
Susan E. Corisis

Abstract: Most jurisdictions enforce postemployment noncompetition covenants that reasonably prevent an employee from using his or her relationship with the employer's clients to take the clients. In Perry v. Moran, the Washington Supreme Court enforced an employment agreement that prevented the employee from taking her employer's clients, regardless of whether she had personal contact with each of the clients or whether the clients had left the employer's services for reasons other than to follow the employee. This note concludes that a postemployment noncompetition covenant is not reasonable if it prevents an employee from serving an employer's clients with whom the employee had no significant personal contact or clients who left the employer's services for reasons other than to follow the employee.

May a postemployment restrictive covenant reasonably prevent a professional from serving any client who had been the employer's client during the professional's term of employment? In Perry v. Moran, the Washington Supreme Court enforced a postemployment restrictive covenant that prevented an accountant from serving any of her former employer's clients. The accountant had worked as head of one of the firm's three departments. After slightly more than one year the accountant left the firm and accepted business from several of the firm's clients. The court held that the postemployment restrictive covenant was reasonable. The court also held that the accountant could be required to pay liquidated damages to her former employer for accepting the business of any of her employer's clients.

The holding in Perry provided too little protection to employees and the public. Reasonable postemployment restrictive covenants should be enforced. A postemployment restrictive covenant may reasonably prevent the employee from soliciting or accepting the business of the employer's clients. However, the covenant is reasonable only where the employee has had significant personal contact with the client. Furthermore, an employee should not be prevented from soliciting or

2. Id. at 700–01, 748 P.2d at 229.
3. Id. at 692, 748 P.2d at 224–25.
4. Id. at 694, 748 P.2d at 225–226.
5. Id. at 700, 748 P.2d at 229.
6. Id. at 699–700, 748 P.2d at 228–29. The noncompetition agreement defined “clients” as any client that the employer had served during the accountant's tenure at the firm. Id. at 693, 748 P.2d at 225.
accepting business from clients who left the employer for reasons other than to follow the employee.

I. BACKGROUND: POSTEMPLOYMENT RESTRICTIVE COVENANTS AND PERRY V. MORAN.

A. Postemployment Restrictive Covenants

The postemployment noncompetition covenant in Perry v. Moran is typical of many agreements that employees sign as a condition of employment. The covenant stated that, upon termination of employment, the employee would not serve any of the employer's clients for five years. Postemployment covenants are commonly used by firms employing professionals, such as doctors and accountants.

A noncompetition covenant restrains trade because it limits the rights of the employee to work in his or her profession. In Washington and other jurisdictions, covenants that unreasonably restrain trade are unenforceable as against public policy. Therefore, jurisdictions that have not completely invalidated postemployment restrictive covenants enforce such covenants only to the extent that they reasonably protect legitimate business interests of an employer.

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7. Postemployment restrictive covenants often restrict the employee from engaging in his profession within a given geographic area. Courts will examine such restrictions for reasonableness. See, e.g., Wood v. May, 73 Wash. 2d 307, 313-14, 438 P.2d 587, 591-92 (1968) (remanded for reduction in geographic restriction). Geographic limitations were not at issue in Perry and are beyond the scope of this note.

8. Perry, 109 Wash. 2d at 693, 748 P.2d at 225.

9. Postemployment restrictive covenants are also used outside of the professions. See, e.g., Wood, 73 Wash. 2d at 308, 438 P.2d at 588 (restrictive covenant used by a horseshoer for his apprentice).

10. See, e.g., Bauer v. Sawyer, 8 Ill. 2d 351, 134 N.E.2d 329, 331 (1956) (restricting doctor from practicing within city for five years was reasonable).


Restrictive covenants are not enforced against attorneys. See WASH. RULES OF PROFESSIONAL CONDUCT Rule 5.6(a) (1988); MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6(a) (1988); see, e.g., Dwyer v. Jung, 133 N.J. Super. 343, 336 A.2d 498, 500 (1975), aff'd per curiam, 137 N.J. Super. 135, 348 A.2d 208 (1975). A covenant restricting a lawyer is void because the attorney-client relationship is highly fiduciary. The client must be able to place confidence in the attorney of his or her choice. Dwyer, 336 A.2d at 500.

12. E.g., Racine, 141 Wash. at 611, 252 P. at 116-17; see also, 14 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1633 (3d ed. 1972).


Postemployment Restrictive Covenants

I. The Competing Interests

Several competing interests underlie postemployment restrictive covenants. Employers, employees, and the public all arguably have interests that they are trying to protect. The weight that a court gives any of the interests may determine whether a covenant is enforced.\textsuperscript{15}

The employer uses a restrictive covenant to protect his or her business by preventing the employee from taking the employer's clients. The employer argues that the client's desire to use the employee's services is part of the business "goodwill."\textsuperscript{16} Goodwill can include a reputation for integrity, skill, and politeness, as well as the confidence that induces clients to return to the same business.\textsuperscript{17} The Perry court held that goodwill belonged to the accounting firm.\textsuperscript{18} Without protection, an employee could take advantage of information about the client's business or the employee's personal contact with the client, thereby infringing on the employer's goodwill.\textsuperscript{19} A restrictive covenant that prevents the employee from using the business's goodwill also enables the employer to secure the full benefit of the employee's services. In Perry, the court noted that without the protection of a restrictive covenant, the employer would have to prevent the formation of personal relationships between the employee and the client.\textsuperscript{20} The employer might prevent the formation of personal relationships by constantly rotating the employee's assignments.\textsuperscript{21}

