁸¹ The seminal case in the field is *Dwyer v. Jung*,⁸² which struck down the use of a noncompete covenant included in a partnership agreement between lawyers.⁸³ The contested covenant in *Dwyer* "parcel[ed] out named clients to specific partners upon dissolution and prevent[ed] one partner from intruding upon another's clients for a period of five years."⁸⁴ The court began its analysis by noting that "[a] lawyer's clients are neither chattels nor merchandise, and his practice and good will may not be offered for sale."⁸⁵ The court then concluded that the contested covenant violated DR 2-108(A), and was therefore "void as against public policy," because the covenant restricted "the right of the lawyer to choose his clients in the event they seek his services" and "*the right of the client to choose the lawyer he wishes to represent him.*"⁸⁶

Significantly, the covenant in *Dwyer* prohibited departing attorneys from representing *existing* firm clients.⁸⁷ This is by no means uncommon in cases concerning attorney noncompete agreements. Indeed, a review of the case law reveals that the fundamental rationale for the per se ban is to permit *existing* clients to choose to *continue* to be represented by a departing attorney, rather than to provide the public—*prospective* clients—unfettered access to the maximum number of attorneys.

The oft-cited⁸⁸ case of *Cohen v. Lord, Day & Lord*⁸⁹ helps illustrate this point. The *Cohen* court struck down a provision in a

81. Ewald, *supra* note 10, at 6–12; *see also, e.g.*, Eisenstein v. David G. Conlin, P.C., 827 N.E.2d 686, 690 (Mass. 2005) ("Rule 5.6 exists to protect the strong interests clients have in being able to choose freely the counsel they determine will best represent their interests.")

82. *Dwyer v. Jung*, 336 A.2d 498 (N.J. Super. Ct. Ch. Div. 1975), *aff'd per curiam*, 348 A.2d 208 (N.J. Super. Ct. App. Div. 1975).

83. *Id.* at 501.

84. *Id.* at 499.

85. *Id.*

86. *Id.* at 501 (emphasis added).

87. *See id.* at 499 (noting that the terms of the agreement applied to existing firm clients).

88. Peter W. Rogers, *Who Gets the Jewels When a Law Firm Dissolves? The Unfinished Business Doctrine and Hourly Matters*, 108 Nw. U. L. REV. 311, 323 (2013) (referring to *Cohen* as "one of its decisions that courts in many jurisdictions have cited").

partnership agreement that placed a financial disincentive on competing with the firm, explaining that “[w]hile a law firm has a legitimate interest in its own survival and economic well-being and in maintaining its clients, it cannot protect those interests by . . . restricting the choices of the clients *to retain and continue* the withdrawing member as counsel.”⁹⁰

Even decisions that are often cited for the lofty proposition that the per se ban is designed to provide the *public* with maximum access to lawyers actually apply that principle only to situations that would restrict *existing* clients from continued representation. The decision in *Jacob v. Norris, McLaughlin & Marcus*,⁹¹ for example, emphasizes “public” access to counsel:

The history behind [RPC 5.6] and its precursors reveals that the *RPC*’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. The *RPC* is thus *designed to serve the public interest in maximum access to lawyers* and to preclude commercial arrangements that interfere with that goal.⁹²

But the *Jacob* court was confronted with a clause in a shareholder’s agreement that barred departing attorneys from collecting termination compensation if they continued to represent existing firm clients within a year of their departure.⁹³ Thus, the

89. *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410 (N.Y. 1989).

90. *Id.* at 413 (emphasis added).

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

92. N.J. Advisory Comm. on Prof’l Ethics, Op. 708 (2006) (citing *Jacob*, 607 A.2d at 146) (emphasis added). In response to this passage from *Jacob*, Professor Linda Sorenson Ewald usefully observes, “Clearly, the court in *Jacob* was correct in its assessment of the modern understanding of the rule’s primary purpose—to protect client choice. But, as the history suggests, client choice was not the original rationale for the rule and, even today, it is not the rule’s only purpose.” Ewald, *supra* note 10, at 11. For this second proposition, Ewald quotes *Donnelly v. Brown, Winick, Graves, Gross, Baskerville, Schoenebaum & Walker, P.L.C.*, 599 N.W.2d 677 (Iowa 1999), for its facetious, yet keenly astute observation:

[W]hile promoting client choice may have been recognized as the primary purpose of the rule, it is not the Rules’ only purpose. . . . [T]here is no[] doubt that the Rule is designed to permit attorneys to have retirement plans that have noncompetition conditions—there is simply no other explanation for the exception to the Rule.

Id. at 11 n.43 (first two alterations in original) (quoting *Donnelly*, 599 N.W.2d at 681).

93. *Jacob*, 607 A.2d at 144. When applying Rule 5.6, the vast majority of jurisdictions that have addressed the issue have agreed with the reasoning of *Jacob* by concluding that indirect penalties, as well as direct prohibitions, on postdeparture competition violate the rule. *See, e.g.*, *Pettingell v. Morrison, Mahoney & Miller*, 687 N.E.2d 1237, 1239 (Mass. 1997) (“The strong majority rule in this country is that a court will not give effect to an agreement that greatly penalizes a lawyer for competing with a former law firm, at least where the benefits that would

“clients’ free choice of counsel,”⁹⁴ which *Jacob* was concerned about upholding, could not have been that of prospective clients because the relevant agreement in no way limited prospective clients’ interests. Rather, *Jacob*’s main concern, like other decisions invoking Rule 5.6(a) to strike down a law-firm restrictive covenant, was with the right of *existing* clients to have *continued* access to attorneys of their choice. In fact, the *Jacob* decision ultimately explained, “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.”⁹⁵ Not surprisingly, *every* case that is cited in the *Jacob* opinion concerns a restrictive covenant that prohibited a departing partner or associate from representing the firm’s *already-established* clients.⁹⁶

The legislative history of Rule 5.6 also suggests that a focus on *existing* clients was presumably the main motivation for adopting the special per se standard. Indeed, as explained in the preceding Part, under the common-law reasonableness test a business already could *not* prohibit a former employee from soliciting *prospective* clients (or even existing firm clients with whom the employee had no actual contact).⁹⁷ Thus, if the legal profession’s concern was for prospective

be forfeited accrued before the lawyer left the firm.”); *Whiteside v. Griffis & Griffis, P.C.*, 902 S.W.2d 739, 744 (Tex. Ct. App. 1995) (“Indirect financial disincentives may interfere with this right just as much as direct covenants not to compete.”). These opinions reason that an enforceable forfeiture-for-competition clause would tend to discourage an attorney from withdrawing from a firm, or in the event that the attorney does withdraw, from competing with the firm. This discouragement, the courts assert, would tend to restrict a client’s choice of counsel. *See, e.g., Pettingell*, 687 N.E.2d at 1239 (“An enforceable forfeiture-for-competition clause would tend to discourage a lawyer who leaves a firm from competing with it. This in turn would tend to restrict a client or potential client’s choice of counsel.”).

94. *Jacob*, 607 A.2d at 148.

95. *Id.* (emphasis added).

96. *See, e.g., Meehan v. Shaughnessy*, 535 N.E.2d 1255, 1262 (Mass. 1989) (reinterpreting a partnership agreement to bring it into compliance with the Massachusetts’ equivalent of Rule 5.6, and stating that the “strong public interest in allowing clients to retain counsel of their choice outweighs any professional benefits derived from a restrictive covenant”); *Cohen v. Graham*, 722 P.2d 1388, 1391 (Wash. Ct. App. 1986) (denying enforcement of a partnership-agreement provision prohibiting departing lawyers from representing a firm’s clients); D.C. Bar Legal Ethics Comm., Op. 181 (1987) (determining that a prohibition on a departing partner’s “interference” with the firm’s clients violates DR 2-108(A)); Tex. State Bar Prof’l Ethics Comm., Op. 422 (1984) (prohibiting agreements restricting former employees from practicing law in competition with their former firm, or from representing former clients of the firm).

97. *See supra* note 34 and accompanying text.

clients, it would have little need to adopt a new standard that effectively duplicated what was already established by hundreds of years' worth of common-law precedent.

C. A Small Minority of Courts Have Rejected the Per Se Ban

Notwithstanding general judicial adherence to Rule 5.6, a few jurisdictions have rejected the Rule as unjustifiably distinguishing the legal profession from every other profession.

In the seminal case of *Howard v. Babcock*,⁹⁸ the California Supreme Court considered an agreement among law partners that required a partner to forfeit all withdrawal benefits if the partner withdrew from the firm and, within one year of the withdrawal, engaged in the firm's specialty practice area within the Los Angeles or Orange County court systems.⁹⁹ Nevertheless, four partners left the firm and immediately started a competing practice in the restricted area, drawing over two hundred cases away from the former firm.¹⁰⁰

The *Babcock* court concluded that the agreement did *not* restrict the right of a partner to practice law, but rather "attache[d] an economic consequence to a departing partner's unrestricted choice to pursue a particular kind of practice."¹⁰¹ The court explained that law firms have economic interests to protect just like any other business, and rejected the contention "that the practice of law is not comparable to a business."¹⁰² Indeed, the court could "see no legal justification for treating partners in law firms differently in this respect from partners in other businesses and professions."¹⁰³

The California Supreme Court carefully considered alternative arguments before making this precedential assertion. In fact, the court went on to directly challenge the propriety of Rule 5.6's fundamental justifications:

Upon reflection, we have determined that these courts' steadfast concern to assure the theoretical freedom of each lawyer to choose whom to represent and what kind of work to undertake, and the theoretical freedom of any client to select his or her attorney of choice is inconsistent with the reality that both freedoms are actually

98. *Howard v. Babcock*, 863 P.2d 150 (Cal. 1993).

