Lawyer Mobility and Trade Secrets Protection: Restrictive Covenant, Confidentiality, and Non-Disclosure Considerations in the Legal Profession

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I. Introduction

Attorneys leaving their law firms or companies for other opportunities is nothing new. And, certainly, changing from one employer to another is not unique to the legal industry. As in many other industries, employees switching jobs among competitors can raise serious concerns about the misappropriation of trade secrets and confidential information, and client poaching. Yet, unlike most other industries, restrictive covenants limiting attorneys from competing with their former firms or companies, or taking clients with them, are generally unenforceable. In fact, most successful firm lawyers are recruited to other firms for the very reason that they have "portable" business.

This does not, however, mean that attorneys have free range to take and utilize confidential information and trade secrets about their prior firms or clients who choose not to go with them. Quite to the contrary, there are ethical rules barring such behavior. Nevertheless, the inability of companies and law firms to impose restrictive covenants on lawyers employed by the companies and firms poses practical challenges. Indeed, in-house counsel, who often act as much as business advisors as they do legal counsel, may be privy to the most sensitive business information of a corporation when they leave to join a competitor, yet they, too, are generally immune from restrictive covenants that restrict their ability to practice law, even for a competitor. The question, then, is what can law firms and companies do to protect themselves—like any other industry—from attorneys who leave to join a competitor?

II. Why Is This Important?

A spike in the number of recent cases delving into these topics has brought the issue of restrictive covenants in the legal profession into the limelight. Earlier this year, for example, Schlumberger Ltd. sued its former deputy general counsel for intellectual property, accusing her of misappropriating trade secret data shortly before exiting the company and taking an executive position at Acacia Research Group, a direct competitor.[1] The defendant allegedly copied confidential trade secret data and information onto USB hard drives and deleted them from her company-issued laptop in the days leading up to her departure.[2] That case was dismissed, however, and Schlumberger was required to pay the former in-house lawyer her attorneys' fees of $350,000, as well as sanctions against it totaling $250,000.[3]

In another a widely publicized case, the former head of Weitz & Luxenberg PC's Los Angeles office sued his former firm, accusing it of maintaining a massive database of confidential client files that it had pilfered from one of its leading competitors, including clients' medical and tax information, confidential settlement agreements, evidence, exhibits used in asbestos cases, and legal strategies of Waters & Kraus LLP.[4] In his suit, Maher alleged Benno Ashrafi of Waters & Kraus was hired by Weitz & Luxenberg to help with asbestos and medical device claims and brought with him this treasure trove of data on an external hard drive.[5]

Likewise, the expansion of cloud computing creates additional pitfalls in this arena. A former partner of Elliott Greenleaf & Siedzikowski, for instance, allegedly installed software on

[1] Brian Mahoney, *Schlumberger Says Top IP Lawyer Stole Trade Secrets*, LAW360, Mar. 17, 2014, http://www.law360.com/articles/518908/schlumberger-says-top-ip-lawyer-stole-trade-secrets-.

[2] *Id.*

[3] Scott McLaughlin and Crystal Parker, *Schlumberger Is Not A New Normal In Trade Secret Cases*, LAW360, Oct. 7, 2014, http://www.law360.com/articles/579206/schlumberger-is-not-a-new-normal-in-trade-secret-cases.

[4] Dionne Searcey, *Weitz Firm Got Rival's Database, Suit Says*, THE WALL STREET JOURNAL ONLINE, Mar. 23, 2012, http://online.wsj.com/articles/SB10001424052702304636404577300043762412610.

