FEARNOW V. RIDENOUR, SWENSON, CLEERE & EVANS, P.C.: ENCOURAGING FIRMS TO PUNISH DEPARTING ATTORNEYS?

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INTRODUCTION

Ethical Rule 5.6(a) of the Arizona Rules of Professional Conduct prohibits an attorney from offering or making "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."[1] In *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*,[2] the Arizona Supreme Court faced the question of whether financial punishments imposed by law firms on departing attorneys constitute a restriction on an attorney's right to practice law, in violation of ER 5.6(a). In a 4–1 decision, the court held that such financial penalties do not restrict an attorney's right to practice, and thus ER 5.6(a) does not preclude them. Instead, the common law rule of reasonableness for restrictive covenants governs such agreements between law firms and attorneys.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1987, William Fearnow bought a partnership interest in a law firm for $33,674.42.[3] In 1991, he joined several other attorneys in creating the new firm of Ridenour, Swenson, Cleere & Evans, P.C. ("RSCE").[4] Instead of making new monetary investments in RSCE, the firm's members converted their partnership investments from the original firm into stock.[5] As a result of the formation of the new firm, Fearnow received one share of stock in RSCE in exchange for his initial $33,674.42 investment.[6]

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1. ARIZ. RULES OF PROF'L CONDUCT ER 5.6(a) (codified at ARIZ. SUP. CT. R. 42).
2. 138 P.3d 723 (Ariz. 2006).
3. *Id.* at 724.
4. *Id.*
5. *Id.*
6. *Id.*

Fearnow and the other new stockholders signed a shareholder agreement, which contained provisions governing the voluntary withdrawal of a shareholder from the firm.[7] Specifically, the provisions precluded stockholders who voluntarily left the firm and remained in practice in the same geographic area from receiving a refund for their stock.[8] Seven years later, in 1998, Fearnow accepted an offer of employment with another Phoenix law firm and insisted that RSCE refund him the $33,674.42 he had invested in the firm's stock.[9] RSCE, citing the voluntary withdrawal provisions in the shareholder agreement, refused to comply.[10]

Fearnow responded by suing RSCE.[11] He contended that the voluntary withdrawal provisions violated ER 5.6(a) of the Arizona Rules of Professional Conduct because they restricted his right to practice law.[12] Upon cross motions for summary judgment, the trial court agreed with Fearnow's argument and refused to enforce the provisions.[13] The trial court also found that the absence of a severability clause, which would have allowed for the removal of the invalid provision from the rest of the agreement,[14] rendered the entire contract invalid.[15]

The trial court further declared Fearnow a "disqualified person" under Arizona's Professional Corporations Act ("the Act"),[16] which mandates that a corporation repurchase a shareholder's stock when the shareholder becomes "disqualified."[17] The trial court based its finding on *Vinall v. Hoffman*,[18] in which the Arizona Supreme Court held that the Act required a corporation to repurchase a departing dentist's share.[19] Because the trial court deemed Fearnow disqualified, it ordered an assessment of his stock in accordance with Arizona Revised Statutes

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7. *Id.*

8. *Id.* The agreement required a stockholder who voluntarily withdrew and planned to compete within the firm's geographic area to "tender his or her Share to the Corporation for no compensation." *Id.* at 724 n.1. The agreement did provide, however, for the repurchase of stock at its original subscription price in the event a lawyer left the firm because of "disability, retirement, withdrawal, or expulsion." *Id.* at 724. "Retirement" was defined as not "engaging in any lawyering activity in competition with the Corporation and within the Corporation's geographic area for more than ten hours per week." *Id.* at 724 n.1.

9. *Id.* at 724.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *See* RESTATEMENT (SECOND) OF CONTRACTS § 183 cmt. a (1981) (explaining that the concept of severability "deals with the situation in which a party is allowed to enforce one part of an agreement even though another part of the same agreement is unenforceable on grounds of public policy, for the reason that the first part does not materially advance the improper purpose.").

15. *Fearnow*, 138 P.3d at 724.