99. *Id.* at 151.

100. *Id.* at 152.

101. *Id.* at 156.

102. *Id.* at 159.

103. *Id.* at 157.

circumscribed. Putting aside lofty assertions about the uniqueness of the legal profession, the reality is that the attorney, like any other professional, has no right to enter into employment or partnership in any particular firm, and sometimes may be discharged or forced out by his or her partners even if the client wishes otherwise. Nor does the attorney have the duty to take any client who proffers employment, and there are many grounds justifying an attorney's decision to terminate the attorney-client relationship over the client's objection. Further, an attorney may be required to decline a potential client's offer of employment despite the client's desire to employ the attorney.¹⁰⁴

In 2006, the Arizona Supreme Court in *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*¹⁰⁵ followed *Babcock's* lead and enforced an agreement that financially disincentivized competition by attorneys.¹⁰⁶ Like the court in *Babcock*, the Arizona Supreme Court found that such agreements should be held to the same reasonableness standards applied to all other fiduciary-based professionals.¹⁰⁷ In abandoning the majority position, the court ruled it was “unable to conclude that the interests of a lawyer's clients are so superior to those of a doctor's patients (whose choice of a physician may literally be a life-or-death decision) as to require a unique rule applicable only to attorneys.”¹⁰⁸

D. Applicability of the Noncompete Restrictions to In-House Counsel

Although most courts follow the per se ban against noncompete covenants involving law firms, this author's research revealed no instance in which a court has used Rule 5.6 to invalidate a restrictive covenant between a corporate employer and its in-house-counsel employee. In fact, in-house counsel, just as their nonlawyer counterparts, regularly sign such agreements when they begin employment.¹⁰⁹ Nevertheless, several state bar associations have found these agreements “unethical” under Rule 5.6(a), and

104. *Id.* at 158–59 (citation omitted).

105. *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*, 138 P.3d 723 (Ariz. 2006) (en banc).

106. *Id.* at 724.

107. *Id.* at 729.

108. *Id.*

109. *See Montello, supra* note 21, at 73 (“[P]ast decades have seen a marked increase in the use of anti-competitive covenants.”).

commentators believe that other jurisdictions will follow in due course.¹¹⁰

There are compelling reasons for treating in-house counsel differently under Rule 5.6(a), and the early history of the Rule suggests that it was designed for the law-firm context. DR 2-108(A) (the predecessor to Rule 5.6), in relevant part, stated, “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.”¹¹¹ Because a corporate employer is not a lawyer, an agreement between in-house counsel and a corporate employer clearly did not fall within the technical confines of the original per se ban.

The ABA, in the first opinion to evaluate the applicability of DR 2-108(A) to in-house counsel, confirmed this interpretation of the text, concluding that an in-house counsel’s covenant not to compete, “does not violate DR [2]-108(A).”¹¹² In that same opinion, however, the Committee described such covenants as “undesirable surplusage,” because the existing ethical canons already protect client confidences, and further restriction would “denigrate[] the dignity of the profession.”¹¹³ The opinion made no reference to a client’s right to choose counsel.

In 1983, the ABA replaced the Model Code and DR2-108(A) with the Model Rules of Professional Conduct and an almost-identical Rule 5.6(a).¹¹⁴ Nonetheless, the Comments to new Rule 5.6 articulated a new rationale for the prohibition by explaining that “[the] agreement restricting the right of *partners or associates to*

110. *E.g., id.* at 80 (“Based on the current trend cited in Opinion 708, it seems likely that the same approach will be adopted in all jurisdictions that have adopted a version of Rule 5.6.”).

111. MODEL CODE OF PROF’L RESPONSIBILITY DR 2-108 (AM. BAR ASS’N 1980) (emphasis added).

112. ABA Comm. on Ethics & Prof’l Responsibility, Informal Op. 1301 (1975). In its original text, the Committee erroneously cited DR2-108(A) as 7-108(A). *Id.*

113. *Id.*

114. CTR. FOR PROF’L RESPONSIBILITY, AM. BAR ASS’N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 667 (Art Garwin ed., 2013). The relevant language of Rule 5.6(a) prohibited a lawyer from being a party to or participating in postemployment restrictions with “a lawyer,” rather than “another lawyer,” as previously provided in DR 2-108. *Id.*; see also *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 147 (N.J. 1992) (“However, because the wording of DR 2-108(A) and RPC 5.6 is so similar, the same reasoning is applicable to both.”).

practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer.”¹¹⁵

Although the text of Rule 5.6(a) was extremely similar to the text of its predecessor rule DR 2-108(A), the ABA’s interpretation of Rule 5.6(a) soon departed from its prior interpretations of DR 2-108(A). In 1994, the ABA held that an employment agreement that prohibited in-house counsel from ever representing someone against the corporation violated Rule 5.6(a).¹¹⁶ In reaching its decision, the Committee stated, “While ethical standards already in place (in Model Rule 1.9) prohibit a lawyer from undertaking some representations adverse to former clients, an agreement denying the lawyer the opportunity to represent any interest adverse to a former client is an overbroad and impermissible restriction on the right to practice.”¹¹⁷ The Committee also likened the restriction to one in a partnership agreement, asserting,

The public would be restricted from access to lawyers who, by virtue of their background and experience, might be the best available lawyers to represent them. While a current client’s interests should assume a certain priority for the lawyer, the extent of those interests that continue to have a claim on the lawyer after the lawyer-client relationship is terminated is defined by the scope of the restriction contained in Model Rule 1.9.¹¹⁸

Since the 1994 ABA opinion, only seven state bar committees have specifically addressed the topic of in-house noncompete agreements. Four of them—the District of Columbia, Virginia, Pennsylvania, and South Carolina—followed the ABA’s lead, voiding the agreements without providing substantive bases for their decisions.¹¹⁹ In 2006, New Jersey followed suit, extending the ban to in-house counsel in a detailed advisory opinion.¹²⁰

115. CTR. FOR PROF’L RESPONSIBILITY, *supra* note 114, at 668 (emphasis added). The specific reference to “partners and associates” remained in the Model Rules until 2002. At that point, it was replaced with “lawyer.” *See id.* at 667–68.

116. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 94-381 (1994). The particular agreement in question did not appear to be specifically designed to protect confidential information, and it provided no express justification for imposing the restraint.

117. *Id.*

118. *Id.*

119. *See* D.C. Bar Legal Ethics Comm., Op. 291 (1999); Phila. Bar Ass’n Prof’l Guidance Comm., Op. 96-5 (1996); S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 00-11 (2000); Va. Standing Comm. on Legal Ethics, Op. 1615 (1995). South Carolina’s opinion is emblematic of this approach—voiding the agreement as violating the “clear provisions of Rule 5.6,” without

The New Jersey Opinion is now the area's leading opinion.¹²¹ In Opinion 708, the New Jersey Supreme Court Advisory Committee on Professional Ethics considered the propriety of a corporate employment contract that included a clause prohibiting an attorney from seeking employment with a competitor for one year after termination, so as to prevent the disclosure of confidential information and trade secrets.¹²² The Committee began its opinion by citing to *Jacob* for the proposition that Rule 5.6 is "designed to serve the public interest in maximum access to lawyers and to preclude commercial arrangements that interfere with that goal."¹²³ The Committee went on to conclude that "[t]he fact that the restrictive covenant agreement in question arises in the corporate context, rather than within a law firm, is of no moment," citing prior decisions of the ABA, Virginia, Connecticut, Washington, and Pennsylvania as proof that an "overwhelming majority of jurisdictions in the United States" agree.¹²⁴

any further analysis. S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 00-11 (2000). However, the South Carolina Committee also usefully explained,

[F]ully consistent with Rule 1.6 and Rule 5.6, the corporation could insist that a lawyer employee sign a confidentially [sic] agreement promising to preserve the corporation's trade secrets as a condition to employment. . . . Thus, pursuant to the law of trade secrets, and consistent with the provisions of Rules 1.6, 1.7, and 1.9, in some circumstances, accepting employment with one employer may preclude certain other subsequent employment. Rule 5.6 is not so broad as to change that result. *Moreover, the lawyer may enter into an appropriate confidentiality agreement even if it has some impact on the lawyer's future employment opportunities.*

Id. (emphasis added).

