NOTEBOOM: A DRAMATIC DEVIATION FROM TEXAS' STAND AGAINST NON-COMPETITION CLAUSES AMONG LAWYERS

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I. INTRODUCTION

A widely recognized tenet of the legal profession is the prohibition against non-competition agreements between law firms and attorneys.[1] While every other profession permits the use of non-competition

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1 ROBERT W. HILLMAN, LAW FIRM BREAKUPS: THE LAW AND ETHICS OF GRABBING AND LEAVING § 2.3, at 28–29 (1990).

agreements (as long as the restrictions are reasonable as to time, geography, and scope) the majority of states view such agreements between law firms and lawyers as per se unenforceable.[2] The reason behind the disparate treatment of lawyers and non-lawyers is strictly a matter of public policy; courts do not want attorneys signing agreements that will restrict clients' ability to select their counsel of choice.[3] This seemingly innocuous and admittedly well-intentioned principle has had a detrimental effect on law firms.[4] Allowing attorneys to take clients with them when they leave a firm indisputably harms the firm.[5] The so-called "Migrating Attorney" problem has spurred numerous articles from commentators.[6] Protecting clients has always been a priority in the legal profession, but how far will courts go to protect clients at the expense of law firms? Can attorneys engage in agreements that indirectly achieve the same result as non-competition agreements?

A hypothetical might better demonstrate the issues at hand. Let us suppose that Able and Baker form a partnership to practice law in Texas, specializing in toxic torts. They have primarily a plaintiff's practice and so they operate on a contingency fee basis. A few years later, the partners allow Charlie to buy into the partnership. Able and Baker have Charlie sign an agreement providing that should Charlie withdraw from the partnership and take with him clients who later recover a victory at trial or a favorable settlement, then Charlie must pay the firm the percentage it would have received from the client had Charlie remained with the firm.

Charlie is a very charismatic and likable fellow, and he quickly befriends a number of the firm's largest clients. He works very hard, but he also uses a number of the firm's resources to aid him in his preparation for his clients. He has two legal secretaries at his disposal, and even had the firm hire two additional paralegals to conduct research for him. Able and Baker think Charlie is demanding on the firm's resources, but they expect it

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[2] Leila El-Hakam, Note, *Texas' Application of the Covenants Not to Compete Among Law Partners: A Comment on* Whiteside v. Griffis & Griffis, 16 REV. LITIG. 439, 440 (1997).

[3] *See* HILLMAN, *supra* note 1, § 2.3.2, at 26–28 & n.22.

[4] *See generally* Stephen E. Kalish, *Covenants Not to Compete and the Legal Profession*, 29 ST. LOUIS U.L.J. 423 (1985).

[5] *Id*.

[6] *See generally* HILLMAN, *supra* note 1, § 2.3; Kalish, *supra* note 4; Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1 (1999); Glenn S. Draper, Comment, *Enforcing Lawyers' Covenants Not to Compete*, 69 WASH. L. REV. 161 (1994); El-Hakam, *supra* note 2.

will pay off in the end so they allow him to continue expending the firm resources. After just a year of working for the firm, Charlie decides to withdraw, taking with him a number of the firm's former clients. Within a few months after Charlie leaves the firm, three of the cases he prepared while working for the firm go to trial and result in large verdicts in favor of Charlie's clients. Able and Baker seek to enforce the agreement they had with Charlie, but Charlie refuses to pay his former partners, claiming the agreement he signed is per se unenforceable.

Can Able and Baker recover any of the money Charlie earned from their former clients? Or do they have to just eat the expenses Charlie ran up as a partner in their firm and let Charlie take a windfall? What if the agreement Charlie signed extended beyond actual clients to potential clients in the area? Could Able and Baker enforce an agreement prohibiting Charlie from practicing toxic tort law within a 300-mile radius? Would it make a difference if Charlie were an associate rather than a partner?

Texas adopted the Texas Disciplinary Rules of Professional Conduct (TDRPC) in 1990 (replacing the Texas Code of Professional Conduct) to serve as guidelines for attorneys on how to conduct themselves ethically and professionally.[7] Generally, the Texas rules are similar to the Model Rules promulgated by the American Bar Association (ABA).[8] While these rules are not controlling in that the violation of a rule does not give rise to a private cause of action, courts use the TDRPC as a foundation to evaluate attorney conduct and often times base their holdings on the rules.[9] In fact, very rarely will the courts rule in contradiction to the TDRPC. One of the guidelines espoused by both the TDRPC and the ABA rules explicitly prohibits attorneys from entering into arrangements that limit the attorney's ability to practice after termination of the relationship between attorney and firm.[10] The TDRPC prohibits restrictive covenants:

[7] Texas Legal Ethics, (1998), http://www.law.cornell.edu/ethics/tx/narr/TX_NARR_0.HTM.

[8] *Id*. There are, however, some significant exceptions. *Id*.

[9] TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 15, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, §9); *see also* Union Gas Corp. v. Gisler, 129 S.W. 3d 145, 157 (Tex. App.—Corpus Christi 2003, no pet.) (dealing with TDRPC 1.04 regarding attorneys' fees); Turner v. State, 49 S.W.3d 461, 465 (Tex. App.—Fort Worth 2001), *pet. dism'd*, 118 S.W.3d 772 (Tex. Crim. App. 2003) (per curiam).

[10] *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 2-108 (1980); TEX. DISCIPLINARY R. PROF'L CONDUCT 5.06, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

> A lawyer shall not participate in offering or making: (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship . . . or (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a suit or controversy . . . .[11]

The Texas Supreme Court created the Texas Professional Ethics Committee, which issues non-binding advisory opinions.[12] The Committee bases its memorandum opinions on the guidelines espoused in the TDRPC.[13] Although the Committee's opinions are non-binding, like the rules they discuss, they are persuasive and are often adopted by the courts.[14] The Committee held in a 1988 advisory opinion that it is improper for a law partnership to have an agreement providing that upon leaving the firm a withdrawing partner or departing associate is required to pay the law firm a percentage of fees thereafter from clients he or she takes from the law firm.[15] This holding is consistent with the majority rule. The Committee based its opinion on DR 2-108(A) of the Code of Professional Responsibility of the American Bar Association, which has since been repealed and replaced by Disciplinary Rule of Professional Conduct 5.06.[16] However, a Texas appellate court has recently rejected the advisory opinion in *Gray v. Noteboom*.[17] The question this holding raises for attorneys and law firms is whether *Noteboom* marks a swing of the pendulum toward protecting the interests of law firms. What effect will this opinion have on an attorney's ability to transfer to other firms and on a firm's ability to protect its business?