Some courts have held that goodwill does not belong to the business. These courts reason that the goodwill a client feels towards the business belongs to the employees.\textsuperscript{22} Therefore, the employer has no legitimate interest to protect and the restrictive covenant cannot be upheld.\textsuperscript{23}

\textsuperscript{15} Compare Racine, 141 Wash. at 612–13, 252 P. at 117 (a restrictive covenant that prevents a client from selecting a particular professional only slightly harms the public; the law presumes that another competent professional is available) with Mailman, Ross, Toyes & Shapiro v. Edelson, 183 N.J. Super. 434, 444 A.2d 75, 79–80 (1982) (the public is not a party in the employment agreement and, therefore, must not be prevented from choosing a professional).

\textsuperscript{16} See Racine, 141 Wash. at 610–11, 252 P. at 116; see also Martin v. Jablonski, 253 Mass. 451, 149 N.E. 156, 159 (1925) (goodwill is all that goes with a business in excess of capital and physical value).

\textsuperscript{17} See Martin, 149 N.E. at 159.


\textsuperscript{19} Id.

\textsuperscript{20} Id. at 700–01, 748 P.2d at 229.

\textsuperscript{21} Id. at 700, 748 P.2d at 229.

\textsuperscript{22} See, e.g., Cook v. Lauten, 1 Ill. App. 2d 255, 117 N.E.2d 414, 416 (1954).

\textsuperscript{23} Id.
An Ohio court carefully articulated the employee's interests in postemployment restrictive covenants in *Arthur Murray Dance Studios of Cleveland v. Witter.* The *Arthur Murray* court stated four major employee interests: the employee's interest in working in a chosen trade, the employee's interest in supporting self and family, the employee's interest in using personal skills and talents, and the employee's interest in bettering his or her status. In addition, restricting an employee from serving a client not only deprives the employee of that client's business, but can also harm the employee's job opportunities.

The public's primary interest in postemployment restrictive covenants is receiving services from a chosen professional. Some courts have stated that the relationship between a client and a professional is highly personal and the client must be able to select the professional of his or her choice. However, many other courts have made the presumption that other competent professionals are available. Therefore, the public is not unduly harmed by restrictions that preclude using a particular professional. These courts also reason that the client's attraction to a particular professional is less compelling when based on a previous relationship made possible only by the former employer.

In addition to the public's interest in the freedom to select particular professionals, the public may have more general interests. The public may be harmed if a restrictive covenant deprives an employee of her livelihood and the public must support her. The public also has an...
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interest in encouraging competition, which tends to be reduced by postemployment restrictive covenants.33

2. Judicial Responses to Postemployment Restrictive Covenants: The Rule of Reason, the Blue Pencil Test, and Invalidation

Many jurisdictions, including Washington, use the Rule of Reason to determine whether a postemployment restrictive covenant will be enforced.34 Under the Rule of Reason, the courts determine reasonableness by applying a three-part test to the facts of each case.35 The test balances the interests of the employer, the employee, and the public.36 The restrictive covenant (1) must be necessary for the protection of the business or goodwill of the employer, (2) must not impose a greater restraint on the employee than is reasonably necessary to secure the employer's business or goodwill, and (3) must not cause undue injury to the public through loss of that employee's services.37 The courts may rewrite unreasonable clauses so that they are reasonable.38

The Rule of Reason may produce drastically different results from those produced by the “blue pencil” method. Some jurisdictions apply the blue pencil test when the restrictive covenant is determined to result in restraint of trade.39 Instead of rewriting an unreasonable clause, the court simply “crosses out” the offending clause of the restrictive covenant.40 The court will enforce the remainder of the contract only if it still makes sense.41 Therefore, a contract that may have been rewritten and enforced under the Rule of Reason may be unenforceable under the blue pencil method.42

33. Id.; see also 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1447 (3d ed. 1972).
34. See, e.g., Perry, 109 Wash. 2d at 698, 748 P.2d at 228; 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1447 (3d ed. 1972).
37. Perry, 109 Wash. 2d at 698, 748 P.2d at 228; see also RESTATEMENT (SECOND) OF CONTRACTS § 188 (1979).
40. See id.
41. Raimonde v. Van Vlerah, 42 Ohio St. 2d 21, 325 N.E.2d 544, 546 (1975). The “blue pencil” test was developed as an attempt to soften the original rule that all postemployment restrictions were void. Id.; see also RESTATEMENT (SECOND) OF CONTRACTS § 183 (1979).
42. Raimonde, 325 N.E.2d at 546.

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Rather than use the Rule of Reason or the blue pencil test, some jurisdictions simply invalidate noncompetition covenants. However, exceptions to the rule of invalidation give courts great discretion to decide whether or not the restrictive covenant is invalid. Therefore, the invalidation method can lead to inconsistent results. Critics also argue that invalidation erroneously ignores the legitimate interests of the employer.