16. ARIZ. REV. STAT. § 10-2201 to 10-2249 (2004).

17. *Id.* at § 10-2201(1). Subsection 10-2201(7) defines a "qualified person" as "a person that is eligible under [the Professional Corporations Act] to be issued shares by a professional corporation." *Id.* at § 10-2201(7). A "disqualified person," in contrast, is "an individual or entity that is not or ceases to be a qualified person" and thus is ineligible to receive or hold shares in a professional corporation. *Id.* at § 10-2201(1).

18. 651 P.2d 850 (Ariz. 1982).

19. *Id.* at 852.

section 10-2223.[20] The court then ordered RSCE to repurchase Fearnow's stock for $86,500, an amount representing the fair value of the stock's earned equity interest.[21]

Division One of the Court of Appeals affirmed the trial court's ruling that the agreement's voluntary withdrawal provisions were not enforceable.[22] The appellate court disagreed, however, with the trial court's finding that Fearnow was a "disqualified person."[23] According to the court of appeals, the trial court had improperly relied on *Vinall* because the version of the Act applied in *Vinall* was later repealed.[24] The court referenced subsection 10-2220(A)(1) of the Act, which provides that individuals who are licensed to practice law in Arizona or another state are eligible to receive shares in a professional corporation.[25] Because Fearnow was a licensed attorney, the court reasoned, he could not be a disqualified person under the Act.[26] The court accordingly reversed the order requiring RSCE to repurchase Fearnow's stock.[27]

The Arizona Supreme Court granted Fearnow's petition for review to determine whether ER 5.6(a) prohibits attorneys from entering into agreements that do not expressly restrict their right to practice law, but do inflict financial burdens upon them for doing so.[28]

II. A CLASH BETWEEN THE COMMON LAW AND THE ETHICAL RULES

A. The Reasonableness Test for Covenants Not to Compete

Restrictive covenants have long been governed by a standard of reasonableness.[29] The Restatement (Second) of Contracts provides that a restrictive covenant is unreasonable if "(a) the restraint is greater than is needed to protect the promisee's legitimate interest, or (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public."[30] Arizona has

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20. *Fearnow*, 138 P.3d at 724. Arizona Revised Statutes section 10-2223(A) provides that, when a shareholder becomes a disqualified person under subsection (A)(2), the "corporation shall acquire the voting shares of its shareholder within the applicable time period." Ariz. Rev. Stat. § 10-2223(A).

21. *See* Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C., 110 P.3d 357, 359 (Ariz. Ct. App. 2005).

22. *Id.* at 360.

23. *Id.* at 361.

24. *Id.*

25. *Id.* (citing ARIZ. REV. STAT. § 10-2220(A)(1)).

26. *Id.*

27. *Id.* at 363. Under the court of appeals decision, Fearnow would have been allowed to retain the stock of RSCE until he retired or became disqualified to practice law. *See* Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C., 138 P.3d 723,730 (Ariz. 2006). The Arizona Supreme Court's decision avoids this curious result. *Id.* at 730–31.

28. *Fearnow*, 138 P.3d at 725.

29. 6 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 13:4 (4th ed. 1995).

30. RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981).

consistently applied this standard to agreements restricting employment,[31] and its courts judge reasonableness based on the totality of facts and circumstances of each case.[32] The Arizona Supreme Court likely would have summarily applied this fact-based reasonableness analysis in *Fearnow* were it not for the need to define what constitutes a restriction on an attorney's right to practice law under ER 5.6(a).[33]

B. Ethical Rule 5.6(a) of the Arizona Rules of Professional Conduct

The Arizona Rules of Professional Conduct, including ER 5.6(a), are based on the American Bar Association's ("ABA") Model Rules of Professional Conduct.[34] Ethical Rule 5.6(a) precludes attorneys from entering into deals that restrict their right to practice law after the conclusion of their relationship with the other contracting party.[35] The text of the rule does not provide guidance, however, for determining the validity of agreements that do not expressly restrict an attorney's right to practice law, but instead impose a monetary penalty at the conclusion of the relationship.[36]

Although *Fearnow* presented Arizona's first opportunity to interpret the scope of ER 5.6(a), the issue is well-settled in other jurisdictions.[37] The strong majority rule holds that agreements imposing a financial punishment for competing with a prior employer are void.[38] In striking down one such provision,

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31. *See, e.g.*, Lassen v. Benton, 346 P.2d 137, 140 (Ariz. 1959) ("The law is well settled that a restrictive covenant which is ancillary to a valid employment contract and which is not unreasonable in its limitations should be upheld in the absence of a showing of bad faith or of contravening public policy."), *modified on other grounds*, 347 P.2d 1012 (Ariz. 1959).