120. N.J. Comm. on Prof'l Ethics, Formal Op. 708 (2006). By contrast, Connecticut and Washington have held that such agreements are permissible if they include a "savings clause" indicating that the covenants are "to be interpreted to comply with any applicable rules of professional conduct." *Id.*; *see also* Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 02-05 (2002) (agreeing with the New Jersey approach of permitting such agreements when they include a savings clause); Wash. State Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 2100 (2005) (same). A savings clause typically clarifies that the Rule's per se prohibition against noncompete agreements applies only to legal representation, and not to future employment with a competitor in a nonlegal capacity. Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 02-05 (2002). Thus, the savings-clause approach provides no meaningful insight into whether or not the agreements are permissible. These opinions essentially say that as long as the covenant does not violate Rule 5.6, it will not violate Rule 5.6.

121. *See* Bentrup, *supra* note 13, at 1039 (discussing how a "majority of jurisdictions" have taken an approach similar to the New Jersey Opinion).

122. *Id.* at 1046.

123. *Id.* at 1041 (quoting *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 146 (N.J. 1992)).

124. N.J. Comm. on Prof'l Ethics, Formal Op. 708 (2006).

Although the Committee struck down the restrictive covenant, it explained that “general rules concerning confidential information, [Rule] 1.6, or attorney-client privilege are easy to state, [but] they are often difficult to apply to in-house counsel, because legal advice given in the corporate setting ‘is often intimately intertwined with and difficult to distinguish from business advice.’”¹²⁵ The Committee went on to explain that it is particularly important to appreciate this entanglement of legal and business roles in the context of in-house counsel because not all duties of an in-house lawyer may involve the practice of law, and communications “made by and to the in-house lawyer regarding business matters, management decisions or business advice are not protected by the attorney-client privilege” or Rule 1.6.¹²⁶ Thus, the Committee concluded that an “in-house lawyer could obtain confidential information and/or trade secrets which would not be protected by Rule 1.6 or the attorney-client privilege,” and therefore a corporation may reasonably ask its lawyers to “sign a non-disclosure or confidentiality agreement.”¹²⁷

Opinions issued in Washington and Connecticut similarly recognized the significance of the hybrid legal/business nature of the in-house position.¹²⁸ Connecticut Opinion 02-05 explains that “Rule 5.6 addresses itself only to restrictions affecting the future practice of law. We therefore would not presume to apply Rule 5.6 in a way that would limit otherwise permissible restrictions on activities constituting something other than ‘the practice of law.’”¹²⁹

In the ten years since New Jersey Ethics Opinion 708 was issued, the landscape of ethical rules for in-house counsel has undergone a seismic change.¹³⁰ In 2008, the ABA adopted the Model Rule for

125. *Id.* (citation omitted) (quoting *Leonen v. Johns-Manville*, 135 F.R.D. 94, 99 (D.N.J. 1990)).

126. *Id.* (citing *Boca Investing P’ship v. United States*, 31 F. Supp. 2d 9, 11 (D.D.C. 1998)).

127. *Id.*

128. Conn. Bar Ass’n Comm. on Prof’l Ethics, Informal Op. 02-05 (2002); Wash. State Bar Ass’n Comm. on Prof’l Ethics, Informal Op. 2100 (2005).

129. Conn. Bar Ass’n Comm. on Prof’l Ethics, Informal Op. 02-05 (2002); *see also* Wash. State Bar Ass’n Comm. on Prof’l Ethics, Informal Op. 2100 (2005). However, Connecticut and Washington adopted a “savings clause” approach by approving in-house counsel noncompete agreements with savings clauses because the agreements purportedly did not limit the attorney’s professional autonomy or infringe on the freedom of clients to choose a lawyer. *See supra* note 120.

130. *See* STEPHEN GILLERS, ROY D. SIMON & ANDREW M. PERLMAN, REGULATION OF LAWYERS, STATUTES AND STANDARDS 408–09 (concise ed. 2014) (providing a legislative history of Rule 5.5).

Registration for In-House Counsel, which authorizes in-house lawyers to provide legal services to their employers without being fully admitted to the bar of the state where they work, subject to certain conditions.¹³¹ Approximately thirty-four states have already adopted an in-house registration rule in some form.¹³² Of those states that have not adopted the in-house registration rule, many have adopted new ABA Model Rule 5.5(d)(1) or other rules or policies that allow in-house lawyers to practice without being admitted.¹³³ Thus, in-house lawyers are more mobile than they have ever been, and vastly more mobile than their outside-counsel counterparts. As more and more lawyers move in house and corporations continue to insist on protecting their legitimate interests through noncompete agreements, the need for a uniform and concisely stated standard regarding the applicability of Rule 5.6 to in-house counsel increases in importance.

III. NONCOMPETE AGREEMENTS BETWEEN IN-HOUSE COUNSEL AND THEIR CORPORATE EMPLOYERS SHOULD BE GOVERNED BY THE REASONABLENESS TEST

By extending the ban on restrictive covenants to in-house counsel, state ethics committees have transformed a questionable policy of professional self-regulation into an unjustifiable infringement on the legitimate interests of corporate employers. Over the last eight years, ethics committees across the country have introduced a swath of new guidelines that recognize the fundamental differences between law-firm and in-house-counsel positions, and that provide in-house counsel with enhanced mobility across jurisdictions.¹³⁴ In light of these changes, it is abundantly clear that the legal profession must abandon its outdated and indefensible per se ban on restrictive covenants for in-house counsel and replace it with the standard reasonableness inquiry that is used to evaluate postemployment agreements in every other profession. First, the underlying justifications for the per se ban in the law-firm context are entirely inapplicable to in-house-counsel positions. Second, as the in-house counsel provides both legal and business advice, the existing

131. *Id.* at 421.

132. *Id.* at xxvi.

133. *Id.*; see also *infra* notes 166–70 and accompanying text (discussing the amendment of Rule 5.5 and its adoption by a vast majority of states)

134. See *supra* notes 130–33 and accompanying text.

ethical rules on confidentiality are inadequate to protect corporate employers' legitimate interests. Ultimately, the legal profession should not let its steadfast refusal to adopt a reasonableness test in the law-firm context prevent it from adopting a reasonable exception for in-house counsel that is fair to corporate employers.

A. *The Underlying Justifications for the Per Se Ban in the Law-Firm Context are Inapplicable to In-House Counsel*

In its first opinion addressing whether the per se ban applied to in-house counsel, the ABA straightforwardly conceded that such agreements were *not* covered by the applicable ethical rule's language and, therefore, did not violate its directive.¹³⁵ As such, it should not be surprising that, although the language of the applicable ethical rule was modified slightly in subsequent versions, the underlying justifications for the rule remain irreconcilable with the nature of the in-house position. Specifically, the per se ban's primary justifications are that restrictive covenants limit the freedom of clients to choose a lawyer and restrain the professional autonomy of the lawyer.¹³⁶ It has also been noted that the ban on restrictive covenants is permissible because law firms have an ethical obligation to subordinate profit motives to client service.¹³⁷ Because an in-house counsel only serves one corporate client at a time and has the ability to move among states to work as a lawyer in jurisdictions where he is not a member of the bar,¹³⁸ these justifications simply are not transferable.

1. *Limitation On The Freedom Of Clients To Choose a Lawyer.* As Part II details, the prevailing rationale for prohibiting noncompete provisions in a law-firm partnership or employment agreement is providing *existing* clients with the freedom to choose to *continue* to be represented by an attorney who is departing from the firm.¹³⁹ Courts and commentators in favor of the ban note that, in the law-firm context, a noncompete agreement can be especially burdensome because an existing client is denied the opportunity to continue a close fiduciary relationship with a trusted confidant and counsel.¹⁴⁰

135. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1301 (1975).

136. *See supra* note 80 and accompanying text.

137. *See infra* Part III.A.3.

138. *See supra* note 131 and accompanying text.

139. *See supra* Part II.

140. *See supra* notes 87–97 and accompanying text.

The abandoned client faces the cost of educating a new attorney on the subject of the representation. And, in extreme situations, the delay during the transition to a new lawyer could impact the overall resolution of the matter.¹⁴¹

This underlying concern for an existing client's choice of attorney does not apply to the in-house context. By definition, an in-house attorney only works for one client at a time—his employer.¹⁴² When an in-house counsel changes his client/employer, it necessarily follows that he cannot continue to represent his original client/employer—regardless of a noncompete agreement. Indeed, the only way the original client/employer could ensure continued representation would be to preclude the in-house counsel from pursuing *any* form of alternative employment (regardless of the nature of the new company). An employment restriction that sweeping would, of course, never be countenanced. In short, in cases involving in-house counsel, “the ability of . . . a client to choose that particular lawyer is limited by the very nature of the employment arrangement.”¹⁴³

The oft-quoted justification for the per se ban as ensuring that attorneys not “barter in clients”¹⁴⁴ is also inapposite in the context of in-house counsel. In the law-firm setting, a group of attorneys with a collection of clients might, without the per se ban, attempt to contractually specify in advance the surviving attorney–client relationships in the event of a firm dissolution or attorney departure—effectively “bartering” clients.¹⁴⁵ Even if this practice might be a bona fide concern in a law firm, the in-house counsel has no client relationship to “barter.” When he departs for another corporate employer, the in-house counsel has no ability to, or interest in, continuing to represent his original client.