[5] *Id.*

Elliott Greenleaf's computers that gave him unfettered access to the firm's files through cloud computing.[6] The suit alleged that the Dropbox spy software he installed stole more than 78,000 files and transmitted them to a cloud from which he could download the documents.[7] The parties settled the suit for a confidential amount.[8]

Another firm, SNR Dentons tackled this issue when it hired the leading partner of Huron Consulting's Healthcare group.[9] Four other Huron employees followed to SNR Denton's predecessor, Sonnenschein, which Huron's complaint claimed was planning to create a non-legal consulting subsidiary.[10] In the suit, Huron sought an injunction and $30 million in damages.[11]

The irony, of course, is that attorneys are hired every day to enforce or seek to block enforcement of non-compete agreements and other post-employment restrictive covenants, yet they are not subject to such agreements themselves. Indeed, while no universal black letter law defines what lawyers can and cannot do in this regard, courts and bar associations facing this issue generally apply a balancing test to ensure that a lawyer's conduct comports with the rules of professional conduct, that client interests are protected, and that there is promotion of fair and open opportunities for lawyer competition. These considerations apply whether the putative restriction applies to in-house or outside counsel. Nevertheless, the overwhelming weight of authority appears to be that attorneys—in-house or outside counsel—are not subject to post-employment restrictive covenants other than under the most exceptional circumstances.

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[6] Dan Packel, *Elliott Greenleaf, Stevens & Lee Settle Hacking Suit*, LAW360, Aug. 17, 2012, http://www.law360.com/articles/370760/elliott-greenleaf-stevens-lee-settle-hacking-suit.

[7] *Id.*

[8] *Id.*

[9] Nate Raymond, *SNR Denton Wins Bid to Revive Counterclaims Against Huron*, THE AMLAW DAILY, Feb. 17, 2012, http://amlawdaily.typepad.com/amlawdaily/2012/02/huron.html.

[10] *Id.*

[11] *Id.*

III. When Ethical Rules Collide: Model Rule 1.6 Confidentiality of Information and Model Rule 5.6 Restrictions on Right to Practice.

The American Bar Association's (ABA) Model Rules of Professional Conduct (MRPC), which have effectively been adopted in one form or another by every state, provide guidance to lawyers on how to govern themselves and balance the competing interests in the profession. Indeed, there may not be a more axiomatic ethical rule in the legal profession than Rule 1.6 regarding client confidentiality. That rule, uniformly adopted in one form or another in every state, follows the Model Rule:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> > (1) to prevent reasonably certain death or substantial bodily harm;
> >
> > (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> >
> > (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
> >
> > (4) to secure legal advice about the lawyer's compliance with these Rules;
> >
> > (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
> >
> > (6) to comply with other law or a court order; or
> >
> > (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership

> of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
>
> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

The purpose of Rule 1.6 is to define the scope of a lawyer's obligations to preserve the confidentiality of client information. This duty, which encompasses, but is broader than the attorney-client privilege, "contributes to the trust that is the hallmark of the client-lawyer relationship."[12]

Juxtaposed against Rule 1.6 is Model Rule 5.6. Most jurisdictions have adopted and implemented Model Rule 5.6, or its counterpart Disciplinary Rule (DR) 2-108, forbidding restrictive covenants limiting lawyers. Specifically, Rule 5.6 states that 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 retirement; or (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

And Disciplinary Rule 2-108, in turn, states:

> (A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.
>
> (B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

The rationale for such a rule is straightforward: restrictive covenants in the lawyer/client relationship interfere with a client's ability freely to choose his or her attorney. The comments to Rule 5.6 further elucidate this policy decision: "An agreement restricting the right of partners or

[12] ABA Model Rule 1.6, cmt. 2.

associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer."[13] As discussed below, many state bar associations and courts are increasingly issuing opinions that weigh the ethical obligations of lawyers with overriding public policy concerns of freedom of competition and client choice.

Rules 5.6 and 2-108 may facially appear only to apply to agreements between attorneys in law firms. Language in the comments refers to rights of "partners and associates"—terms that at first glance appear inapplicable in the in-house context. In addition, the principal effect of the Rules on in-house lawyers is where they can work as opposed to who they can serve, since, unlike most outside counsel, in-house lawyers by definition have only one client. Moreover, unlike outside counsel, in-house lawyers often are not strictly legal in their corporate roles, but, rather, often occupy a hybrid position where they address legal concerns but also guide the business in a non-legal capacity. Nevertheless, despite well-reasoned arguments to the contrary, these rules barring non-competes with respect to attorneys are often applied to both in-house and outside counsel without regard to the practical differences between the two roles.