This Comment addresses the current and future state of non-competition agreements among lawyers in Texas. It begins by generally outlining the development of the policy against restrictive covenants among lawyers,

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[11] TEX. DISCIPLINARY R. PROF'L CONDUCT 5.06.

[12] Texas Legal Ethics, *supra* note 7.

[13] *Id*.

[14] Whiteside v. Griffis & Griffis, P.C., 902 S.W.2d 739, 743 n.6 (Tex. App.—Austin 1995, writ denied) (citing State v. Baker, 539 S.W.2d 367, 372 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (recognizing that ethics opinions are persuasive but not binding)).

[15] Tex. Comm. on Prof'l Ethics, Op. 459, 51 TEX. B.J. 1140 (1988).

[16] *Whiteside*, 902 S.W.2d at 743 n.5; MODEL CODE OF PROF'L RESPONSIBILITY DR 2-108 (1980); TEX. DISCIPLINARY R. PROF'L CONDUCT 5.06; Op. 459, *supra* note 15 at 1140.

[17] 159 S.W.3d 750, 752–53 (Tex. App.—Fort Worth 2005, pet. denied).

then narrows its scope to focus on Texas law, and finally takes up the recent *Noteboom* decision and analyzes its effect on the future of non-competition agreements in Texas. This Comment concludes by suggesting that *Noteboom* will at most alter the treatment of only indirect forms of restrictive covenants and even then, its application will likely be limited to situations similar to the fact pattern raised in *Noteboom*.

II. General Background; The Development of the Policy Against Non-Competition Agreements Among Lawyers

The landmark case *Dwyer v. Jung* was the first case to distinguish the propriety of non-competition agreements for lawyers from those for non-lawyers.[18] *Dwyer* addressed the enforceability of a restrictive covenant in a partnership agreement among law partners.[19] In *Dwyer*, a New Jersey law firm drafted an agreement providing that upon dissolution of the firm, clients would be divided between the partners, and all partners would be restricted from doing business with each others' clients for five years.[20] Relying on DR 2-108(A) of the Code of Professional Responsibility of the American Bar Association, the court rejected the reasonableness test which usually applies to restrictive covenants in the employment context, finding that "[t]he attorney-client relationship is consensual, highly fiduciary on the part of counsel, and [the attorney] may do nothing which restricts the right of the client to repose confidence in any counsel of his choice."[21] The court stated that "[a] lawyer's clients are neither chattels nor merchandise."[22] While a reasonable restrictive covenant in a general commercial setting would not be considered against public policy, strong public policy considerations unique to the legal profession preclude the applicability of commercial standards in evaluating the reasonableness of lawyer restrictive covenants.[23] According to the court, restrictions on attorneys are injurious to the public interest in that a client should always be entitled to representation by counsel of his own choosing.[24]

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[18] 336 A.2d 498, 499–501 (N.J. Super. Ct. Ch. Div. 1975), *aff'd* 343 A.2d 208 (N.J. Super. Ct. App. Div. 1975).

[19] *Id*. at 501.

[20] *Id*. at 499.

[21] *Id*. at 500 (citing Henry S. Drinker, Legal Ethics 89 et seq. (1965)).

[22] *Id*. at 499.

[23] *Id*. at 500.

[24] *Id*.

The TDRPC provides in rule 5.06:

> A lawyer shall not participate in offering or making:
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> (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
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> (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a suit or controversy, except that as part of the settlement of a disciplinary proceeding against a lawyer an agreement may be made placing restrictions on the right of that lawyer to practice.[25]

The justification for this rule is that "[a]n agreement restricting the rights of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer."[26]

Other states followed the approach taken in *Dwyer*, holding restrictive covenants among law partners unenforceable.[27] Furthermore, courts have extended *Dwyer* to situations indirectly restricting competition.

Jacob v. Norris, McLaughlin & Marcus was the first case to explicitly extend DR 2-108(A) (the predecessor to TDRPC 5.06) to a situation where the restraint of trade was indirect.[28] In *Jacob*, the court declared provisions of a law firm partnership agreement unenforceable on the grounds that the provisions restricted freedom of competition.[29] The agreement provided that if a withdrawing partner competed with the firm by soliciting the firm's

[25] TEX. DISCIPLINARY R. PROF'L CONDUCT 5.06.

[26] *Id*. cmt. 1.

[27] *See* Karlin v. Weinberg, 390 A.2d 1161, 1167–68 (N.J. 1978) (recognizing that DR 2-108(A) prohibits "restrictive covenants of any scope" among lawyers); Silverberg v. Schwartz, 427 N.Y.S.2d 480, 482 (App. Div. 1980), *appeal dismissed*, 53 N.Y.2d 704 (1981), *subsequent appeal on other grounds*, 438 N.Y.S.2d 143, 143–44 (App. Div. 1981) (denying stay of arbitration proceedings because restrictive provision was void and thus could not be the subject of arbitration); Cohen v. Graham, 722 P.2d 1388, 1390–91 (Wash. Ct. App. 1986) (affirming confirmation of arbitration award which found partnership agreement provision prohibiting departing lawyers from representing firm's clients was unenforceable).

[28] 607 A.2d 142, 148–49 (N.J. 1992).

