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# Professional Responsibility -- Covenants Not To Compete Between Attorneys

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Perhaps the Bill of Rights does not provide safeguards at sentencing, but in the late eighteenth century, no safeguards were needed. At that time, sentences were fixed for the crime, not individualized by the sentencing judge to fit the defendant. Today the convicted defendant needs protection from mistakes and arbitrary and capricious action during sentencing just as much as the accused during trial. In a sector of the judicial process in which the stakes for society and the defendant are so high as they are at sentencing, and in which procedural safeguards are inadequate, there is a strong case for developing a body of substantive standards to ensure that sentences are not based on inaccurate assumptions of little probative value. Disclosure of the presentence report and opportunity to rebut adverse charges is certainly a safeguard that should be guaranteed to the criminal defendant. However, as *Weston* has shown, that alone is not sufficient. Perhaps the best solution would be to provide for an appellate system to review sentences of all defendants. Short of such a radical change, however, the solution of the *Weston* court may provide a viable alternative.

MARVIN ALLEN BETHUNE

### **Professional Responsibility—Covenants Not To Compete Between Attorneys**

*A*, a lawyer, wishes to hire *X*, another lawyer, to work for him in a small town in western North Carolina. Because the town is small, *A* would like somehow to ensure that *X* will not later leave his employment and set up a competing practice in the same community. *A* most likely will ask *X* to agree in writing not to practice law in the town for one year after the termination of employment. *X*, understanding *A*'s position and intending to leave the town after a few years anyway, agrees. Whether or not this is a common situation in this state or around the country, it appears that this would be a reasonable approach to the problem provided the lawyers have a full understanding of their contract. However, according to the Council of the North Carolina State Bar, *A*, and probably *X*, is guilty of unethical conduct.

On October 21, 1971, the Council responded to two inquiries related to the problem of *A* and *X*:

- (1) Is it unethical for an attorney employing another attorney to

include as a part of the agreement between them a restrictive covenant prohibiting the employee from practicing law in a specified local area for a specified time after the termination of the employment?

(2) May a restrictive covenant upon the individual practice of law by a withdrawing partner be incorporated into a partnership agreement?<sup>1</sup>

The Council answered the first inquiry affirmatively and the second negatively. The Council's opinions were in part based on ABA Formal Opinion 300,<sup>2</sup> which reasoned that since Canon 27 prohibits solicitation, an employee-lawyer could not actively seek out the business of those clients of his past employer (or partner) with whom he had contact. Furthermore, the ABA Committee felt that Canons 6 and 37 bind the lawyer to preserve the secrets and confidences of clients of his former employer and that Canon 7 prohibits interference with the work of another attorney.<sup>3</sup> Since a restrictive covenant is not necessary to enforce the provisions of the Canons of Ethics and since the Canons safeguard any protectible interest, a restrictive covenant would be improper.

The North Carolina Council also relied on the ABA Code of Professional Responsibility, Disciplinary Rule 2-108(A),<sup>4</sup> which provides that "a lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits." Finally, the Council acknowledged the policy argument that an attorney is licensed by the state and, regardless of his location, should be free to provide assistance to all potential clients who desire to engage him—or, stated conversely, the legal profession considers the right of a client to choose his own counsel to be of paramount importance.<sup>6</sup>

At common law, the covenant not to compete was considered a

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<sup>1</sup>N.C. STATE BAR COUNCIL, OPINIONS, No. 776 (1971), reported, 18 THE NORTH CAROLINA BAR no. 4 at 11 (1971) [hereinafter cited as N.C. BAR].

<sup>2</sup>ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 300 (1961).

<sup>3</sup>Canons 6, 7, 27, and 37 refer to the ABA Canons of Professional Ethics, which were replaced by the Code of Professional Responsibility in 1970. North Carolina is not among the majority of states that have adopted the Code of Professional Responsibility.

<sup>4</sup>All the disciplinary rules are mandatory in nature and state the minimum standard of conduct. Preliminary Statement, ABA CODE OF PROFESSIONAL RESPONSIBILITY.

<sup>5</sup>The Council's use of this citation would seem to indicate that *X* would also be guilty of unethical conduct.

<sup>6</sup>N.C. BAR 13.