32. Valley Med. Specialists v. Farber, 982 P.2d 1277, 1283 (Ariz. 1999); *see also* Bryceland v. Northey, 772 P.2d 36, 40 (Ariz. Ct. App. 1989) ("Each case hinges on its own particular facts.").

33. *Fearnow*, 138 P.3d at 725–26.

34. *Id.* at 726 (citing the preamble to the Arizona Rules of Professional Conduct, ARIZ. SUP. CT. R. 42, which reads: "The professional conduct of members shall be governed by the Model Rules of Professional Conduct of the American Bar Association, adopted August 2, 1983, as amended by this court and adopted as the Arizona Rules of Professional Conduct.").

35. ARIZ. RULES OF PROF'L CONDUCT ER 5.6(a) ("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 controversy between private parties.")

36. *Id.*

37. *See* Laurel S. Terry, *Ethical Pitfalls and Malpractice Consequences of Law Firm Breakups*, 61 TEMP. L. REV. 1055, 1078–79 (1988).

38. *See, e.g.*, Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598, 601 (Iowa 1990) ("[W]hile the provision in question does not expressly or completely prohibit a withdrawing partner from engaging in the practice of law, the significant monetary penalty it exacts, if the withdrawing partner practices competitively with the former firm, constitutes an impermissible restriction on the practice of law."); Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 148 (N.J. 1992) ("[I]ndirect

an Illinois appellate court declared that "each person must have the untrammeled right to the counsel of his choice. A contrary decision would allow clients to be unknowingly treated like objects of commerce, to be bargained for and traded by merchant-attorneys like beans and potatoes."[39]

California, however, takes a different view. In *Haight, Brown & Bonesteel v. Superior Court*,[40] a California appellate court held that California's counterpart to ER 5.6(a) prohibits only express restrictions on an attorney's right to practice law, and no more.[41] Interpreting the rule narrowly, the court noted that the rule does not explicitly mention agreements that require a lawyer to pay financial compensation to his former law firm when the attorney leaves and chooses to represent the firm's former clients.[42] Thus, the rule was not intended to prevent such agreements.[43] The California Supreme Court later agreed, holding in *Howard v. Babcock*[44] that such provisions are valid so long as the costs they impose are reasonable.[45]

III. THE DECISION OF THE ARIZONA SUPREME COURT

Faced with this issue of first impression, the Arizona Supreme Court reflected on the two competing views. Although the vast majority of courts equate financial disincentives to practicing law with express restrictions against doing so, the court ultimately chose to side with California, holding that ER 5.6(a) does not prohibit law firms from imposing financial penalties on departing attorneys who will compete with the firm.[46] Justice Bales disagreed, calling for a broader reading of ER 5.6(a).[47] He argued that a provision imposing negative monetary

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restrictions on the practice of law, such as the financial disincentives at issue in this case . . . violate both the language and the spirit of [New Jersey's version of ER 5.6(a)]."); Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 411 (N.Y. 1989) (musing that to require an attorney to pay money before competing with a former employer hinders clients' ability to choose counsel by "functionally and realistically discourag[ing] and foreclos[ing] a withdrawing partner from serving clients who might wish to continue to be represented by the withdrawing lawyer"); Hagen v. O'Connell, Goyak & Ball, P.C., 683 P.2d 563, 565 (Or. Ct. App. 1984) (finding an employment agreement that reduced the value of a departing attorney's stock by forty percent if the attorney left the firm without signing a noncompetition agreement is unenforceable "because it is contrary to the public policy of making legal counsel available, insofar as possible, according to the wishes of a client").