[29] *See id*. at 153–54.

clients or by associating with other firm professionals within one year from the date of termination of employment, the partner must forfeit the termination compensation to which he would otherwise be entitled.[30] When withdrawing partners requested compensation, the partnership denied their request due to violation of the agreement.[31] The New Jersey Supreme Court recognized that "[b]y 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."[32] Although the abandoned firm has a legitimate interest in maintaining clients, the court stated that "[t]he commercial concerns of the firm and of the departing lawyer are secondary to the need to preserve client choice."[33] It further justified its decision by discussing different ways to mitigate the detrimental effect on the law firm by reducing the departing partner's equity due upon withdrawal.[34] The court accordingly held the provisions unenforceable because the competitive departure created a financial disincentive for a departing shareholder to retain clients or solicit employees.[35] The court ultimately severed the financial disincentive provisions from the agreement, holding that the former partners were entitled to the same compensation as attorneys whose departure was noncompetitive.[36]

Other courts followed *Jacob*'s lead, holding indirect restrictions unenforceable, including non-competition provisions in partnership agreements and employment contracts restricting a withdrawn partner's ability to serve clients of the former partnership.[37] These provisions use financial disincentives such as fee-payment agreements and forfeiture-for-competition agreements to discourage competition.[38] Fee-payment agreements "require that future fees earned by a departing attorney be paid to the former law firm" which in turn discourages attorneys from continuing

[30] *Id*. at 145.
[31] *Id*.
[32] *Id*. at 148.
[33] *Id*. at 151.
[34] *Id*. at 151–52.
[35] *Id*. at 154.
[36] *Id*. at 155.
[37] El-Hakam, *supra* note 2, at 446–50 (1997); *see* Draper, *supra* note 6, at 166–68.
[38] El-Hakam, *supra* note 2, at 446.

to represent clients after leaving or withdrawing from the firm.[39] An example of a fee-payment agreement is the termination agreement in *Judge v. Bartlett, Pontiff, Stewart & Rhodes P.C.* which required the departing attorney to pay the former firm seventy-five percent of future fees for competing within a thirty-mile radius.[40] The New York court held that this agreement was an unenforceable violation of DR 2-108.[41] The majority rule (among states that have adopted relevant rules) is that fee-payment agreements are unenforceable because of the detrimental effect they have on clients.[42]

The majority also hold forfeiture-for-competition clauses unenforceable.[43] A forfeiture-for-competition agreement reduces an attorney's departure compensation when an attorney leaves and continues to practice in competition with the firm.[44] Like the fee-payment agreements, this type of agreement discourages departing attorneys from representing clients they might otherwise represent, thus limiting the number of attorneys from which clients have to choose to represent them.[45] An example of a forfeiture-for-competition clause can be found in the agreement in *Gray v. Martin*.[46] This agreement precluded a withdrawing partner from receiving certain benefits to which he was otherwise entitled upon departure because he practiced within a designated three-county area.[47] Another example is the agreement in *Cohen v. Lord, Day & Lord* which conditioned payment of uncollected partnership revenues on a withdrawing partner's agreement not to compete with the firm.[48] Both the *Martin* and *Cohen* courts found the agreements to be violations of DR 2-108 and ruled them unenforceable.[49]

[39] *Id*. at 448.

[40] 610 N.Y.S.2d 412, 413 (App. Div. 1994).

[41] *Id*. at 414.

[42] *See* HILLMAN *supra* note 1, § 2.3.2, at 28 & n.22 (1990).

[43] *Id.* at 29–30.

[44] El-Hakam, *supra* note 2, at 447.

[45] *See* Regan, *supra* note 6, at 73–74.

[46] 663 P.2d 1285, 1290 (Or. Ct. App. 1983).

[47] *Id*. at 1290.

[48] 550 N.E.2d 410, 410–11 (N.Y. 1989).

[49] *Id*. at 411; *Martin*, 663 P.2d at 1290–91; *see also* Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598, 601–02 (Iowa 1990) (holding that conditioning payment of a departing partner's interest in firm on refraining from competing against the firm violates DR 2-108).

While the majority rule holds indirect restrictions unenforceable, some courts have held that restrictive covenants which merely result in an indirect effect on clients are enforceable.[50] *Howard v. Babcock* is the leading case that subscribes to this minority view.[51] In *Babcock*, the California Supreme Court ruled that a forfeiture-for-competition clause that deprived departing partners of all withdrawal benefits other than return of their capital contributions was enforceable.[52] The court reasoned that an agreement among law partners imposing a reasonable cost on departing partners who compete with the firm was neither inconsistent with the California Rules of Professional Conduct nor contrary to public policy.[53] According to the California court, such agreements merely attach "an economic consequence to a departing partner's unrestricted choice to pursue a particular kind of practice."[54] While the court recognized the other jurisdictions' concern for the protection of client choice, it presented its own opinion:

> 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.[55]

Furthermore, the court expressed doubt as to whether a reasonable forfeiture-for-competition agreement would discourage departing partners from continuing to represent firm clients.[56] It indicated that fee-payment agreements are permitted as long as they are "in an amount that at the time of the agreement is reasonably calculated to compensate the firm for losses that may be caused by the withdrawing partner's competition with the firm."[57] In an attempt to "achieve a balance between the interest of clients in having the attorney of choice, and the interest of law firms in a stable business environment," the court held forfeiture-for-competition agreements were not per se illegal but rather were to be evaluated for

[50] Howard v. Babcock, 863 P.2d 150, 157–58 (Cal. 1993).
[51] *Id*.
[52] *Id*. at 151, 161.
[53] *Id*. at 156–57, 160.
[54] *Id*. at 156.
[55] *Id*. at 158.
[56] *Id*. at 159.
[57] *Id*. at 160.

reasonableness just like non-competition clauses used in other professions.[58]

III. Texas Development of Non-Competition Agreements Among Lawyers

Texas traditionally has had a very client-oriented outlook on non-competition clauses between attorneys and law firms.[59] From the very beginning, Texas approached these clauses stringently, holding clauses containing what the courts perceived as even the most indirect effect on clients unenforceable as a matter of public policy.[60]

The Texas Professional Ethics Committee first took up the issue of attorney non-competition agreements in Texas in a 1988 memorandum opinion.[61] The Texas Commission on Professional Ethics is a committee created by the Texas Supreme Court pursuant to sections81.091 through 81.095 of the State Bar Act as set forth in Texas Government Code.[62] Like the Texas Disciplinary Rules of Professional Conduct (TDRPC), the Committee's opinions are nonbinding in nature but are considered persuasive authority on ethics issues.[63] Ethics Opinion 459 addresses whether it is proper for a firm to have a contract with an associate providing that, upon termination, the associate could not provide legal services to any of the firm's clients unless he paid the firm a sum equal to the fee the firm would have received had the work been done by the associate while under the firm's employ.[64] The opinion analyzed the agreement in question under DR 2-108(A), the predecessor to TDRPC 5.06.[65] In its discussion of such agreements, the Committee stated:

> First, [non-competition agreements] are clear violations of the explicit prohibition against attorneys entering into an

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[58] *Id*. at 160–61.