“restraint of trade” and was, therefore, not upheld.<sup>7</sup> The strict view against these covenants was gradually eroded<sup>8</sup> and the courts began to uphold them when the equities of the case required it.<sup>9</sup> Though some state statutes declare restrictive covenants of this type void, many states uphold them.<sup>10</sup> The general tests applied by the courts to determine their validity are necessity and reasonableness, and a covenant normally will be upheld if it is not excessive.<sup>11</sup> To determine if the restriction is excessive, the courts look at the scope<sup>12</sup> and duration of the restriction.<sup>13</sup> These factors are balanced against the employer’s protectible interests, the hardship imposed on the employee, and the interests of the public.<sup>14</sup> Courts have even gone so far as to uphold a restrictive covenant that was excessive in scope if it was possible to salvage some acceptable restraint out of the covenant.<sup>15</sup> The “blue-pencil” test<sup>16</sup> and the doctrine of selective construction<sup>17</sup> are the two most common methods used by the courts to enforce some portion of an excessive covenant.<sup>18</sup> The North Carolina Supreme Court has stated that restrictive covenants will be upheld if they are in writing, for valuable and contemporaneous consid-

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<sup>7</sup>*Dyer’s Case*, Y.B. Mich. 2 Hen. 5, f. 5, pl. 26 (C.P. 1414), cited in Comment, *Contracts in Restraint of Trade: Employee Covenants Not to Compete*, 21 ARK. L. REV. & B.A.J. 214 (1967).

<sup>8</sup>Apparently the first case to uphold a restrictive covenant was *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711). A complete discussion of the developments after *Mitchel* can be found in Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960) [hereinafter cited as Blake].

<sup>9</sup>A distinction should be drawn between restraints incident to the sale of a business, discussion of which is beyond the scope of this note, and post-employment restraints aimed at prevention of competitive use of information or relationships peculiar to the employer. See Blake 647.

<sup>10</sup>*E.g.*, Louisiana declares such contracts void as against public policy except where the employer incurs expenses in the specialized training of the employee. LA. REV. STAT. ANN. § 23:921 (1964). North Dakota and Oklahoma declare all such contracts void except those between partners in anticipation of a dissolution of the partnership and those ancillary to the sale of the good will of a business. N.D. CENT. CODE § 9-08-06 (1959); OKLA. STAT. ANN. tit. 15, §§ 217-19 (1966). The North Carolina General Statutes are silent on the subject.

<sup>11</sup>RESTATEMENT OF CONTRACTS §§ 513-15 (1932) provide a basis for the tests used. See Annot., 43 A.L.R.2d 94 (1955).

<sup>12</sup>*E.g.*, *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944); see Blake 675-77.

<sup>13</sup>*E.g.*, *Asheville Associates, Inc. v. Miller*, 255 N.C. 400, 121 S.E.2d 593 (1961); see Note, *Covenants Not to Compete*, 38 N.C.L. Rev. 395 (1960).

<sup>14</sup>Comment, 21 ARK. L. REV. & B.A.J., *supra* note 7, at 215; see Blake 651-87.

<sup>15</sup>*E.g.*, *Welcome Wagon Int’l, Inc. v. Pender*, 255 N.C. 244, 120 S.E.2d 739 (1961).

<sup>16</sup>So named because the covenant will be upheld if the excessive restraint can be eliminated by merely marking out the objectionable portions. *Id.* at 256, 120 S.E.2d at 747 (dissenting opinion).

<sup>17</sup>*Creter v. Creter*, 52 N.J. Super. 197, 145 A.2d 149 (1958).

<sup>18</sup>For a thorough discussion of these tests see Note, *Contracts—Partial Enforcement of Restrictive Covenants*, 50 N.C.L. REV. 691 (1972).

eration, reasonable as to time and territory embraced, fair to the parties, and not against public policy.<sup>19</sup> Since the Council made no reference to the scope of reasonableness of the restrictive covenant it was considering, it must have been concerned with the public policy involved.