IV. Considerations of Restrictive Covenants as To In-House Counsel

The rules applicable to in-house lawyers are concomitantly more restrictive and less restrictive than rules applicable to non-lawyers with comparable levels of responsibility within an organization. For example, lawyers have a continuing duty to uphold client confidentiality, even after the termination of an attorney-client relationship. In contrast, non-lawyers, depending on the position held within the organization, often have confidentiality obligations arising solely from legal contracts with the organization or from duties of loyalty that cease to exist upon termination of the employment relationship. This creates a sensitive issue for in-house lawyers

[13] ABA Model Rule 5.6, cmt. 1.

who perform hybrid business-lawyer roles within an organization, especially when corporations impose heightened levels of confidentiality and duties on the lawyer via restrictive covenants such as non-disclosure and/or non-compete agreements.

The lawyer's broad duty of confidentiality significantly overlaps with other confidentiality obligations, such as the fiduciary duty of loyalty, covering a wide range of activities between lawyers and clients, as well as lawyers and their employers. The duty of loyalty applies to both current and former clients, and undoubtedly is intended to encourage public confidence and trust in the legal profession. As a general matter, after a relationship with a former client is severed, a lawyer may not do anything to injuriously affect the former client in any matter in which the lawyer formerly represented the client, nor may the lawyer at any time use knowledge or information acquired by virtue of the previous relationship against the former client.[14]

For an in-house lawyer, the "client" is the company or organization that employs the lawyer in a legal capacity.[15] As is the case for outside lawyers, an in-house lawyer may not undertake representation adverse to his or her former client (i.e., the former employer) in the same or substantially related matter absent the former client's consent. However, for purposes of MPRC 1.9(a), an in-house lawyer does not represent the corporate client in *all* legal matters that arise during the lawyer's employment. Consistent with the Model Rules, ABA Formal Opinion 99-415 states that in-house counsel personally represents the company for purposes of the rule *only when* the lawyer is directly involved in a matter or when the lawyer engages in a type of supervision that results in access to material information concerning a matter.[16] In-house counsel

[14] *See* MPRC 1.9.

[15] *See* MPRC 1.13(a).

[16] ABA Comm'n on Ethics and Prof'l Responsibility, Formal Opinion 99-415.

are also prohibited under MPRC 1.9(c) from using the former employer's protected information that is not generally known, as well as disclosing such information even if counsel's new employment is not adverse to the former client or the current work is not substantially related to the prior employment.

A. Non-Disclosure Agreements to Protect Confidentiality.

While it may seem unnecessary to require a lawyer to sign a confidentiality agreement given his or her ethical obligations, certain types of information fall outside of the lawyer's ethical duty of confidentiality, and some companies may want to protect certain proprietary information using a non-disclosure agreement (NDA) as the chosen vehicle. While Rule 5.6 effectively prohibits restrictions on the rights of a lawyer to practice after termination of an employment or partnership relationship, there are certain contexts where NDAs are considered appropriate and do not raise ethical concerns.

For example, the New York State Bar (NYSB) considered the propriety of conditioning an in-house lawyer's employment on the execution of a confidentiality (non-disclosure) agreement.[17] The issue was whether a not-for-profit corporation could require its in-house lawyers to enter into the same confidentiality agreement imposed on all other current or prospective employees, intended to have effect in multiple jurisdictions, with respect to the corporation's highly-sensitive research and marketing information. Notably, the confidentiality provisions were to survive employment if an in-house lawyer left the corporation. At the heart of the analysis was whether the proposed confidentiality agreement would violate Model Rules 1.6, 1.9, or 5.6, with respect to the duty of confidentiality owed and an in-house lawyer's right to practice law following employment. The NYSB concluded that companies may require in-house