[59] *See infra* notes 66, 68, 69–89 and accompanying text.

[60] *See infra* notes 68, 69–89 and accompanying text.

[61] Op. 459, *supra* note 15, at 1140.

[62] Texas Legal Ethics, (1998), http://www.law.cornell.edu/ethics/tx/narr/TX_NARR_0.HTM #0.2:220.

[63] *See* Whiteside v. Griffis & Griffis, P.C., 902 S.W.2d 739, 743 n.6 (Tex. App.—Austin 1995, writ denied).

[64] Op. 459, *supra* note 15, at 1140.

[65] Op. 459, *supra* note 15, at 1140; *see also* CHARLES F. HERRING, JR., TEXAS: LEGAL MALPRACTICE & LAWYER DISCIPLINE § 4.57.2 (4th ed. 2004).

> agreement restricting the right of an attorney to practice law, which recognizes no exceptions for limitations of geography or time. Secondly, they violate a basic tenet of the professional responsibility of all lawyers that every person have ready access to the independent professional services of a lawyer of integrity and competence.[66]

The Committee further analyzed the agreement under DR 2-107(A) (since replaced by TDRPC 1.04(f)).[67] TDRPC 1.04(f) provides that attorneys who are either partners or associates may not divide fees unless the client consents to the employment of the other lawyer after a full disclosure that a division of the fees will be made, and the division is made in proportion to the services performed and the responsibility assumed or the lawyer's total fee constitutes reasonable compensation for the legal services rendered.[68] The opinion clearly indicates the Committee's view that contractual provisions requiring attorneys to pay a percentage of the fees earned in the future from clients previously receiving services from the firm are unenforceable.[69]

In 1992, *Law Offices of Windle Turley v. Giunta*, an unpublished memorandum opinion, discussed the issue of non-competition clauses among attorneys.[70] In *Turley*, an attorney and a legal assistant employed by a Texas professional corporation (PC) signed a contract with the PC providing that the employee could not enter into any professional relationship involving the practice of law with any of the PC's former employees for two years after the employee departed from the firm.[71] The attorney and the legal assistant subsequently left the PC to join another law firm.[72] The court analyzed the agreement under TDRPC 5.06's predecessor, DR 2-108(A).[73] It recognized that the rule prohibits attorneys from entering agreements that restrict the right of an attorney to practice

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66 Op. 459, *supra* note 15, at 1140.

67 Op. 459, *supra* note 15, at 1140.

68 TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(f), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

69 *See supra* note 66 and accompanying text.

70 No. 05-91-00776-CV, 1992 WL 57464 at *2–4 (Tex. App.—Dallas March 23, 1992, writ denied) (not designated for publication).

71 *Id*. at *1.

72 *Id*. at *1.

73 *Id*. at *2–3.

law after the termination of an employment relationship.[74] As such, the court held that the agreement was void as a violation of public policy.[75]

The first published Texas case to address restrictive covenants between law firms and lawyers was *Whiteside v. Griffis & Griffis, P.C.*[76] This case involved an indirect restriction on competition.[77] In *Whiteside*, a lawyer and shareholder of a firm signed an agreement with his firm requiring shareholders to automatically sell their stock back to the law firm at book value upon death, disability, or withdrawal from the firm.[78] The agreement further provided that if a shareholder left the firm and did not subsequently compete with the corporation within 300 miles during the next five years, then the base price would increase to reflect a goodwill factor.[79] Plainly stated, if the shareholder competed within 300 miles, he would receive less withdrawal benefits than if he did not compete.[80] Immediately after his withdrawal, the attorney began practicing law within the designated 300-mile radius.[81] Over three years after his withdrawal from the firm, the departing attorney alleged that he was entitled to goodwill compensation of more than $112,000.[82] Refusing the law firm's offer to pay him the book value of his shares plus accumulated interest, the attorney filed suit against the firm, asserting, among other things, that the non-competition provision was an unreasonably restrictive condition as to time and distance.[83] The court commented that the provision indirectly imposed a restriction on the right to practice law in that it provided a financial disincentive to compete by linking payment of a goodwill factor to geographic and time limitations.[84] The court limited its inquiry to determining whether a provision creating an indirect restriction by posing a financial disincentive to practicing law violates DR 2-108 (now 5.06), making it void as against public policy.[85] The court recognized that although the disciplinary rules

[74] *Id*. at *2.
[75] *Id*. at *4.
[76] 902 S.W.2d 739, 743 (Tex. App.—Austin 1995, writ denied).
[77] *Id*. at 743.
[78] *Id*. at 741.
[79] *Id*.
[80] *See id*.
[81] *Id*.
[82] *Id*.
[83] *Id*. at 741–42.
[84] *Id*. at 743.
[85] *Id*.

are not binding on courts, they are highly persuasive and should be given the utmost consideration.[86]

Furthermore, the court noted that the majority of other jurisdictions held this type of restrictive covenant unenforceable.[87] The court was unwilling to follow the minority position in favor of these agreements because to do so would "abandon the concept of client choice that . . . remains the premise underlying [TDRPC 5.06]."[88] While an indirect financial disincentive against competition or a reasonable covenant not to compete may be viable in a commercial setting, the court believed that the "strong public-policy concerns surrounding client choice warrant prohibition of lawyer restrictions."[89] Thus, the court held that the agreement was void because it restricted the practice of law contrary to public policy.

IV. *NOTEBOOM*: A DRAMATIC DEVIATION FROM TEXAS' STAND AGAINST NON-COMPETITION CLAUSES AMONG LAWYERS

In 2005, Texas law took a dramatic turn with the Fort Worth Court of Appeals' decision in *Gray v. Noteboom*, becoming much more firm-friendly.[90] In *Noteboom*, the members of a two-person law firm entered into a partnership agreement providing that a withdrawing partner must pay part of the fees he earned from personal injury cases he took with him from the firm.[91] After one of the partners withdrew, a dispute arose over the distribution of the firm's assets.[92] The dispute was taken to arbitration where the arbitration panel awarded a percentage of the fees to be earned by the withdrawing partner (as well as certain amounts the court perceived to be expenses associated with the cases) to the other partner.[93] The withdrawing partner then brought suit claiming, among other things, that the partnership agreement was unenforceable because it violated Ethics Opinion 459 and TDRPC 5.06.[94]

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[86] *Id*. at 743 n.6 (citing State v. Baker, 539 S.W.2d 367, 372 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.)).