Other state ethics committees that have considered the problem of restrictive covenants in lawyers' employment and partnership agreements have taken varied approaches. At least one committee has gone to the opposite extreme from the North Carolina and American Bar Association committees and has held that a covenant not to practice law is ethical if entered into between lawyers with no substantial inequality of bargaining power. Furthermore, this committee held that violation of the covenant is unethical.<sup>20</sup> However, many bar committees agree with the North Carolina opinion.<sup>21</sup>

Perhaps the best statement of the underlying policy reasons for the North Carolina opinion is articulated in the American Bar Association Formal Opinion 300, from which the Council quoted extensively. In 1945, the ABA Committee had stated that it was improper for an attorney to purchase the practice and good will of an attorney who was not his partner because the good will of an attorney is not an asset to be bought and sold. This led the Committee to conclude that if the conduct in question can be considered an effort by attorneys to "barter in clients" it is unprofessional.<sup>22</sup> The view of the ABA Committee was further substantiated by the language of Canon 7, which says that "[e]fforts, direct or indirect, in any way to encroach upon the professional employment of another lawyer, are unworthy of those who should be brethren at the Bar . . . ."<sup>23</sup> In Formal Opinion 300, the ABA Committee relied on this 1945 opinion and the Canons<sup>24</sup> dealing with the prohibition against solicitation and the preservation of the secrets and confidences of clients. The Committee reasoned that since these canons can be enforced without reliance on restrictive covenants and since the Canons of Ethics adequately protect any protectable interest,

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<sup>19</sup>Asheville Associates, Inc. v. Miller, 255 N.C. 400, 121 S.E.2d 593 (1961).

<sup>20</sup>Opinion 148 (Ill. 1958), *reported*, DIGEST OF BAR ASSOCIATION OPINIONS 11 (Maru ed. 1970) [hereinafter cited as DIGEST].

<sup>21</sup>Opinion 127 (Ore. 1963), *reported*, DIGEST 435; Opinion 3 (Allegheny County, N.Y. 1962), *reported*, DIGEST 445; Opinion 831 (N.Y. City, N.Y. 1957), *reported*, DIGEST 334; Opinion 688 (N.Y. City, N.Y. 1945), *reported*, DIGEST 318.

<sup>22</sup>ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 266 (1945).

<sup>23</sup>ABA CANONS OF PROFESSIONAL ETHICS No. 7.

<sup>24</sup>ABA CANONS OF PROFESSIONAL ETHICS Nos. 6, 27 & 37.

a restrictive covenant would be improper and inconsistent with the professional status of attorneys.

One problem with the reasoning of the ABA Committee and the Council of the North Carolina State Bar is that it fails to take into consideration the increased tolerance that the courts have displayed for this type of restrictive covenant.<sup>25</sup> Courts have been required to consider the public policy when faced with restrictive covenants in other types of employment contracts. They have upheld the restrictions even<sup>26</sup> though the practice involved could easily have been considered a "profession and a privilege granted by the state."<sup>27</sup> It is at least conceivable that the Council may find itself in the position of attempting to discipline an attorney for entering into a restrictive covenant that the courts have already enforced.<sup>28</sup>

Enforcement of the Council's opinion presents still another problem. The statute empowering the North Carolina Council to administer punishment lists the grounds upon which the Council may proceed against an attorney. Only two of those grounds might possibly be interpreted as empowering the Council to discipline attorneys for entering into restrictive covenant contracts: that dealing with violations of canons of ethics and that allowing punishment for "conduct involving willful deceit, fraud or any other *unprofessional conduct*."<sup>29</sup> Since the Council did not state that the use of a restrictive covenant violates a specific canon of ethics, the only possible section of the statute upon which the Council can rely is that allowing punishment for "*unprofessional conduct*." Therefore, enforcement of the Council's opinion will put it in the anomalous position of finding that it is unprofessional for an attorney to include in an employment contract he drafts for his own

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<sup>25</sup>See text accompanying notes 8-19 *supra*.

<sup>26</sup>See, e.g., *Toulmin v. Becker*, 69 Ohio L. Abs. 109, 124 N.E.2d 778 (Ct. App. 1954) (patent attorney); *Scadron's Sons v. Susskind*, 132 Misc. 406, 229 N.Y.S. 209 (Sup. Ct. 1928) (optometrist); *Dodd, Contracts Not to Practice Medicine*, 23 B.U.L. REV. 305 (1943) (doctors). See also cases cited in Annot., 43 A.L.R.2d 94 (1955).

<sup>27</sup>N.C. BAR 13.

<sup>28</sup>In *Hicklin v. O'Brien*, 11 Ill. App. 2d 541, 138 N.E.2d 47 (1956), the court, while upholding a restrictive covenant between doctors, stated that "[i]t is not necessary for us to determine whether the contract violates some canon of professional ethics." *Id.* at 550, 138 N.E.2d at 52.