39. Corti v. Fleisher, 417 N.E.2d 764, 769 (Ill. App. Ct. 1981).

40. 285 Cal. Rptr. 845 (Ct. App. 1991).

41. *Id.* at 848. Though phrased slightly differently than Arizona's ER 5.6, California Rule of Professional Conduct 1-500 similarly prohibits members of the bar from "participat[ing] in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law." CAL. RULE OF PROF'L CONDUCT 1-500.

42. *Haight, Brown & Bonesteel*, 285 Cal. Rptr. at 848.

43. *Id.*

44. 863 P.2d 150 (Cal. 1993).

45. *Id.* at 160. An appellate court in Pennsylvania has agreed with this approach. *See* Capozzi v. Latsha & Capozzi, P.C., 797 A.2d 314, 318–21 (Pa. Super. Ct. 2002).

46. Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C., 138 P.3d 723, 729 (Ariz. 2006).

47. *Id.* at 731 (Bales, J., concurring in part and dissenting in part).

consequences on a departing attorney does restrict that attorney's right to practice law, and therefore constitutes a violation of ER 5.6(a).[48]

A. The Majority Decision

Writing for the majority, Justice Hurwitz observed that the text of ER 5.6(a) only bars those agreements that restrict an attorney's right to practice law.[49] Although the court stressed the importance of the general rule that the reasonableness standard applies to restrictive covenants, it recognized the appropriateness of a narrow exception for provisions that impede an attorney's right to practice law or to represent particular clients.[50] The court went on, however, to criticize the idea of a wholly separate rule distinguishing attorneys from other equally respected professionals such as accountants and physicians.[51] Pointing out that a doctor's patients often require care greater than that expected by an attorney's clients, the court pronounced: "The language of ER 5.6 does not support such a sweeping special treatment of lawyers, nor does protection of clients mandate such a result."[52] The court thus chose to subscribe to California's view and held that the time-honored reasonableness standard—and not ER 5.6(a)—applies to agreements that inflict monetary penalties on attorneys who leave law firms.[53]

Turning to the shareholder agreement at issue, the court concluded that the voluntary withdrawal provisions that required forfeiture of the departing attorney's stock did not directly encumber Fearnow's future right to practice law.[54] To the contrary, quipped the court, "they merely provide a lawyer who withdraws and decides to practice elsewhere with less money than others making different decisions."[55] Therefore, the reasonableness framework provides the standard for determining the enforceability of the provisions.[56]

Because both the superior court and the court of appeals had found the voluntary withdrawal provisions invalid under ER 5.6(a), neither court had ruled on their reasonableness.[57] Moreover, neither Fearnow nor RSCE had had the opportunity to present evidence concerning the reasonableness of the provisions.[58] Reiterating the importance of a fact-specific analysis, the Arizona Supreme Court remanded the case to the superior court to determine whether the voluntary withdrawal provisions were reasonable.[59] The court instructed the superior court to

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48. *Id.*
49. *Id.* at 728 (majority opinion).
50. *Id.*
51. *Id.*
52. *Id.* at 729.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 730.

take into account the fact that the provisions inflict no penalty on those departing members who compete outside the specified geographical area.[60]

The court then went on to consider the suitable remedy for Fearnow should the superior court find the voluntary withdrawal provisions unreasonable.[61] The court first noted that a "qualified person" is defined under Arizona Revised Statutes section 10-2201(7) as "a person that is eligible under this chapter to be issued shares by a corporation."[62] The court then focused on subsection 10-2220(A)(1), which provides that those "who are licensed by law in this or another state to render a service described in the corporation's articles of incorporation" may be issued shares.[63] Because Fearnow was a licensed attorney in the state of Arizona for all periods relevant to the litigation, the court affirmed the finding of the court of appeals that he was not a "disqualified person."[64]