141. Cf. ROBERT W. HILLMAN, *LAW FIRM BREAKUPS* 29, 68 (1990) (explaining the costs incurred on clients when they have to change their legal representation).

142. See MODEL RULES OF PROF'L CONDUCT r. 1.13(a) (AM. BAR ASS'N 2013) (explaining that for an in-house lawyer, the “client” is the company or organization that employs the lawyer in a legal capacity).

143. Bentrup, *supra* note 13, at 1058.

144. ABA Comm. on Prof'l Ethics & Grievances, Informal Op. 1072 (1968).

145. See, e.g., *Dwyer v. Jung*, 336 A.2d 498, 499 (N.J. Super. Ct. Ch. Div. 1975) (refusing to enforce a restrictive covenant “parcel[ing] out named clients to specific partners upon dissolution”). More often, the noncompete provision would restrict the departing attorney from working with *any* firm clients. See, e.g., *Cohen v. Graham*, 722 P.2d 1388, 1391 (Wash. Ct. App. 1986) (refusing to enforce a partnership provision prohibiting departing lawyers from representing the firm's clients).

Given that the very nature of in-house counsel negates any concern for an *existing* client's choice, the question remains whether there might be a bona fide concern about infringing on the choice of *prospective* clients. A review of the ethical rules clearly shows that no such concern exists.¹⁴⁶

As the court in *Babcock* correctly observed, ethical rules do not obligate lawyers to accept every client who wishes to employ them.¹⁴⁷ In fact, a lawyer may decline to represent a client for any number of reasons within the lawyer's discretion, ranging from economic considerations to a desire to limit or alter his practice areas.¹⁴⁸ Conflict-of-interest rules also often restrict a client's right to counsel of his choice.¹⁴⁹ Indeed, an attorney may withdraw from representing a client for nonpayment of fees, even in circumstances in which the withdrawal will have a material adverse effect on the client.¹⁵⁰

Significantly, the Model Rules actually *mandate* a covenant not to compete in the sale of a law practice. Rule 1.17 requires the seller of a law firm to refrain from the private practice of law in the same geographic vicinity of the firm that he is selling.¹⁵¹ Thus, Rule 1.17 not only prohibits the attorney from continuing to represent his *existing* clients, it effectively *forbids* him from working with any *prospective* clients in the area as well.¹⁵² The harm to existing and prospective clients is indistinguishable from the harm caused by a similar

146. See Kirstan Penasack, Note, *Abandoning the Per Se Rule Against Law Firm Agreements Anticipating Competition: Comment on Haight, Brown & Bonesteel v. Superior Court of Los Angeles County*, 5 GEO. J. LEGAL ETHICS 889, 911 (1992) (refuting the contention that there is an absolute right of client choice); see generally Robert W. Hillman, *Client Choice, Contractual Restraints, and the Market for Legal Services*, 36 HOFSTRA L. REV. 65 (2007) (providing an overview of the restrictions on client choice).

147. *Howard v. Babcock*, 863 P.2d 150, 158 (Cal. 1993).

148. *Wilcox*, *supra* note 72, at 936.

149. CTR. FOR PROF'L RESP., AM. BAR. ASS'N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 177 (2d ed. 1992) ("Courts have recognized that the ethical considerations underlying imputed disqualification must be balanced with the right to one's free choice of counsel.").

150. MODEL RULES OF PROF'L CONDUCT r. 1.16(b) (AM. BAR ASS'N 2013).

151. *Id.* r. 1.17. Of course, once sold, the clients remain entitled to terminate the relationship with the purchaser at their discretion. See *id.* r. 1.17 cmt. 2 ("The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation.").

152. Ironically, Rule 1.17 is so restrictive on the attorney's professional autonomy and client choice that it likely would not be enforceable under the common law. See *supra* note 34 and accompanying text.

covenant contained in an employment or partnership agreement.¹⁵³ Although the Comments to Rule 1.17 profess the same sentiment seen in Rule 5.6 opinions that “[c]lients are not commodities that can be purchased and sold at will,” the Rule 1.17 Comments go on to explain that it is more important to ensure the purchasing attorney obtains adequate “compensation for the reasonable value of the practice.”¹⁵⁴ Rule 1.17 not only trounces any notion of an unfettered right of *existing and prospective* client choice, it elevates the financial well-being of a purchasing attorney over the principles of client choice and professional autonomy. It is incomprehensible why ethics committees have chosen to flatly forbid a *potential* client’s choice of in-house attorney to be bargained away in reasonable noncompete agreements when a business corporation’s economic well-being is on the line, but maintain ethical rules that mandate such restrictions when a *purchasing* lawyer’s financial well-being is at issue.

Even if the legal community’s professed devotion to “client choice” were more than just rhetoric, the detriment to the public from being deprived of a lawyer’s services is no greater than the detriment that the public sustains from being deprived of other professionals’ services. State ethics committees justify the per se ban by asserting that “by limiting the mobility of lawyers within any given industry, clients are left with a smaller and less skilled pool of lawyers from which to choose.”¹⁵⁵ That is undoubtedly true; covenants not to compete do prevent certain members of the public from accessing a particular attorney’s skills.¹⁵⁶ However, reasonable covenants not to compete involving other skilled professionals are regularly enforced, with the court rationalizing that “the reduction of . . . [one doctor] will [not] cause such injury to the public as to justify . . . refusing to enforce [a covenant not to compete].”¹⁵⁷

This logical lapse has been widely criticized by courts¹⁵⁸ and commentators in a broad range of professions, arguing that it is

153. John Dwight Ingram, *Covenants Not to Compete in the Professions*, 3 FLA. ST. U. BUS. REV. 11, 29 (2003).

154. MODEL RULES OF PROF’L CONDUCT r. 1.17 cmt. 2 (AM. BAR ASS’N 2013).

155. *Blackburn v. Sweeney*, 637 N.E.2d 1340, 1343 (Ind. Ct. App. 1994).

156. Of course, noncompete agreements also prevent the public from accessing confidential information that a particular attorney could misappropriate.

157. *Bauer v. Sawyer*, 134 N.E.2d 329, 331 (Ill. 1956).

158. *See, e.g., Howard v. Babcock*, 863 P.2d 150, 158 (Cal. 1993) (“Putting aside lofty assertions about the uniqueness of the legal profession, the reality is that the attorney, like any other professional, has no right to enter into employment or partnership in any particular firm,

difficult to find a legitimate argument that doctors and other fiduciary-based professionals should be treated less favorably than lawyers.¹⁵⁹ Indeed, in a recent New Jersey Supreme Court case denying the extension of a per se ban to doctors' covenants not to compete, the court did not provide a single substantive reason for the divergent treatment of noncompetes between lawyers and doctors, and instead opted to "continue to rely on [the] Court's power to govern the ethical standards of the legal profession as justification for [its] decision to treat [the two professions] differently."¹⁶⁰ Any justification that bar associations might proffer in the law-firm context would have less force in the realm of in-house attorneys, who provide service solely to the country's business corporations, as opposed to individual citizens.

Ultimately, the in-house counsel's unique relationship with a single client/employer, the ethical rules' overarching lack of concern for *prospective* clients, and an unsubstantiated public-policy rationale for distinguishing lawyers from other professionals are fatal to Rule 5.6's professed concern for preserving "client choice" as a legitimate justification for invalidating all noncompete agreements between in-house counsel and corporate employers.

and sometimes may be . . . forced out by his or her partners even if the client wishes otherwise.").

159. See Barton, *supra* note 6, at 490 (listing commentators from both the legal and medical profession arguing against this justification); see also Haight, Brown & Bonesteel v. Superior Court, 285 Cal. Rptr. 845, 850 (Cal. Ct. App. 1991) ("We find no reason to treat attorneys any differently from professionals such as physicians or certified public accountants . . ."); Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 419 (N.Y. 1989) (Hancock, J., dissenting) ("If the agreement pertained to any other business or profession, there would be no question that the parties would be held to their bargain."); HILLMAN, *supra* note 141, at 29 ("The reasons for distinguishing lawyering from other professions in this context are vague, and it is questionable whether the availability of choice for the client is any less critical when the professional engaged is a physician . . .").

160. Cmty. Hosp. Grp., Inc. v. More, 869 A.2d 884, 896 (N.J. 2005). The court appealed to its authority to regulate the legal profession, and actively pointed out weaknesses in the decision. The court explained that "both sides mount strong arguments in favor of their respective positions. We recognize the importance of patient choice in the initial selection and continuation of the relationship with a physician. We also agree that the similarities between the attorney-client and physician-patient relationships are substantial." *Id.* at 895. Then, as if to acknowledge that its decision could not be rationally justified, the court went on to list an array of commentators who have critiqued the policy basis for the different treatment. See *id.* (recognizing that "several commentators have criticized the distinction our law makes between physicians and attorneys in respect of restrictive covenants" and citing three such commentators).