[17] *See* New York State Bar Association, Committee on Professional Ethics, Opinion No. 858 (Mar. 17, 2011) (available at: http://www.nysba.org/Ethics/)

counsel to sign confidentiality agreements that might otherwise extend attorney confidentiality obligations after the employment period, to information not otherwise protected as confidential information under the Rules, provided that the agreement explicitly states, through a "savings clause" or otherwise, that the confidentiality obligations *do not restrict* the lawyer's right to practice law following employment to comport with Rule 5.6, and similarly do not expand the scope of the attorney's duty of confidentiality under the Rule 1.6. *Id.*

Indeed, there are even some circumstances in which other types of restrictive covenants, including non-solicitation agreements, may be enforceable. The Illinois State Bar Association (ISBA) considered this issue and indicated that attorney non-disclosure/non-solicitation agreements may be enforceable within certain parameters. In an advisory opinion, the ISBA addressed a situation in which an attorney was both the co-owner and general counsel of a retail collection agency, who, when he decided to sell his share in the business, was asked to enter into a 2-year agreement that would have: (a) restricted his use of the information acquired while an officer of the company; and (b) prohibited him from contacting the company's customers.[18] The ISBA found no professional impropriety by the attorney entering into the agreement because "any supposed encroachment on the attorney's practice [was] at best indirect[.]"[19]

B. Non-Compete Agreements as a Restriction on In-House Lawyers.

By comparison, Rule 5.6 is broadly interpreted and often places more stringent restrictions on the ability of companies to subject in-house counsel to non-compete agreements in the event the employment relationship is terminated, than to other, less restrictive, post-employment restrictive covenants. In 2006, New Jersey became the first state to explicitly

[18] Illinois State Bar Association, Advisory Opinion on Professional Conduct, No. 92-14, 1993 WL 836947 (January 22, 1993).

[19] *Id.* at *1.

prohibit the use of restrictive covenants for in-house counsel, opining that such restrictions were in direct violation of Rule 5.6.[20] Relying on sister states' bar opinions, as well as cases involving outside counsel, the New Jersey Advisory Commission commented that "the overwhelming majority of jurisdictions in the United States follow the ABA's approach [per Rule 5.6] and hold that restrictive covenants affecting lawyers, whether employed by corporations or private law firms, generally violate state ethical standards."[21] Those states adopted Model Rule 5.6 and Disciplinary Rule 2-108(A) and determined that such non-compete agreements were unethical as to lawyer's because they "unduly limit[ed] the freedom of clients to choose their lawyer and improperly impinge[d] upon the lawyer's professional autonomy."[22]

Likewise, ethics opinions issued in several other jurisdictions have established that in-house counsel may be required to sign non-compete agreements but such agreements are only enforceable if lawyer obtains a non-lawyer position with a competitor so that the lawyer is still free to provide legal service to a competitor in accordance with Rule 5.6.[23] Among the jurisdictions that have addressed the issue, no jurisdiction permits companies to require in-house counsel to enter into non-compete agreements that would restrict their ability to practice law, regardless of whether it is in an in-house position or otherwise.[24]

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[20] See N.J. Advisory Comm. On Prof'l Ethics, Op. 708, N.J. L.J., July 3, 2006, at 5.

[21] *Id.* at 3.

[22] *Id.*

[23] *See*, *e.g.*, Washington Bar Informal Op. No. 2100 (2005) (available at http://pro.wsba.org/io/); Connecticut Bar Association, Non-competition agreement as condition of additional compensation to attorney/employee, CT Eth. Op. 02-052002 WL 570602 (Feb. 26, 2002); Philadelphia Bar Association Ethics Opinion 96-5 (May 1996) (available at: http://www.philadelphiabar.org/page/EthicsOpinion96-5) and Ethics Opinion 2003-9 (Sept. 2003) (available at: http://www.philadelphiabar.org/page/EthicsOpinion2003-9); Washington D.C. Bar Ass'n Op. 291 (1999) (available at http://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion291.cfm).