The Arizona Supreme Court disagreed, however, with the determination by the court of appeals that Fearnow was entitled to keep his stock in RSCE until he should either retire or become disqualified to practice law.[65] The court observed that the shareholder agreement allowed for the repurchase of all departing employees' stock except those who, like Fearnow, left voluntarily and remained in the same geographic area to compete with the firm.[66] The court found this to be indicative of the parties' intent that all departing shareholders sell their stock back to RSCE.[67] Thus, the court concluded, the voluntary withdrawal provisions must be grammatically severable because they are the only exceptions to the otherwise consistent provisions in the agreement providing for the repurchase of stock at the original amount paid by the shareholders.[68] Therefore, a superior court finding that the voluntary withdrawal provisions are unreasonable would require RSCE to repurchase Fearnow's stock at the original purchase price of $33,647.42.[69]

B. Justice Bales's Opinion

Justice Bales wrote separately to express his disagreement with the court's acceptance of the reasoning behind the California rule.[70] He took a more

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60. *Id.* at 730 n.11.
61. *Id.* at 730.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* The court cited the Professional Corporations Act, which provides in relevant part that "[a] provision for the acquisition of shares contained in a professional corporation's articles of incorporation or bylaws or in a private agreement is specifically enforceable." ARIZ. REV. STAT. § 10-2223(E) (2004).
66. *Fearnow*, 138 P.3d at 731.
67. *Id.*
68. *Id.* (citing Olliver/Pilcher Ins., Inc. v. Daniels, 715 P.2d 1218, 1221 (Ariz. 1986) ("[O]nly that part of the agreement which is unreasonable should be voided, and the rest enforced. . . . If it is clear from its terms that a contract was intended to be severable, the court can enforce the lawful part and ignore the unlawful part.")); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 183 cmt. a (1981).
69. *Fearnow*, 138 P.3d at 731.
70. *Id.* at 731 (Bales, J., concurring in part and dissenting in part).

expansive view of ER 5.6(a), maintaining that "the majority . . . compresses the rule to less than what its terms expressly provide."[71] Justice Bales advocated instead for the adoption of the majority rule, which, he said, appreciates that financial loss does serve as a significant restriction on an attorney's right to practice law; accordingly, agreements that impose financial penalties on departing attorneys do fall under ER 5.6(a).[72] Not only do the majority of courts recognize this fact, the justice argued, but the Restatement (Third) of the Law Governing Lawyers does as well.[73] Justice Bales pointed to the comments accompanying section 13 of the Restatement, which reflect the common opinion that rules similar to ER 5.6(a) do preclude agreements denying attorneys "otherwise-accrued financial benefits" when leaving to compete, "unless the denial applies to all departing lawyers" regardless of their intent to compete with the firm.[74] This view, the justice insisted, helps promote the policies that ER 5.6 was designed to advance—protection of clients' freedom to select their attorneys and lawyers' professional autonomy.[75]

Justice Bales next observed that, while this case is the first time the Arizona Supreme Court had actually applied ER 5.6(a) to attorneys, previous decisions have recognized ER 5.6(a) as a prohibition on restrictive covenants between attorneys.[76] He remarked that Arizona courts have habitually followed the Restatement unless precluded by case law to the contrary.[77] In addition, Justice Bales pointed out that the court could have suggested its present interpretation of ER 5.6(a) when it chose to incorporate the ABA's most recent amendments to the Model Rules of Professional Conduct into the Arizona Rules.[78] "One would

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71. *Id.*

72. *Id.*

73. *Id.* at 732; *see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 13 cmt. b (2000).

74. *Fearnow*, 138 P.3d at 732 (Bales, J., concurring in part and dissenting in part) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 13 cmt. b).

75. *Id.* Justice Bales also noted the possibility that RSCE may have been attempting to evade ER 5.6(a) by disguising the voluntary withdrawal provisions as retirement terms. *Id.*

76. *Id.* (citing Valley Med. Specialists v. Farber, 982 P.2d 1277, 1282 (Ariz. 1999)). As noted by Justice Bales, *id.* at 733, the *Valley Medical Specialists* decision recognized that ER 5.6(a) imposes a stricter prohibition against restrictive covenants among attorneys than the test applied to similar agreements among physicians. 982 P.2d at 1282–83. Regardless of the special duties that doctors or other professionals might owe to their clients, however, he believes that the power to determine the scope of ER 5.6(a) resides in the Arizona Supreme Court because of certain unique aspects of the legal profession. *Fearnow*, 138 P.3d at 734 (Bales, J., concurring in part and dissenting in part).