[87] *Id*. at 743–44.

[88] *Id*. at 744.

[89] *Id*.

[90] *See generally* 159 S.W.3d 750 (Tex. App.—Fort Worth 2005, pet. denied).

[91] *Id*. at 751.

[92] *Id*.

[93] *Id*.

[94] *Id*. at 752.

Ethics Opinion 459 holds that it is not proper for a law firm to have an employment agreement or partnership agreement which provides that upon leaving the firm, the associate or the partner would be required to pay to his former law firm a percentage of fees thereafter earned from clients brought from his former law firm.[95] The Fort Worth Court of Appeals recognized that the partnership agreement clearly violated the ethics opinion, yet nonetheless held that the agreement was enforceable.[96] The court stated that it would not allow the withdrawing partner to use the ethics opinion or the TDRPC as a "procedural weapon."[97] It criticized the ethics opinion, claiming that the Ethics Committee failed to take into account that the cost of preparing litigation involves "not only the efforts by the lawyer handling the case but also the efforts of the firm's legal staff or outside counsel, investigative staff, clerical staff, and the time and expense of expert witnesses in some cases."[98] The court claimed that in an effort to be fair to the withdrawing attorney, the Ethics Committee was not mindful of the rights of the firm.[99]

A. Analysis of Noteboom

The *Noteboom* decision is surprising not only because it goes against the majority of other states, Ethics Opinion 459, and Texas jurisprudence regarding these restrictive covenants, but also because it does not address the principal policy reason against enforcing these agreements: to protect clients' ability to choose their attorney.[100] The purpose behind TDRPC 5.06 and Ethics Opinion 459 is to protect clients' ability to retain independent and competent counsel.[101] The *Noteboom* court glosses over the interests of clients, claiming clients are not affected by the enforcement of the agreement.[102] Moreover, the court only mentioned the clients' interests in

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[95] Op. 459, *supra* note 15, at 1140.

[96] *Noteboom*, 159 S.W.3d at 752–53.

[97] *Id*. (quoting TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 15).

[98] *Id*. at 752.

[99] *Id*.

[100] *See* Whiteside v. Griffis & Griffis, P.C., 902 S.W.2d 739, 743–44 (Tex. App.—Austin 1995, writ denied); *see also* Dwyer v. Jung, 336 A.2d 498, 500 (N.J. Super. Ct. Ch. Div. 1975); *see generally Noteboom*, 159 S.W.3d 750.

[101] *Whiteside*, 902 S.W.2d at 744 (citing Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598, 601 (Iowa 1990)); Op. 459, *supra* note 15, at 1140.

[102] *Noteboom*, 159 S.W.3d at 751.

response to the plaintiff's claim that the award was in error because the clients did not agree to arbitration.[103] The court never discussed clients' rights with regard to the fee-forfeiture agreement.[104] It never addressed the withdrawing partner's disincentive to represent the firm's former clients when doing so would require him to pay a percentage of the fee earned to the firm.[105] This disincentive is the reason why the Texas Professional Ethics Committee and the majority of other states faced with this issue have held such agreements unenforceable.[106]

In Ethics Opinion 459, the Ethics Committee considered a provision requiring departing attorneys to pay the firm a percentage of fees made from clients taken from the firm and determined that this provision was unenforceable because it served as a disincentive to attorneys to represent former clients.[107] The attorney would be inclined to turn down employment because of his agreement to take less profit and the client would be deprived of being represented by the attorney of his choice.[108] *Whiteside* likewise considered a financial disincentive to the attorney a restraint on clients' choice in representation.[109]

Instead of focusing on the balance between preserving the clients rights and protecting firms against attorneys leaving with firm clients, the *Noteboom* court focused on the withdrawing attorney's rights versus the firms' rights, criticizing the ethics opinion for granting too much deference to the withdrawing attorney.[110] While the opinion admittedly expresses concern for the withdrawing attorney, it follows up that concern with an expression of concern for clients' choice in representation.[111] Furthermore, historically, public policy has been centered around the effect on clients, and whatever benefit protecting clients' rights had on attorneys was merely incidental.[112] While there are certainly valid arguments in favor of choosing the interests of the law firm over the client, the court did not

[103] *Id*. at 751–52.
[104] *See id*.
[105] *See generally Noteboom*, 159 S.W.3d 750.
[106] *See Whiteside*, 902 S.W.2d at 743–44; Op. 459, *supra* note 15, at 1140.
[107] Op. 459, *supra* note 15, at 1140.
[108] Op. 459, *supra* note 15, at 1140.
[109] *Whiteside*, 902 S.W.2d at 744.
[110] *Noteboom*, 159 S.W.3d at 752.
[111] Op. 459, *supra* note 15, at 1140.
[112] *See* Dwyer v. Jung, 336 A.2d 498, 500 (N.J. Super. Ct. Ch. Div. 1975).

undertake to explain its balancing in favor of law firms.[113] The court may have intentionally chosen not to discuss the policy granting deference to clients' choice in representation over law firms and shifted the attention to attorneys' rights, which obviously is the easier argument to attack; or it may have simply determined that clients were not affected by the agreement, and thus it did not deem discussion of client choice necessary. Regardless of the court's reasoning, the effect remains the same: this type of indirect restrictive covenant is enforceable under *Noteboom*. Courts will simply have less analysis to draw from when faced with deciding how far *Noteboom* should extend with regard to other restrictive agreements.

B. Can Noteboom *Be Reconciled with* Whiteside*?*

A very important question *Noteboom* raises is whether the type of restrictive covenant in *Whiteside* would be enforceable under *Noteboom*. Are these cases distinguishable, or are *Noteboom* and *Whiteside* irreconcilable?

The restrictive covenant that the court in *Whiteside* held unenforceable provided that a shareholder would receive a reduced equity interest upon withdrawal from the firm if he competed with the firm within a 300-mile radius.[114] The provision that the *Noteboom* court held enforceable provided that an attorney who took clients with him upon leaving the firm would have to pay a percentage of the fees earned from that client to the firm.[115] Both provisions indirectly affect clients' ability to choose their attorney by decreasing the attorney's incentive to represent them. The *Whiteside* provision is arguably more indirect than *Noteboom*. The *Noteboom* agreement involved former clients of the firm, whereas the *Whiteside* agreement extended to potential clients within a designated area.[116] Since the *Noteboom* provision affects actual clients in addition to potential clients, the *Noteboom* agreement can be said to have a more direct effect on clients.[117] Furthermore, the *Whiteside* agreement only reduced the departing attorney's retirement benefits whereas the agreement in

[113] *See Noteboom*, 159 S.W.3d at 752–53.