2. *The Lawyer's Right to Practice His Profession.* As detailed in Part II.A, the original justification for implementing a per se ban on attorney noncompete agreements was a belief that such agreements constituted an “unwarranted restriction on the right of a lawyer to choose where he will practice and [are] inconsistent with our professional status.”¹⁶¹

The root of this protectionist policy may be attributable to an attorney's traditional lack of mobility when the per se ban was implemented.¹⁶² When Rule 5.6(a) was promulgated by the ABA,¹⁶³ and subsequently adopted by state ethics committees, an attorney could only practice law in a jurisdiction where she had passed the bar.¹⁶⁴ This rule applied to in-house counsel and outside counsel alike.¹⁶⁵ Thus, if an attorney entered into a covenant not to compete that restricted her from working in a geographic vicinity, her prospects for future employment were especially constrained. Unlike most business executives, the attorney could not simply move to another state and start practicing law. Therefore, it was logical that state bar associations would be wary of covenants not to compete that could place an undue hardship on an attorney's right to engage in her profession.

Notably, in 2002, ABA Rule 5.5 was amended, drastically increasing the geographic mobility of *in-house* counsel.¹⁶⁶ Amended Rule 5.5(d)(1) reads,

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that (1) are provided to the lawyer's *employer or its organizational affiliates* and are not services for which the forum requires pro hac vice admission.¹⁶⁷

161. ABA Comm. on Prof'l Ethics, Formal Op. 300 (1961).

162. See Ewald, *supra* note 10, at 43 (noting a lack of mobility in the attorney's practice).

163. The Rule was adopted in 1983. MODEL RULES OF PROF'L CONDUCT r. 5.6 (AM. BAR ASS'N 1983).

164. See *id.* r. 5.5 (“A lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.”).

165. *Id.* r. 5.5 cmt 16.

166. GILLERS ET AL., *supra* note 130, at 408 (providing a legislative history of Model Rule 5.5).

167. See MODEL RULES OF PROF'L CONDUCT r. 5.5(d)(1) (AM. BAR ASS'N 2013) (emphasis added).

At least forty-four states have now adopted a provision similar or identical to this provision.¹⁶⁸

In addition to the widespread adoption of Rule 5.5(d)(1), the ABA House of Delegates in 2008 approved by voice vote a Model Rule on Registration of In-House Counsel to provide a basis of uniformity in the regulation of in-house lawyers.¹⁶⁹ More than thirty states have already adopted similar in-house registration rules, bringing increased standardization to the procedural process governing multijurisdictional in-house practice.¹⁷⁰

With the recent expansion in multijurisdictional opportunities for in-house counsel, these attorneys (as compared to outside counsel working in law firms) now enjoy vastly expanded geographic freedom to practice wherever they choose. As a result, the special practical concerns that likely contributed to adoption of the per se ban on attorney noncompete agreements do not apply in the current in-house counsel context.¹⁷¹

3. *The Economic Interests of a Corporation Are Not Subordinate to a Lawyer's Interest in Professional Autonomy.* Virtually every discussion of the per se ban explains that “[t]he Rules of Professional Conduct govern the practice of law based on ethical standards, not commercial desires.”¹⁷² They emphasize that the purpose of the rules of professional ethics is to guide the conduct of the attorneys and “not to protect the financial interests of law firms.”¹⁷³ And they assert that “[t]he more lenient test used to determine the enforceability of a restrictive covenant in a commercial setting, is not appropriate in the

168. GILLERS ET AL., *supra* note 130, at 408 (providing a legislative history of Model Rule 5.5).

169. *Id.* at 421.

170. GILLERS ET AL., *supra* note 130, at xxvi. Additionally, in February 2013, the Rule was significantly amended to permit foreign (i.e., non-U.S.) lawyers to register as in-house counsel, subject to certain conditions and restrictions. See GILLERS ET AL., *supra* note 130, at 421 (providing a legislative history of Model Rule 5.5).

171. To continue to prevent a corporation from adequately protecting its rights through reasonable noncompete agreements based on blind fidelity to a protectionist principle of professional autonomy that was adopted in a radically different setting would be unreflective of reality and an abuse of the legal profession's power to self-regulate. See *Linder v. Ins. Claims Consultants, Inc.*, 560 S.E.2d 612, 617 (S.C. 2002) (“Our duty to regulate the legal profession is not for the purpose of creating a monopoly for lawyers, or for their economic protection.”).

172. *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 151 (N.J. 1992); *Dwyer v. Jung*, 336 A.2d 498, 500 (N.J. Super. Ct. Ch. Div. 1975) (“Commercial standards may not be used to evaluate the reasonableness of lawyer restrictive covenants.”).

173. *Howard v. Babcock*, 863 P.2d 150, 165 (Cal. 1993).

legal setting.”¹⁷⁴ In short, before even engaging in a balancing of the conflicting interests of the parties, they assume that “the commercial concerns of the firm . . . are secondary to the need to preserve client choice.”¹⁷⁵

From this starting point, the justifications of client choice and professional autonomy become simple boilerplate. Because courts have the exclusive authority to “govern the ethical standards of the legal profession,” they can comfortably define the diminished rights of law firms.¹⁷⁶ Law firms are a construct of courts’ ethical rules¹⁷⁷ and, under that construct, they have already imposed on firms the “ethical obligation to subordinate profit motives in favor of client service.”¹⁷⁸ Against that background, courts essentially weigh the interests of client choice against the interests of an entity that is obligated to put a client’s right over its own. With the scales tipped so heavily, the inevitable product is the *per se* ban and the conclusion that the “protection of the clients’ ability to employ the attorneys they have come to trust, is more important than safeguarding the economic interests of established attorneys and law firms.”¹⁷⁹

Unlike law firms, corporations are *not* constructs of legal-ethics rules. Ethics committees, like that of New Jersey, fail to acknowledge this difference between law firms and corporate employers when they apply the same reasoning to restrictive covenants in both employment contexts and directly dismiss the distinction as being “of no moment.”¹⁸⁰ Corporations are not comprised solely of “established attorneys.”¹⁸¹ They have no “ethical obligation to subordinate profit motives in favor of client service.”¹⁸² To the contrary, their duty is to maximize value for shareholders.¹⁸³

As such, an ethics committee cannot lightly relegate the corporation’s interests below the interests of the departing attorney.

174. *Jacob*, 607 A.2d at 151 (citations omitted).

175. *Id.*

176. *See supra* note 159–160 and accompanying text.

177. *See* MODEL RULES OF PROF’L CONDUCT r. 1.0 (AM. BAR ASS’N 2013) (“[L]aw firm” denotes a lawyer or lawyers in a law firm partnership . . .”).

178. Herbert, *supra* note 14, at 269 n.162 (stating the applicable North Carolina statute).

179. *Howard v. Babcock*, 863 P.2d 150, 161 (Cal. 1993) (Kennard, J., dissenting).

180. N.J. Comm. on Prof’l Ethics, Formal Op. 708 (2006).

181. *Id.*

182. *Cf.* Herbert, *supra* note 14, at 269 n.162 (discussing an applicable North Carolina statute, which provides that lawyers do indeed have the obligation to subordinate profit motives in favor of client service).

183. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 681 (Mich. 1919).

It is uniformly recognized that corporations have a significant interest in protecting their trade secrets and confidential information,¹⁸⁴ and they regularly use restrictive covenants to protect these interests.¹⁸⁵ Simply because they hire an attorney does not mean they no longer have legitimate business interests worth protecting.

In the law-firm context, it is conceivable to defend the legitimacy of the per se ban with the baseline rationale that “the commercial concerns of the firm . . . are secondary to the need to preserve client choice.”¹⁸⁶ However, one cannot replace the word “firm” with “corporation,” and assert that this same principle holds true. Interestingly, it appears that no court decisions fall prey to this logical fallacy. Yet, that is precisely what ethics committees have done by expressly extending the per se prohibition on attorney noncompetes to encompass in-house counsel.

B. The Existing Ethical Obligations of an Attorney Do Not Adequately Protect the Legitimate Interests of the Corporation

Perhaps based upon a recognition that the preexisting justifications for the per se ban are inapplicable to the in-house role, ethics committees have largely justified the extension of the per se ban to in-house attorneys by asserting that an attorney’s preexisting ethical obligations of confidentiality under Rule 1.9 adequately protect corporate employers.¹⁸⁷

184. See, e.g., *Minn. Mining & Mfg. Co. v. Kirkevold*, 87 F.R.D. 324, 334–35 (D. Minn. 1980) (finding that Minnesota has significant interest in protecting its corporations from loss of trade secrets and confidential information); *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. Ct. App. 1993) (upholding restrictive covenant to protect employer’s commercial interests against employee’s disclosure of confidential information and trade secrets); *Victoria’s Secret Stores, Inc., v. May Dep’t Stores Co.*, 157 S.W.3d 256, 260 (Mo. Ct. App. 2004) (finding a protectable interest in trade secrets and confidential information); *Superior Gearbox Co. v. Edwards*, 869 S.W.3d 239, 247–48 (Mo. Ct. App. 1993) (“An employer has protectable interests in . . . trade secrets.”).