[24] *See*, *e.g.*, N.J. Advisory Comm. On Prof'l Ethics, Op. 708, N.J. L.J., July 3, 2006, at 5 (relying on Virginia, Illinois, Connecticut, Washington and Philadelphia state bar ethics opinions, and cases involving outside counsel); *see also* Russell Beck, *Are New England's in-house counsel free to join competitors?*, NEW ENGLAND IN-HOUSE, Feb. 14, 2012, http://newenglandinhouse.com/2012/02/14/are-new-england%e2%80%99s-in-house-counsel-free-to-join-competitors/.

VI. Ethical Considerations For Restrictive Covenants As To Outside Counsel

A. Non-Disclosure Agreements For Outside Counsel.

In today's vacillating legal market (and especially with the morphing of law firms and partnerships in response to economic changes), there is perhaps an even greater need for contractual confidentiality restrictions on lawyers affiliated with law firms than there ever has been before. As previously discussed, Rule 1.6 protects the confidentiality of client communications, but certain internal law firm communications are not privileged as between a law firm and its employees. For example, there may be types of organizational "proprietary" information that law firms reasonably seek to protect from use or disclosure by former employees, such as business development plans, marketing tools, template work product, and other internal resources that are related to the practice of law but that are not client communications protected by Rule 1.6. In that sense, a nondisclosure agreement would be appropriate to protect the law firm as a business, and the imposition of confidentiality obligations on a departing lawyer, outside of client communications, would not inhibit the practice of law or consumer (client) choice, but rather, promote healthy competition and protect "branded" aspects of the individual law firm. Again, as long as the NDA does not impinge on a lawyer's ability to freely practice the law, the use of such an agreement between a law firm and a potentially departing lawyer does not appear to raise any ethical red flags.

B. Non-Compete Agreements For Outside Counsel.

The overriding policy concerns from Rule 5.6—an attorney's ability to freely practice law and the protection of client choice—apply with particular gusto to lawyers at law firms. In one landmark decision, the Illinois Supreme Court held that non-compete agreements were unenforceable as to attorneys based on Rule 5.6 of the Rules of Professional Conduct on "public

policy" grounds.[25] Specifically, the Court held that Rule 5.6 "is designed both to afford clients greater freedom in choosing counsel and to protect lawyers from onerous conditions that would unduly limit their mobility."[26]

There are very limited exceptions to Rule 5.6, however, that permit the use of restrictive covenants by law firms in certain circumstances. These exceptions include agreements providing for financial penalties upon a lawyer departing a firm, bona fide retirements, and/or the sale of a law practice (in accordance with Rule 1.17). Nevertheless, similar to the policy rationale underlying Rule 5.6, the comments to Rule 1.17 indicate that client choice should not be infringed upon in any way and "[c]lients are not commodities that can be purchased and sold at will."[27] Moreover, the "retirement" exception has been held to apply only to *bona fide* retirements—i.e., the complete withdrawal from the practice of law—and will not apply if a lawyer leaves one firm for another or different form of law practice.[28]

A minority of states hold that law firms may levy reasonable financial penalties on lawyers who leave a law firm and compete without violating Rule 5.6 of the rules of professional conduct.[29] Other courts, however, have held that unreasonable financial penalties are prohibited

[25] *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 481, 693 N.E.2d 358 (1998).

[26] *Id.*

[27] MPRC 1.17 cmt. (1).

[28] *See Miller v. Foulston, Siefkin, Powers & Eberhard*t, 790 P.2d 404 (Kan. 1990) (retirement exception properly applies in view of minimum requirements of age (60) or period of service (30 years)); *Pettingell v. Morrison, Mahoney & Miller*, 426 Mass. 253, 258, 687 N.E.2d 1237 (1997); *Hoff v. Mayer, Brown and Platt,* 331 Ill .App. 3d 732, 740, 772 N.E.2d 263, 270 (1 Dist. 2002) (holding law firm's retirement plan gave retiring partner choice between continuing to practice law and receiving retirement benefits and provision was adequately protected by Rule 5.6(a)).