[114] *Whiteside*, 902 S.W.2d at 741.

[115] *Noteboom*, 159 S.W.3d at 752–53.

[116] *Noteboom*, 159 S.W.3d at 752; *Whiteside*, 902 S.W.2d at 741.

[117] Of course, the magnitude of the effect of the *Whiteside* decision is much greater given that it affects all potential clients in a certain proximity whereas *Noteboom* only affects current clients.

Noteboom reduced fees the attorney generated after he departed from the firm.[118]

The *Whiteside* court considered a decrease in goodwill an impermissible disincentive to attorneys in their decision to represent clients.[119] The failure to increase the base price of the stock to include goodwill is a mere reduction in the corporation or partnership interest to which the attorney is entitled upon withdrawal. *Noteboom*, on the other hand, concerns an actual fee to be paid by the attorney to the firm.[120] This is not a mere reduction in what the firm owes the attorney; this is the attorney affirmatively taking action to pay fees generated after departure out of his pocket to the firm. Because the *Noteboom* court ruled in favor of enforcing a clause that had a more direct impact on clients, the court's decision seems irreconcilable with *Whiteside*.[121]

The issue of indirect restrictions on attorneys is ripe for review by the Texas Supreme Court as there is clearly a conflict in the Texas courts of appeals.[122] The evil that *Whiteside* addressed was the indirect effect the agreement had on clients by discouraging attorneys from representing potential clients.[123] The *Noteboom* court failed to adequately address the effect on clients, but the issue is nevertheless raised by the agreement the court held enforceable.[124] As an issue of first impression for the Texas Supreme Court, the court will have to first decide whether the policy against limiting clients' choice of attorneys is a valid objective and if so, whether even an indirect effect on clients' choice is worthy of protection.

C. Policy Issues for the Texas Supreme Court to Consider

The deference the legal profession gives to clients over the interests of attorneys is the essence of the policy against restrictive covenants placed on attorneys. Although the majority rule views even indirect effects on clients

[118] *Noteboom*, 159 S.W.3d at 752; *Whiteside*, 902 S.W.2d at 741.

[119] *See Whiteside*, 902 S.W.2d at 744.

[120] *Noteboom*, 159 S.W.3d at 752.

[121] *See id*. at 752–53.

[122] TEX. GOV'T CODE ANN. § 22.001(a)(2) (Vernon 2004) ("The supreme court has appellate jurisdiction . . . [to hear] a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision . . . .").

[123] *Whiteside*, 902 S.W.2d at 744.

[124] *Noteboom*, 159 S.W.3d at 752.

as intolerable, there are a number of practical arguments in favor of enforcing forfeiture-for-competition and fee-payment clauses. Many commentators question why attorneys receive special treatment when it comes to non-competition agreements.[125] Limiting competition among attorneys may affect clients, but so does limiting competition in other professions where non-competition agreements are permitted.[126] What makes attorneys different from doctors or accountants? Attorneys, doctors, and accountants all provide very personal services to clients, and in all three professions, the professional is involved in some type of fiduciary relationship with clients; yet courts have concluded that covenants not to compete between doctors or accountants are not unduly injurious to the public as long as they meet a reasonableness test.[127] Surely a reasonable restriction on attorneys could be fashioned. For instance, an agreement providing that the departing attorney pay the firm an amount sufficient to reimburse the firm for expenses incurred by the attorney's clients prior to the departure of the attorney and clients would certainly be considered a reasonable restraint on the attorney.[128]

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[125] *See* HILLMAN, *supra* note 1, §2.3.3, at 29 (1990); Henry K. Snyder, Note, *Upholding Forfeiture for Competition and Noncompete Provisions in Law Firm Partnership Agreements: Changing the Focus from the Client's Interests to the Clients' Interests*, 28 CONN. L. REV. 1259, 1278 (1996); *see also* Kevin T. Caiaccio, Comment, Howard v. Babcock, *The Business of Law Versus the Ethics of Lawyers: Are Noncompetition Covenants Among Law Partners Against Public Policy?*, 28 GA. L. REV. 807, 808–09 (1994).

[126] Draper, *supra* note 6, at 172.

[127] *Id*.

[128] Some cases suggest that law firms have an interest in their pending law suits, and that when a client operating under a contingency fee arrangement is taken away from a firm, the firm should be compensated by quantum meruit for reasonable fees incurred. Hoover Slovacek, L.L.P. v. Walton, 49 Tex. Sup. Ct. J. 895, 897 (2006) (observing if a client discharges an attorney with good cause under a contingent fee contract, the attorney may recover reasonable fees for services rendered until the point of discharge in quantum meruit; but if the client discharges the attorney without good cause, the attorney may collect his entire fee from the client's eventual recovery); Law Offices of Windle Turley, P.C. v. Ghiasinejad, 109 S.W.3d 68, 70–71 (Tex. App.—Fort Worth 2003, no pet.) (recognizing that where a contingent fee contract assigns an interest in a case or recovery, a justiciable interest in the suit is created); *see also* La Mantia v. Durst, 561 A.2d 275, 276 (N.J. Super. Ct. App. Div. 1989) (splitting a contingency fee between the firm left behind and the departing attorney based on a theory of quantum meruit, where the departing attorney took a client with him when he left the firm and later won a verdict on the client's case); Kopelman & Assocs., L.C. v. Collins, 473 S.E.2d 910, 913, 918–21 (W. Va. 1996) (splitting contingency fees between the old firm where the clients were initially retained and a new firm created by of a small group of attorneys leaving the old firm and taking clients with them).

Even assuming the relationship between clients and attorneys warrants special treatment, the needs of the law firm should also be considered. Firms suffer when attorneys leave, taking along clients whose cases the attorney was working on before leaving. As the *Noteboom* court recognized, the cost of preparing litigation involves "the efforts of the firm's legal staff or outside counsel, investigative staff, clerical staff, and the time and expense of expert witnesses in some cases."[129] Although the practice of law was traditionally viewed as a profession rather than a business, law firms are increasingly recognized as having practical needs just like any other business operating to make a profit.[130] They deserve protection to keep their workers, whether partners or associates, from using firm resources to win a case and then departing from the firm just in time to take all the winnings and leave the firm holding the bag.