77. *Fearnow*, 138 P.3d at 732–33 (Bales, J., concurring in part and dissenting in part) (citing Espinoza v. Schulenburg, 129 P.3d 937, 939 (Ariz. 2006)); *see also* Cunningham v. Goettl Air Conditioning, Inc., 980 P.2d 489, 492 (Ariz. 1999) ("In the absence of statutory and case authority that directly speaks to an issue, Arizona courts look to the Restatement for guidance."); Jesik v. Maricopa County Cmty. Coll. Dist., 611 P.2d 547, 550 (Ariz. 1980) ("[W]e follow the Restatement only in the absence of Arizona authority to the contrary.").

78. *Fearnow*, 138 P.3d at 733. (Bales, J., concurring in part and dissenting in part). Justice Bales indicated that the only changes proposed and eventually adopted in

think," the justice opined, "that, if Arizona had adopted or proposed to adopt a version of ER 5.6(a) that is narrower than the generally accepted interpretation of Model Rule 5.6 and Restatement § 13, there would be some attention to this fact."[79]

Justice Bales went on to criticize the majority's reliance on *Howard v. Babcock*.[80] According to him, the *Howard* rule is not fit for Arizona because, unlike Arizona's ER 5.6, the text of California's version explicitly allows certain restrictive covenants.[81] Moreover, Justice Bales attacked the majority's focus on protecting the ability of law firms to guard their own economic interests.[82] ER 5.6(a), he said, was not designed to promote that policy.[83] The effect of the court's decision, he continued, will be to dissuade attorneys from leaving their law firms, enabling the firms to "tighten the golden handcuffs on their lawyers."[84]

Justice Bales also disagreed with the court's decision to remand the case to the superior court.[85] He stated that, despite its fact-specific nature, reasonableness is still a question of law.[86] He disputed the majority's claim that RSCE had not had the opportunity to present evidence of reasonableness.[87] He pointed out that RSCE had argued during summary judgment briefing that the voluntary withdrawal provisions were reasonable because some of the firm's clients had followed Fearnow after he left the firm.[88] In any case, RSCE's contentions did not persuade Justice Bales, who noted that, given ER 5.6(a), a law firm does not have a legitimate interest in merely avoiding competition for its clients by its former lawyers.[89] Thus, he would have found the provisions unenforceable and considered the court's remanding of the case a futile prolonging of litigation.[90]

Justice Bales concurred with the majority opinion only concerning the remedy available to Fearnow should the superior court find the voluntary withdrawal provisions unreasonable and thus unenforceable.[91] That is, Fearnow should be entitled to recover the amount he originally invested in RSCE stock.[92]

Arizona for ER 5.6(a) had the effect of broadening the rule's scope to cover all forms of agreements, whether partnership, shareholder, operating, employment, or otherwise. *Id.*

79. *Id.*
80. 863 P.2d 150 (Cal. 1993).
81. *Fearnow*, 138 P.3d at 733 (Bales, J., concurring in part and dissenting in part).
82. *Id.* at 734.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* (citing Valley Med. Specialists v. Farber, 982 P.2d 1277, 1280–81 (Ariz. 1999)).
87. *Id.*
88. *Id.*
89. *Id.* (citing *Valley Med. Specialists*, 982 P.2d at 1280–81).
90. *Id.* at 735.
91. *Id.*
92. *Id.*

CONCLUSION

In *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*, the Arizona Supreme Court held that ER 5.6(a) prohibits only those agreements that restrict an attorney's right to practice law and not those that merely inflict financial penalties on attorneys who choose to leave and compete with their former firms. Instead, such agreements are valid so long as the penalties are reasonable. In so holding, the court joins a small minority of courts that do not view monetary punishments as significant restrictions on an attorney's right to practice. Given the substantial amount of money that law firms invest in their attorneys, the *Fearnow* decision will likely encourage Arizona firms to impose financial consequences on departing attorneys who will be competing for the firm's business.