[29] *See, e.g., Haight, Brown & Bonesteel v. Superior Court*, 234 Cal. App. 3d 963, 971 (1991) (holding shareholder agreement requiring departing lawyer to tender his stock to professional corporation for no compensation if he thereafter competed with corporation in the practice of law, was not prohibited by Rule 5.6 because it did "not expressly or completely prohibit the [attorneys] from engaging in the practice of law, or from representing clients"); *Howard v. Babcock*, 6 Cal. 4th 409, 425, 863 P.2d 150, 160 (1993) ("We are confident that the interest of the public in being served by diligent, loyal and competent counsel can be assured at the same time as the legitimate business interest of law firms is protected by an agreement placing a reasonable price on competition"); *Fearnow v.*

by Rule 5.6.[30] The ABA Commission on Ethics and Professional Responsibility, for its part, has issued an opinion stating that "law firm partnership agreements generally may not include provisions that require partners who leave the firm and engage in a competing practice of law to forfeit financial benefits that are otherwise payable to partners who withdraw from the firm and do not thereafter compete."[31]

C. Client Choice and Restrictive Covenants.

As a general matter, when considering restrictive covenants by and between lawyers and their respective employers, the policy consideration of consumer choice rooted in Rule 5.6 seems to be the lynchpin of the court's analysis. While the rule is written to promote a "lawyer's right to practice," the fundamental theme is to "ensure the freedom of clients to select their counsel of choice."[32] The concept of client choice would be seemingly vitiated if agreements sought to appropriate ownership of client contact information between the law firm and the lawyer. "Although [a law] firm may refer to clients of the firm as 'the firm's clients,' clients are not the 'possession' of anyone, but, to the contrary, control who will represent them."[33]

Ridenour, Swenson, Cleere & Evans, P.C., 213 Ariz. 24, 27, 138 P.3d 723, 726 (2006) (relying on reasoning in *Howard v. Babcock*).

[30] *See, e.g.*, *Minge v. Weeks*, 629 So. 2d 545 (La. Ct. App. 4th Cir. 1993) (holding that law firm could not require departing lawyer to either leave clients with firm, or else pay 80% of any fee obtained through post-termination representation); *see also* Ill. State Bar Ass'n, Ethics Op. 93-13 (March 1994) (available at: http://www.isba.org/sites/default/files/ethicsopinions/93-13.pdf) (holding employment agreement providing for execution of promissory note by attorney/employee payable only if attorney competes after terminating employment is professionally improper).

[31] *See* ABA Comm'n on Ethics and Prof'l Responsibility, Formal Op. 06-444.

[32] *See, e.g.*, *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 146 (N.J. 1992); *Eisenstein v. David G. Conlin, P.C.*, 827 N.E.2d 686, 690 (Mass. 2005).

[33] *Kelly v. Smith*, 611 N.E.2d 118, 122 (Ind. 1993). *See also* Robert W. Hillman, *Client Choice, Contractual Restraints, and the Market for Legal Services*, 36 HOFSTRA L. R. 65, 66 (2007).

VII. Practical Pointers - What Would Rule 5.6 Say?

Undeniably, freedom of choice, for both the lawyer and the client, needs to be the primary consideration when a restrictive covenant is presented to a lawyer. Whether in the form of a non-disclosure agreement or a non-compete, the provisions of the agreement will need to conform to the policy considerations of Rule 5.6. Ask yourself these questions when drafting or presenting a restrictive covenant to a lawyer:

(1) Does it restrict the non-retiring lawyer from further practice of law?

(2) Does it prevent the client(s) from now, or in the future, from the ability to choose legal representation?

If the answer is "yes" to either of these questions, it is best to go back to the drawing board, as the contemplated restrictive covenant will likely be unenforceable.