The Texas Supreme Court has some very important policies to question and to balance, should it choose to address this issue. Until then, Texas law firms will have both *Whiteside* and *Noteboom* to deal with.

V. THE FUTURE OF "THE MIGRATING ATTORNEY" IN TEXAS; DEALING WITH *WHITESIDE* AND *NOTEBOOM*

Assuming the Texas Supreme Court does not step in to clear up the law concerning restrictive covenants among attorneys in the near future, what effect will *Noteboom* have on these restrictive covenants? There is clearly no longer a per se ban on restrictive covenants between law firms and attorneys, but is *Noteboom* limited to situations where the agreement concerns contingency fees for cases already in progress when the partner withdrew? This is a difficult question to answer because we do not know for certain the court's justification for placing the interests of law firms before clients. Certainly, courts would not go so far as to hold permissible direct non-competition agreements (agreements providing that should a departing attorney compete with a firm, the firm can sue to enforce the agreement and enjoin the attorney from competing). Additionally, it is unlikely that a Texas court would uphold an agreement penalizing an attorney for representing former clients or otherwise competing with the firm by requiring him to pay a fine to the firm. This type of restriction unequivocally affects clients. However, restrictions providing more

[129] *Noteboom*, 159 S.W.3d at 752.
[130] Snyder, *supra* note 125, at 1259.

indirect financial disincentives to departing attorneys to represent clients, such as contingent fee-splitting provisions, are less certain. Again, for these situations, law firms will have both *Whiteside* and *Noteboom* to consider.

A. Fee Forfeiture Agreements

1. Former Clients

The *Noteboom* decision addressed a situation where the agreement in question provided that a withdrawing partner must pay a percentage of the fees earned on a contingency fee basis from former clients of the firm.[131] What if the withdrawing attorney took a client with him, but the firm had been billing the client based on hours worked instead of using a contingency fee arrangement? Would Texas courts hold an agreement requiring the departing attorney to pay the firm a percentage of fees earned from former clients enforceable in this circumstance? It should be noted that the scope of the *Whiteside* agreement extended beyond the firm's clients, thus, where the agreement in question strictly concerns former clients, courts may look to *Noteboom* as the more persuasive precedent.[132] However, *Noteboom*'s justification for enforcing the agreement is inapplicable in this situation. The *Noteboom* court's concern was that the firm had spent its resources on the client without seeing any return.[133] This only happens when the fees are earned on a contingency basis. When the firm is billing the client as it spends its resources, this problem is avoided. Thus, *Noteboom*'s justification for enforcing the agreement would be inapplicable where the fees are computed on an hourly basis.

Additionally, because there is no Texas law directly on point, courts would likely look to other jurisdictions. In *Denburg v. Parker Chappin Flattau & Klimpl*, the New York Court of Appeals held a similar agreement unenforceable.[134] The agreement in *Denburg* required a departing partner to pay the greater of two amounts, one computed on the basis of the attorney's billings to former clients of the firm and the other computed on the basis of profit allocation.[135] The court held the agreement

[131] *Noteboom*, 159 S.W.3d at 752.

[132] *See* Whiteside v. Griffis & Griffis, P.C., 902 S.W.2d. 739, 741 (Tex. App.—Austin 1995, writ denied).

[133] *See Noteboom*, 159 S.W.3d at 752.

[134] 624 N.E.2d 995, 1001–02 (N.Y. 1993).

[135] *Id*. at 997.

unenforceable, as it "improperly deter[red] competition and thus impinge[d] upon clients' choice of counsel."[136] Similarly, in *Minge v. Weeks*, a Louisiana court of appeals held void, as against public policy, an agreement between a departing attorney and his former law firm that required the attorney to pay the law firm eighty percent of his net attorney fees generated for soliciting or accepting employment from law firm clients.[137] In *In re Silverberg*, a New York appellate court held void, as against public policy, a termination agreement that required one partner to return to the other partner eighty percent of the gross fees received by the first partner for representing former clients of the partnership within eighteen months following termination.[138]

Furthermore, according to the Texas Professional Ethics Committee:

> [I]t is not proper for a firm and a partner or associate thereof to enter into an agreement that categorizes clients and their related files as property of the firm which could give rise to a claim for damages for the purpose of inhibiting a former employee or partner in accepting employment from any such client.[139]

The Committee quotes the American Bar Association, claiming "[c]lients are not merchandise. Lawyers are not tradesmen. . . . An attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status."[140] While the *Noteboom* court made it clear that courts are not bound by the ethics opinions,[141] the strong policy reasons against enforcing this type of agreement and the lack of justification for enforcing it in this situation indicate that courts will likely declare unenforceable any agreement requiring the departing attorney to pay the firm when the firm has been collecting for services as they are rendered.

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[136] *Id*. at 999.

[137] 629 So. 2d 545, 546–47 (La. Ct. App. 1993).

[138] 427 N.Y.S.2d 480, 481–82 (App. Div. 1980).

[139] Op. 459, *supra* note 15, at 1140.

[140] *Id*. (quoting ABA Comms. on Prof'l Ethics Formal Op. 300 (1961)).

[141] *See* Gray v. Noteboom, 159 S.W.3d 750, 752–53 (Tex. App.—Fort Worth 2005, pet. denied).

2. New Clients

Noteboom's application is not likely to extend to situations involving new clients. The justification in *Noteboom* for enforcing the agreement, protecting the firm from a situation where its resources are spent on a client without seeing any of the return later realized,[142] is also less applicable where the agreement concerns new clients because the firm has not expended any of its resources on these clients. Granted, there may be situations where a firm has expended resources to develop client relations that come to fruition later, but the line must be drawn somewhere and such claims are far too speculative to merit consideration. While the firm has an interest in stifling its competition, it does not suffer the direct harm it would otherwise suffer if the withdrawing attorney took the firm's clients with him. This situation is more similar to the agreement held unenforceable in *Whiteside*. The *Whiteside* agreement penalized the departing partner for taking clients, presumably both former clients and new clients, found within a 300-mile radius of the firm.[143] The *Whiteside* court held this provision was an impermissible, albeit indirect, financial disincentive against competition.[144]

Additionally, the majority of other jurisdictions presented with agreements concerning new clients have held these agreements unenforceable.[145] In *Anderson*, an Iowa court held an agreement conditioning payment of a departing partner's interest in the firm on the partner's refraining from acts such as competing against the firm violated DR 2-108.[146] In *Cohen*, a New York court held a provision of a partnership agreement conditioning payment of uncollected partnership revenues on a withdrawing partner's non-competition was a violation of DR 2-108.[147] Again, in *Judge*, the court held a termination agreement requiring forfeiture of seventy-five percent of future benefits for competing within a thirty-mile

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[142] *Id*. at 752.