185. Significantly, although these corporations can require in-house counsel to execute confidentiality agreements and other protections, it is much easier for the corporation to protect itself, as a practical matter, by ensuring that a trusted employee does not depart for a direct competitor. That is, of course, precisely why corporations routinely include noncompete covenants in their employment agreements.

186. *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 151 (N.J. 1992).

187. In the first opinion addressing the propriety of covenants not to compete in the in-house counsel setting, the ABA Ethics Committee made *no reference* to principles of client choice, professional autonomy, or the legitimate interests of the employer, and conceded that such agreements were not covered by the language of the applicable ethical rule, and therefore did not violate its directive. ABA Comm. on Ethics & Prof’l Responsibility, Informal Op. 1301 (1975). Yet, despite the text of the rule and its justifications *mandating* a contrary conclusion,

However, Rule 1.9 clearly does not provide adequate protection from misappropriation of confidential information. Rule 1.9(a) states, “A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which [the] person’s interests are materially adverse to the interest of the former client.”¹⁸⁸ This concept is seemingly reinforced by one of the Rule’s Comments: “When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests is clearly prohibited.”¹⁸⁹ The Comment’s “next sentence tends to muddy the water a bit”¹⁹⁰: “On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.”¹⁹¹ Thus, in most cases, the text of Rule 1.9 does not provide clear guidance for disqualification.

One abundantly clear aspect of Rule 1.9 is that under its directive, an attorney’s duty “to retain confidentiality extends only to information ‘relating to [legal] representation of a client.’”¹⁹² “Further, communications made by and to the same in-house lawyer regarding business matters, management decisions or business advice are not protected by the attorney-client privilege.”¹⁹³ This principle is

the Ethics Committee noted its disapproval. Although the Committee let the agreement stand, it explained that “[t]he Code of Professional Responsibility specifically requires that a lawyer shall preserve and protect confidences and secrets of one who has employed him,” and therefore the covenant is “undesirable surplusage” that “denigrates the dignity of the profession.” *Id.*; see also, e.g., N.J. Advisory Comm. on Prof’l Ethics, Op. 708 (2008) (noting that many jurisdictions “have found that non-compete agreements designed to protect against the disclosure of a corporation’s confidential information and trade secrets are superfluous, due to a lawyer’s overriding obligation to maintain client confidentiality”). In its next opinion on the subject, the ABA Committee did not claim that the duties to a former client under Rule 1.9 protected all of a corporation’s confidences, or that a covenant would be “surplusage”; it merely asserted that any restriction beyond those codified in Rule 1.9 “would impermissibly restrain a lawyer from engaging in his profession.” ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 94-381 (1994). This reasoning has generally been adopted by state ethics committees extending the per se ban to in-house counsel. See, e.g., N.J. Advisory Comm. on Prof’l Ethics, Op. 708 (2008) (adopting this stance and listing other jurisdictions that had as well).

188. MODEL RULES OF PROF’L CONDUCT r. 1.9 (AM. BAR ASS’N 2013).

189. *Id.* cmt. 2.

190. *Hyman Cos. v. Brozost*, 964 F. Supp. 168, 173 (E.D. Pa. 1997).

191. MODEL RULES OF PROF’L CONDUCT r. 1.9 cmt. 2 (AM. BAR ASS’N 2013).

192. N.J. Advisory Comm. on Prof’l Ethics, Op. 708 (2008).

193. *Id.*

important in the context of in-house counsel because legal advice given in the corporate setting “is often intimately intertwined with and difficult to distinguish from business advice.”¹⁹⁴ In fact, the New Jersey Ethics Committee that extended the ban even conceded that “[n]ot all duties of an in-house lawyer may involve the practice of law,”¹⁹⁵ and therefore an “in-house lawyer could obtain confidential information and/or trade secrets which would not be protected by [Rule] 1.6, [1.9] or the attorney-client privilege.”¹⁹⁶ This concession is fatal to the argument that *all* in-house-counsel restrictive covenants should be barred because the ethical rules provide ample protection for corporate confidences. To the contrary, everything that the attorney learns during the distinctly “business” portion of his job will not be subject to confidentiality restrictions under the ethical rules.

In light of this void in protection, both the New Jersey and South Carolina Committees explained that a corporation may ask its lawyers to “sign a non-disclosure or confidentiality agreement.”¹⁹⁷ Specifically, the South Carolina Committee explained that “[f]ully consistent with [confidentiality rules] and Rule 5.6, the corporation could insist that a lawyer employee sign a confidentiality agreement promising to preserve the corporation’s trade secrets as a condition to employment.”¹⁹⁸ Based upon Rules 1.6, 1.7, 1.9, and trade-secret laws, the Committee found that “in some circumstances, accepting employment with one employer may preclude certain other subsequent employment. Rule 5.6 is not so broad as to change that result. Moreover, the lawyer may enter into an appropriate confidentiality agreement even if it has some impact on the lawyer’s future employment opportunities.”¹⁹⁹

By acknowledging that corporations can use confidentiality agreements for in-house counsel, ethics committees again are implicitly conceding that the existing ethical rules do not adequately protect against the threat of disclosing confidential business information. However, confidentiality agreements are incapable of providing sufficient protection. For all other professions, courts and scholars recognize that employers may enforce covenants not to

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 00-11 (2000).

199. *Id.*

compete in addition to confidentiality agreements because the covenant not to compete fills the voids in the confidentiality agreement and provides an enhancement necessary to protect employer rights.²⁰⁰

Given the fact that certain aspects of the lawyer's job as an in-house counsel are not "legal" or governed by applicable ethics rules, lawyers should not be treated any differently from their fellow employees whose covenants are assessed under the common-law reasonableness test. To the extent that a particular court, based on the unique facts of a case, finds that the attorney's ethical duties adequately protect the employer's rights, the court could circumscribe the covenant accordingly under the analytically flexible reasonableness test.

IV. BAR ASSOCIATIONS THAT PERPETUATE THE PER SE BAN COULD FACE ANTITRUST LIABILITY

When a group of competing professionals agrees to do something that benefits itself at the expense of consumers, the collective actors typically would be held liable under the Sherman Act²⁰¹ for anticompetitive behavior. As demonstrated in Parts I–III of this Note, the extension of the per se ban on restrictive covenants to in-house counsel has left corporations exposed to potential misappropriation of confidential information and trade secrets, so that attorneys can protect their "right to choose where [t]he[y] will practice."²⁰² This is precisely the type of "self-serving"²⁰³ behavior that antitrust laws condemn.

State bar associations, however, historically have operated largely outside of antitrust jurisdiction based on an assumption that they were protected by the state-action immunity doctrine.²⁰⁴ Yet, in

200. See, e.g., Michael Selmi, *The Restatement's Supersized Duty of Loyalty Provision*, 16 EMP. RTS. & EMP. POL'Y J. 395, 395–96 (2012) (describing the growth of the "twin doctrines" of noncompetes and trade secret protections); Derek P. Martin, Comment, *An Employer's Guide to Protecting Trade Secrets from Employee Misappropriation*, 1993 B.Y.U. L. REV. 949, 960 (asserting that noncompetes "strengthen[] the employer's case" when trying to protect confidential information).

201. 15 U.S.C. § 1 (2012).

202. ABA Comm. on Prof'l Ethics, Formal Op. 300 (1961).

203. See *Raymundo v. Hammond Clinic Ass'n*, 449 N.E.2d 276, 280–81 (Ind. 1983) (rejecting doctors' arguments to extend the per se prohibition on noncompete clauses to their profession, instead reasoning that "[t]he [doctors'] self-serving position . . . cannot be upheld").

204. See Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 FORDHAM L. REV. 559, 587–88 (1992) (arguing that an ethical rule adopted

its recent landmark decision—*North Carolina State Board of Dental Examiners v. FTC*²⁰⁵—the Supreme Court clarified that state agencies controlled by active market participants (like many state bar associations) must be under “active supervision” by the state to enjoy federal antitrust immunity.²⁰⁶ In the recent months since the *Dental Board* decision, the legal blogosphere has exploded with dozens of articles explaining that the Court’s decision likely exposes state bar associations to antitrust liability for their protectionist and anticompetitive actions.²⁰⁷ Further, corporations and individuals who have been disadvantaged by state bar associations’ anticompetitive policies, such as LegalZoom, have started to file antitrust lawsuits against these associations.²⁰⁸

This Part proceeds in two Sections. Section A demonstrates how the extension of the per se ban on noncompetes to in-house counsel is anticompetitive and violates the Sherman Act absent state-action immunity. Section B argues that these state bar associations are not immune from antitrust liability under the Supreme Court’s *Dental Board* standard.

by a state bar association could be challenged on anticompetitive grounds, but that the Federal Trade Commission has declined to pursue these actions).

205. N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101 (2015).

206. *Id.* at 1112.