<sup>29</sup>N.C. GEN. STAT. § 84-28 (1965) states that an appointed council "(2) May administer the punishments . . . for any of the following causes: . . . d. Conduct involving willful deceit or fraud or any other unprofessional conduct . . . f. The violation of any of the canons of ethics which have been adopted and promulgated by the Council of the North Carolina State Bar." (Emphasis added.)

professional employees the same covenant that he can, and in some instances must, include in the employment contracts he drafts for clients from all other professions, businesses, and trades. Yet, as a British court said, "[t]he case of a solicitor is eminently a case where some protection is almost always necessary if the employee is a person who is being employed in a more or less confidential position, where he does come into touch with, and does get to know, some, at any rate, of his employer's clients."<sup>30</sup>

Thus the Council declined to express reasons of its own for holding the covenant not to compete unethical and instead relied principally upon ABA Opinion 300,<sup>31</sup> which in turn had relied very heavily upon the prohibition against attempts to "barter in clients". Although this is a catching phrase, examination of its source leads to the conclusion that it should not be used in the context of covenants not to compete. The phrase "bartering in clients" was originally used in an ABA opinion which found it unethical for an attorney to purchase the business and good will of another attorney.<sup>32</sup> Purchase of the good will of a lawyer would indeed be bartering in clients. There would always be some haggling over how much a lawyer should pay to get a particular client, and once the sale is made the clients presumably would be required to go to the purchasing attorney. However, there is a difference between attempting to buy the good will and business of a lawyer and merely inserting a non-competition covenant in an employment contract. In the former the clients are, at least theoretically, forced to go to the purchasing attorney or firm, and the clients are the subject matter of the transaction; but in the latter, the agreement does not purport to control the clients, who are in precisely the same status before and after the employment contract is entered into. A possible exception is the situation in which the size of the town is such that only a few lawyers are practicing there. A demand by an employer for a covenant not to compete may further reduce the clients' choice by discouraging lawyers who do not wish to be so bound from seeking employment in the community. Of course, this is not related to bartering in clients, and an employer in a small town may, because of limited clientele, have precisely the type of

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<sup>30</sup>Dickson v. Jones, [1939] 3 All E.R. 182, 188 (Ch.).

<sup>31</sup>ABA Informal Opinion Number 1072, upon which the Council also relies, merely restates the position of opinion 300, as does Disciplinary Rule 2-108(A) of the Code of Professional Responsibility. Therefore, these enunciations are as questionable bases for the Council's decision as was the original opinion.

<sup>32</sup>ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 266 (1945).

protectible interests anticipated by the courts.

Somewhere between the purchase of the good will of an attorney and the hiring of a new associate is the partnership agreement between practicing attorneys. A lawyer from the same community entering into a partnership agreement will be bringing his established clients with him. If, as a condition to the agreement, he is required to forego the practice of law in the community upon the dissolution of the partnership it can be argued that he is trading his clients for the right to be a partner. However, the clients are free to choose any attorney they may wish during the course of the partnership, and upon termination of the partnership the clients may still go to the established firm upon which they were relying or they may go elsewhere. The converse of the underlying policy that clients should be free to choose their own attorneys is the right of an attorney to refuse any case.<sup>33</sup> Certainly this right is no less viable when it happens to be exercised in the course of entering into a partnership agreement.

It is suggested that the Council's opinion disregards the reality of the situation. The employing lawyer has a definite interest in protecting himself, especially when one considers the inherently confidential relationships formed in the practice of law.<sup>34</sup> The courts are likely to enforce a reasonable covenant not to compete without regard to the opinion of an ethics committee.<sup>35</sup> In addition, the Council itself may have difficulty in enforcing its decision because of the vagueness of the statute involved.<sup>36</sup> Finally, it is submitted that the legal profession should be free to do for itself at least as much as it may be professionally required to do for its clientele.

TIMOTHY J. SIMMONS

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<sup>33</sup>ABA CANONS OF PROFESSIONAL ETHICS No. 31. *But cf.* Ethical Consideration 2-26, ABA CODE OF PROFESSIONAL RESPONSIBILITY.

<sup>34</sup>A discussion of the type of employment relationship that requires protection for the employee is in Annot., 9 A.L.R. 1456, 1468 (1920), which was cited with approval in *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 249, 120 S.E.2d 739, 742 (1961).

<sup>35</sup>*E.g.*, *Hicklin v. O'Brien*, 11 Ill. App.2d 541, 138 N.E.2d 47 (1956).

<sup>36</sup>See text accompanying note 29 *supra*.