[143] Whiteside v. Griffis & Griffis, P.C., 902 S.W.2d 739, 741 (Tex. App.—Austin 1995, writ denied).

[144] *Id*. at 744.

[145] *See* Kelly v. Smith, 611 N.E.2d 118, 122 (Ind. 1993); Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598, 601–02 (Iowa 1990); Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 413 (N.Y. 1989); Judge v. Bartlett, Pontiff, Stewart & Rhodes, P.C., 610 N.Y.S.2d 412, 414 (App. Div. 1994); Gray v. Martin, 663 P.2d 1285, 1290 (Or. Ct. App. 1983).

[146] *Anderson*, 461 N.W.2d at 601–02.

[147] *Cohen*, 550 N.E.2d at 413.

radius void as against DR 2-108.[148] Finally, the court in *Martin* held that an agreement requiring a departing attorney to forfeit a share of firm profits for practicing within a three-county area violated DR 2-108.[149]

B. Application to Associates

The published Texas decisions thus far have all involved agreements pertaining to the owners of the firm, whether they were shareholders or partners.[150] Whether the principles involved in these decisions extend to associates is uncertain.

Although neither constitutes binding authority, at least two sources indicate the policy against allowing partners to enter restrictive covenants that extends to associates.[151] *Law Offices of Windle Turley v. Giunta*, an unpublished opinion, dealt with an attorney and a legal assistant employed by a Texas professional corporation.[152] The court held an agreement restricting the two from competing with the firm was unenforceable.[153] The court reasoned that "[a]n agreement restricting the rights of partners or associates to practice law after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer."[154] Additionally, Ethics Opinion 459 addressed both partners and associates.[155] The question posed to the Committee asked specifically whether it is proper for a firm to have an employment contract with an associate lawyer providing that should the associate provide legal services to any clients of his former firm following termination of his employment, he must pay to the former employer a sum equal to the same percentage of such fee as the former employer would have received if said work had been done during the associate's employ.[156] The Committee responded that it is

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148 *Judge*, 610 N.Y.S.2d at 414.

149 *Martin*, 663 P.2d at 1290.

150 *See generally* Gray v. Noteboom, 159 S.W.3d 750 (Tex. App.—Fort Worth 2005, no pet. h.); Whiteside v. Griffis & Griffis, P.C., 902 S.W.2d 739 (Tex. App.—Austin 1995, pet. denied).

151 *See* Law Offices of Windle Turley v. Giunta, No. 05-91-00776-CV, 1992 WL 57464, at *3 (Tex. App.—Dallas March 23, 1992, writ denied) (not designated for publication); Op. 459, *supra* note 15, at 1140.

152 *Giunta*, 1992 WL 57464, at *1.

153 *Id*. at *3–4.

154 *Id*. at *3 (citing ABA Comms. On Ethics and Prof'l Responsibility Informal Op. 1417 (1978)).

155 Op. 459, *supra* note 15, at 1140.

156 *Id.*

not proper for a firm to have this sort of agreement with an associate and it is not proper for a firm to have similar provisions in its partnership agreement.[157]

Neither *Whiteside* nor *Noteboom* involved associates, but the rationale behind these courts' decisions extends to associates. In its decision not to enforce the non-competition agreement, the *Whiteside* court was concerned with restrictions on client choice in representation.[158] Placing similar financial disincentives on associates would likewise restrict client choice because the associates would be less willing to take on these clients. Thus, *Whiteside*'s reasoning applies to associates as well as shareholders and partners.

Noteboom's justification for enforcing the partnership agreement also applies to similar agreements with associates. If a departing associate were to take with him former clients and fees were earned on a contingency basis, the firm would suffer the same effect of having spent resources on clients without receiving any return. Therefore, *Noteboom* probably also extends to similar agreements entered by associates. Thus, the analysis concerning contingency fees versus billable hours and former clients versus new clients, discussed *supra*, likely applies to associates as well.

VI. CONCLUSION

The per se ban on non-competition clauses among attorneys in Texas has been lifted. However, law firms should not be content with this mild victory, for they have far from won the war. While *Noteboom* opens the door for these clauses, it only paves a narrow path for an extension of its endorsement. Because *Noteboom* sharply conflicts with *Whiteside*, the enforceability of a non-competition clause resulting in indirect effects on clients is ripe for review by the Texas Supreme Court.

Should the Texas Supreme Court take up this issue, it will have to balance the policy of deference to clients with the need to protect firms. No court has effectively explained the reason why lawyers' clients deserve greater deference than the clients of other professionals in fields permitting non-competition clauses. However, assuming this is true, the court will have to balance this policy with the undeniably detrimental effect on the

[157] *Id.*

[158] Whiteside v. Griffis & Griffis, P.C., 903 S.W.2d 739, 744 (Tex. App.—Austin 1995, writ denied).

firm to determine if a per se rule is preferable. Until the Texas Supreme Court opts to rule on this issue, law firms will have both *Whiteside* and *Noteboom* to deal with. *Noteboom* speaks only to former clients while *Whiteside* also speaks to potential clients within a designated geographical area.

Noteboom's application will likely be restricted to agreements providing the payment of some fee to the firm based on clients charged on a contingency basis. However, even a narrow exception to the general per se ban on these agreements will likely have a noticeably beneficial effect on law firms. Furthermore, these agreements should not affect clients' choice in representation because agreements written to provide fair compensation to a firm that expended its resources on a client are not likely to act as a disincentive to attorneys from representing clients; they merely ensure that the departing attorney does not receive a windfall. Thanks to *Noteboom*, Texas law firms are currently in a much better position than they were pre-*Noteboom* at arguably no expense to clients.