207. *See, e.g.*, Daniel Fisher, *Could Dental-Board Decision Unlock Lawyer Control of State Bar Regulations?*, FORBES (Mar. 4, 2015, 7:04 AM), <http://www.forbes.com/sites/danielfisher/2015/03/04/dental-board-decision-could-unlock-lawyer-control> [<http://perma.cc/S58L-WMKC>] (“While the case dealt specifically with dentistry . . . the ruling will have far broader ramifications for many professions, including how the practice of law is regulated.”); Mark Walsh, *Dental Board Ruling May Drill into State Bar Associations’ Immunity*, ABA JOURNAL (May 1, 2015, 6:55 AM), http://www.abajournal.com/magazine/article/dental_board_ruling_may_drill_into_state_bar_associations_immunity [<http://perma.cc/Q64V-5FNT>] (“The ruling could expose state bar associations and oversight boards to greater antitrust liability . . .”).

208. *See, e.g.*, Complaint for Damages and Injunctive Relief at 5, LegalZoom.com, Inc. v. N.C. State Bar, No. 1:15-CV-439 (M.D.N.C. June 3, 2015), 2015 WL 3499887, at ¶ 5 (claiming that the State Bar “illegally and unreasonably restrain[ed] trade in the market for legal services”). Some plaintiffs in these suits have already settled claims favorably. *See, e.g.*, Terry Carter, *LegalZoom Resolves \$10.5M Antitrust Suit Against North Carolina State Bar*, ABA JOURNAL (Oct. 23, 2015, 3:15 PM), http://www.abajournal.com/news/article/legalzoom_resolves_10.5m_antitrust_suit_against_north_carolina_state_bar [<http://perma.cc/QW9V-A8GQ>] (explaining that under its agreement with North Carolina LegalZoom will be allowed to continue operating in the state).

A. *The Extension of the Per Se Ban on Noncompetes to In-House Counsel Violates the Sherman Act Absent State-Action Immunity*

Section 1 of the Sherman Antitrust Act prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade.”²⁰⁹ To establish a Section 1 antitrust violation, a plaintiff must prove “(1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade.”²¹⁰ For professional associations engaged in self-regulation, such as bar associations, an association’s adoption of ethical rules or opinions constitutes evidence of a concerted action or agreement sufficient to trigger application of Section 1 of the Sherman Act and therefore meets the first prerequisite for its violation.²¹¹ Thus, the question often turns to whether the association’s action unreasonably restrains competition.

Under the antitrust rule of reason, “[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”²¹² Although many ethical restraints are adopted ostensibly to protect or improve “quality of care,” the Supreme Court has made clear in at least four decisions that there is no blanket quality-of-care defense to otherwise proscribed restraints implemented by professionals.²¹³ In assessing the New Jersey Bar Association’s ruling in Opinion 708 and ones like it, a full “rule-of-reason” analysis is required that “consider[s] the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; [and] the nature of the restraint and

209. 15 U.S.C. § 1 (2012).

210. *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 284 (4th Cir. 2012) (quoting *Dickson v. Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir. 2002)).

211. *E.g.*, *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 356 (5th Cir. 2008) (“When an organization is controlled by a group of competitors, it is considered to be a conspiracy of its members.”); *Cal. Dental Ass’n v. FTC*, 128 F.3d 720, 728 (9th Cir. 1997) (noting that “[p]rofessional associations are ‘routinely treated as continuing conspiracies of their members’” (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988))); *Kreuzer v. Am. Acad. of Periodontology*, 735 F.2d 1479, 1496 (D.C. Cir. 1984) (finding that there was “no doubt that a conspiracy existed within” a professional association that enforced rules regarding requirements for “active membership” in the association); *In re Cal. Dental Ass’n*, 121 F.T.C. 190, 292 (1996) (“[P]rofessional associations are routinely treated as continuing conspiracies of their members.”).

212. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

213. *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 423 (1990); *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 464 (1986); *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 31 (1984); *Nat’l Soc. of Prof’l Eng’rs v. United States*, 435 U.S. 679, 699 (1978).

its effect, actual or probable.”²¹⁴ In short, under the antitrust rule of reason, courts evaluate whether the procompetitive effects of the action outweigh the anticompetitive effects. As demonstrated below, a state ethics committee’s collective ban on *reasonable* covenants not to compete in the context of in-house counsel is inherently anticompetitive.

1. *Reasonable Noncompete Agreements are Actually Procompetitive.* The plain language of Section 1 of the Sherman Act prohibits “every” contract that restrains trade.²¹⁵ Because such a literal reading of the statute “would outlaw the entire body of private contract law,”²¹⁶ and because Congress “expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition,”²¹⁷ courts have “long held that certain ‘ancillary’ restraints of trade may be defended as reasonable.”²¹⁸

Specifically, under antitrust analysis “covenants not to compete in a particular business, for a certain period of time, within a defined geographical area, ha[ve] always been considered reasonable when necessary to carry out otherwise procompetitive contracts.”²¹⁹ Courts consistently explain that they uphold such covenants because it is “necessary for people to cooperate in some respects before they compete in others, and cooperation facilitates efficient production.”²²⁰ In short, although perhaps semantically counterintuitive, reasonable noncompetes effectuate a procompetitive result in the marketplace.

214. *Bd. of Trade of Chi.*, 246 U.S. at 238.

215. 15 U.S.C. § 1 (2012). Section 1 of the Sherman Act provides, “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” *Id.*

216. *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531 (1983) (quoting *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 687–88).

217. *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 687–88.

218. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 737 (1988) (Stevens, J., dissenting).

219. *Id.*

220. *Polk Bros. v. Forest City Enters.*, 776 F.2d 185, 188 (7th Cir. 1985) (“Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment.”); *see also* *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984) (noting that in some industries, “horizontal restraints on competition are essential if the product is to be available at all”); *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008) (noting the “efficiency-enhancing” purpose of reasonable restrictive covenants); *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1151 (9th Cir. 2003) (same); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 970 (10th Cir. 1994) (same).

A commonplace demonstration of the hiring process illustrates the procompetitive effect of restrictive covenants: A hires B as a salesman. B signs a reciprocal covenant not to compete, and A then passes valuable customer lists to B. “At the time A and B strike their bargain, the enterprise (viewed as a whole) expands output and competition by putting B to work. The covenant not to compete means that A may trust B with broader responsibilities, the better to compete against third parties.”²²¹

This procompetitive aspect of noncompete covenants is of paramount importance. It is undoubtedly true that once employment ends, nothing is left but the restraint—“but the aftermath is the wrong focus.”²²² As Judge Frank Easterbrook has explained, “A legal rule that enforces covenants not to compete, even after an employee has launched his own firm, *makes it easier for people to cooperate productively in the first place.*”²²³ Under such a regime, an employer, “[k]nowing that he is not cutting his throat by doing so . . . will train the employee, giving him skills, knowledge, and trade secrets that make the firm more productive.”²²⁴

2. The Bar Associations’ Per Se Ban on Reasonable Noncompetes Is Inherently Unreasonable. Prior to the 1960s, restrictive covenants for attorneys, like all other professionals, were governed on a case-specific basis under the common-law reasonableness test.²²⁵ The antitrust “rule-of-reason” test mirrors the common-law reasonableness test discussed above.²²⁶ It follows, therefore, that the

221. *Polk Bros.*, 776 F.2d at 189 (emphasis added).

222. *Id.*

223. *Id.* (emphasis added).

224. *Id.* To be clear, the procompetitive aspects of covenants not to compete not only benefit the employer and the employee but also benefit the public at large. Judge (later Chief Justice and President) Taft, in the premier antitrust case in U.S. history, explained that “[c]ontracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made . . . but because it is for the benefit of the public at large that they should be enforced.” *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898) (quoting *Mallan v. May*, 11 Mees. & W. 652, 665–66 (1843)). Judge Taft agreed with the reasoning of an earlier decision, which stated that “*the public derives an advantage in the unrestrained choice* which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction and experience.” *Id.* (emphasis added).

225. *See supra* Part I.

226. *See, e.g., Baker’s Aid v. Hussmann Foodservice Co.*, 730 F. Supp. 1209, 1217 (E.D.N.Y. 1990) (finding that a reasonable covenant does not violate the Sherman Act); *Carvel Corp. v. Eisenberg*, 692 F. Supp. 182, 185 (S.D.N.Y. 1988) (explaining that covenants should be analyzed for antitrust purposes under the rule of reason); *R.W. Intern., Inc. v. Borden Interamerica, Inc.*,

per se ban on attorney noncompete agreements raises a serious antitrust issue. The per se ban, after all, precludes even *reasonable* attorney noncompete agreements, which are enforced only if they are procompetitive, efficiency enhancing, and in the public interest.²²⁷ By establishing a per se ban, the bar committees have effectively eliminated a legal regime that allows people “to cooperate [more] productively in the first place,”²²⁸ and to form contracts that “benefit . . . the public at large.”²²⁹

As Parts I–III explain, public-interest justifications do not warrant prohibiting *all* noncompete agreements involving in-house counsel.²³⁰ The per se prohibition is particularly egregious in light of the fact that the common-law reasonableness test provides the analytical flexibility to strike down a specific covenant at a more informed stage on the basis of public interest. And where other professionals (like doctors) have advocated for a per se ban against covenants not to compete on the basis of “public interest,” courts have consistently rejected these requests—calling a per se rule “self-serving” and recognizing the harm that could result to patients under such an approach.²³¹ Repeatedly, the Supreme Court has dismissed these self-serving “quality-of-care” arguments, making clear that professional associations have no excuse to masquerade anticompetitive policies as ethical rules.²³²

673 F. Supp. 654, 656 (D.P.R. 1987) (noting that covenants not to compete are analyzed under the rule of reason); *Lektro-Vend Corp. v. Vendo Corp.*, 500 F. Supp. 332, 335 (N.D. Ill. 1980) (holding that a covenant not to compete was not an antitrust violation under the rule of reason); *Vanguard Envtl., Inc. v. Curler*, 190 P.3d 1158, 1169 (Okla. Civ. App. 2007) (holding that a ten-year restrictive covenant unlimited by geography was an unreasonable restraint of trade).

227. See *supra* note 220 (collecting cases); see also RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981) (considering injury to the public as part of the analysis for the rule of reason).

228. *Polk Bros. v. Forest City Enters.*, 776 F.2d 185, 188 (7th Cir. 1985).

229. *Addyston Pipe & Steel Co.*, 85 F. at 281.

230. The analysis in Part I, in particular, bolsters this by demonstrating that Rule 5.6’s policy justifications do not apply to in-house counsel.

231. *Raymundo v. Hammond Clinic Ass’n*, 449 N.E.2d 276, 280–81 (Ind. 1983); see also *Mohanty v. St. John Heart Clinic, S.C.*, 866 N.E.2d 85, 95 (Ill. 2006) (“[R]estrictive covenants can have a positive impact on patient care. We do not know, and are ill-equipped to determine, what the possible consequences might be if we were to adopt the sweeping changes plaintiffs advocate.”); *id.* (“It is possible that patients would be more adversely affected if we were to ban reasonable restrictive covenants in physician employment contracts.”); *Cent. Ind. Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 728 (Ind. 2008) (“Any decision to ban physician noncompetition agreements altogether should be left to the legislature.”).

232. *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 423 (1990); *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 464 (1986); *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 31

By prohibiting *reasonable* covenants not to compete in order to protect the “professional autonomy”²³³ of lawyers, bar associations have placed the parochial, self-interested concerns of bar members over a balanced legal regime designed to protect competition and consumers. Such behavior is manifestly anticompetitive and likely in violation of the Sherman Act.

B. Bar Associations Are Not Entitled to State-Action Immunity Under the Supreme Court’s Dental Board Standard

The primary reason that ethics opinions, like New Jersey Opinion 708, have not been challenged under antitrust doctrine is that, for the last several decades, courts have assumed that challenges to state bar associations would fail under the state-action immunity doctrine.²³⁴ The core doctrine of state-action immunity holds that a “state’s own actions ‘*ipso facto* are exempt’ from the antitrust laws.”²³⁵ In other words, the state has the power to restrict trade, grant monopolies, and authorize business combinations that otherwise would be illegal under federal law. For example, legal ethics *rules* are immune from antitrust liability because they are promulgated by the state supreme court (not the bar association) and, therefore, are an exercise of the state’s sovereign power.²³⁶ However, legal ethics *opinions* adopted by state bar associations, rather than courts, are not subject to the same blanket immunity. In fact, the Supreme Court specifically rejected this contention in *Goldfarb v. Virginia State Bar*,²³⁷ in which it held a state bar association liable under Section 1 of the Sherman Antitrust Act: “[T]hat the State Bar is a state agency for

(1984); *Nat’l Soc. of Prof’l Eng’rs v. United States*, 435 U.S. 679, 699 (1978); *see also* *Am. Med. Ass’n v. United States*, 130 F.2d 233, 249 (D.C. Cir. 1942) (“[T]he fact that the conspiracy may be intended to promote the public welfare . . . is [not] sufficient to avoid the penalties of the Sherman Act.”).

233. MODEL RULES OF PROF’L CONDUCT r. 5.6 cmt. 1 (AM. BAR ASS’N 2013).

234. *See* Munneke, *supra* note 204, at 587–88 (discussing the FTC’s reluctance to pursue antitrust actions against ethics opinions of state bar associations).

235. *N.C. State Bd. of Dental Exam’rs v. FTC*, 717 F.3d 359, 366 (4th Cir. 2013) (emphasis added).

236. *See* *Bates v. State Bar of Ariz.*, 433 U.S. 350, 360 (1977) (“[When] the challenged restraint is the affirmative command of the Arizona Supreme Court . . . the ultimate body wielding the State’s power over the practice of law . . . restraint is ‘compelled by direction of the State acting as a sovereign.’” (quoting *Goldfarb v. Va. State Bar*, 41 U.S. 773, 791 (1975))).

237. *Goldfarb v. Va. State Bar*, 41 U.S. 773 (1975).

some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.”²³⁸

Although that decision in its own right would suggest that all behavior of bar associations would be susceptible to antitrust attack, subsequent case law has not provided a consistent or clear framework to determine when bar associations (or other similar state agencies) are susceptible to antitrust liability.²³⁹

Supreme Court precedent holds that a “private actor” can be immune from the antitrust laws under the state-action-immunity doctrine only if the challenged restraint is (1) “clearly articulated and affirmatively expressed as state policy” and (2) “actively supervised” by the state itself.²⁴⁰ It was generally accepted that a state bar’s action would, at a minimum, need to be “clearly articulated and affirmatively expressed as state policy” to be immune under the state-action doctrine.²⁴¹ Prior to the *Dental Board* case, however, it was also almost unanimously believed that bar associations would not have to meet the “active state supervision” prong to secure immunity.²⁴² As such, state ethics committees, operated by market participants who are elected by other market participants, regularly issue ethics opinions and conclude, without judicial oversight, that in-house attorneys may not sign covenants not to compete.²⁴³

Dental Board explicitly rejected this assumption and held that “a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*’s active supervision requirement in order to invoke

238. *Id.* at 791.

239. Munneke, *supra* note 204, at 594.

240. *Id.* at 593 (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978)).

241. *Id.*

242. *Supreme Court: State Agencies Controlled by Active Market Participants Must Have Active State Supervision to Qualify for Antitrust Immunity*, MCDERMOTT WILL & EMERY (Mar. 2, 2015), <http://www.mwe.com/Supreme-Court-State-Agencies-Controlled-by-Active-Market-Participants-Must-Have-Active-State-Supervision-to-Qualify-for-Antitrust-Immunity-03-02-2015> [<http://perma.cc/X8F9-E9MH>]; see also Munneke, *supra* note 204, at 594 (“[T]he state may avoid such a conflict by either formulating standards and administering procedures or delegating the job to private parties, in which case the policies displacing competition must be clearly and affirmatively expressed and appropriately supervised.”).

243. See *id.* at 594 n.219 (“Although procedures vary from state to state, state supreme courts, in practice, are seldom active participants in overseeing anticompetitive policy. Rather, they oversee the disciplinary process as a whole.”).

state-action antitrust immunity.”²⁴⁴ The Court sensibly explained that “[w]hen a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest.”²⁴⁵ As such, “[t]he similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State.”²⁴⁶

In the future, state bar associations can adjust their organizational structures and their relationships with the state supreme courts to help ensure that they meet this new criteria for active state supervision. However, many state bar associations have almost certainly lacked adequate supervision. In amici filings in *Dental Board*, the state bar associations themselves acknowledged that “[m]any state legislatures have chosen to regulate the legal profession through agencies composed of lawyers elected by their peers” (the precise definition of a private market participant under the Fourth Circuit’s test), and conceded that “[i]f the Fourth Circuit’s decision stands, those state bars will face Sherman Act liability.”²⁴⁷

Given the clearly anticompetitive effect of the extension of the per se ban to in-house attorneys, and the absence of active state supervision, state ethics commissions are vulnerable to antitrust lawsuits.

CONCLUSION

The existing per se ban on noncompete agreements in the legal profession is hard to reconcile with the successful application of the common-law reasonableness test for every other profession. In fact, no logical basis exists for imposing a flat prohibition on noncompete agreements in the legal context, rather than balancing the competing interests of employer, employee, and the public at large on a case-specific basis.

244. N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101, 1114 (2015) (referring to *Cal. Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)).

245. *Id.*

246. *Id.*

247. Brief of the North Carolina State Bar et al. as Amici Curiae in Support of Petitioner at 6, 17, N.C. Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101 (2015) (No. 13-154) (essentially conceding that state bar associations do not proceed under “active supervision” of the state itself).

However problematic the per se ban might be when applied to attorneys departing law firms, it is far more troubling when applied to in-house counsel. Indeed, the arguments typically advanced in the context of outside counsel—ranging from the special ethical obligations of law firms to the promotion of client choice in retaining existing legal representation—are inapposite to in-house counsel. By rubberstamping an already dubious per se ban in a context in which it has no plausible justification, courts and bar ethics committees harm employers and the public. The per se ban on reasonable noncompete agreements involving in-house counsel is anticompetitive, and bar ethics committees that continue to espouse that ban may risk antitrust liability.