B. Postemployment Restrictive Covenants in Washington and in Other Jurisdictions

In Perry v. Moran, the Washington Supreme Court required an employee to pay liquidated damages to her former employer for violating a postemployment restrictive covenant. Jurisdictions are split on whether a restrictive covenant may prevent the employee from serving any of the employer's clients or merely from soliciting the business of the employer's clients. However, most jurisdictions have determined that personal contact between the employee and the client gives the employee an "unfair" competitive advantage and that the employer deserves protection.

1. Facts and Holding of Perry v. Moran

In Perry v. Moran, an accountant signed an employment agreement with an accounting firm. The agreement contained a postemployment restrictive covenant stating that upon termination of employment, the accountant would not serve any of the employer's clients for five years. The covenant defined "clients" as including all clients or accounts served by the accounting firm while the accountant was employed there. According to the agreement, if the accountant

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44. See, e.g., Chalmers Corp. v. Carnell, 479 So. 2d 990 (La. Ct. App. 1985). Louisiana law invalidates restrictive covenants unless the employer has incurred advertising or employee training expenses. In Chalmers, the employer spent over $500 on training seminars and textbooks. However, this court held that the employer did not meet the exceptions requirements. Id. at 992–93.
45. See infra notes 97–99 and accompanying text (discussing invalidation problems).
47. Id.
48. Id. at 692, 748 P.2d at 225.
49. Id. at 693, 748 P.2d at 225.
50. Id.
served any of the employer's clients, she would pay liquidated damages to the employer.\footnote{Id.; see infra note 92 (discussing the Perry court's liquidated damages holding).}

The accountant worked as head of the employer's retirement department for slightly more than one year.\footnote{Perry, 109 Wash. 2d at 692–93, 748 P.2d at 225.} Shortly after resigning her position, the accountant formed a combined practice with two other accountants, both of whom had been members of her department at the employer's firm.\footnote{Id. at 694, 748 P.2d at 225–26.} Although the accountant did not solicit her former employer's clients, she did accept work from several of her employer's current and former clients.\footnote{Id. at 694–95, 748 P.2d at 226.} The employer sued for injunctive relief and alternatively, for liquidated damages.\footnote{Id. at 694–95, 748 P.2d at 226.}

The trial court refused to enforce the covenant.\footnote{Id. at 697, 748 P.2d at 227; see WASH. R. APP. P. 4.3.} The trial court found that the accountant had not diverted any of her employer's active clients and therefore had not harmed her employer.\footnote{Perry, 109 Wash. 2d at 698–700, 748 P.2d at 228–29; see supra note 37 and accompanying text (discussing the Rule of Reason test).} The court reasoned that restricting the accountant from serving clients who had already left the accounting firm was not reasonably necessary to protect the accounting firm.\footnote{Id. at 695, 748 P.2d at 226.} On appeal, the Washington Court of Appeals certified the case directly to the Washington Supreme Court, which reversed.\footnote{Id. at 701, 748 P.2d at 229.}

The Washington Supreme Court applied the three-part Rule of Reason test and determined that the covenant was reasonable.\footnote{Id.} The court found that the accounting firm's business interests were legitimate,\footnote{Id. at 702, 748 P.2d at 230.} the covenant did not unduly restrain the employee,\footnote{Id. at 704, 748 P.2d at 230.} and the public was not unduly harmed.\footnote{Id.}

The court made no attempt to rewrite the covenant. The court held that it was reasonable for the employer to prohibit the accountant from merely accepting, as well as soliciting the employer's clients.\footnote{Id. at 701, 748 P.2d at 229.} The court did not address the issue of whether the employer's protectable interest should be limited to clients with whom the employee actually had significant personal contact. The court also did not
address whether the restrictive covenant should exclude clients who had left the employer for reasons other than to follow the employee. Finally, even upon reconsideration, the court held that liquidated damages could be awarded for any of the employer’s clients that the accountant served after she left the employer.\textsuperscript{65}

2. Is Solicitation Necessary?

The \textit{Perry} court held that a postemployment agreement preventing an employee from accepting business from her employer’s clients may be reasonable even if the employee did not solicit the client’s business.\textsuperscript{66} The court stated that requiring proof of solicitation would place an undue burden on the employer.\textsuperscript{67} The employer’s burden would be difficult and expensive, and would offend the employer’s clients.\textsuperscript{68}

Other jurisdictions are split on the issue of solicitation. Many jurisdictions agree with Washington and hold that solicitation is unnecessary.\textsuperscript{69} These jurisdictions reason that an employee’s unfair competitive advantage arises out of his or her personal contact with the employer’s clients.\textsuperscript{70} The advantage can harm the employer whether the employee solicits or merely accepts the client’s business.\textsuperscript{71} On the other hand, some jurisdictions hold that solicitation is necessary.\textsuperscript{72} These courts reason that enforcing covenants not to serve clients creates a disproportionate hardship on the employee.\textsuperscript{73} Enforcing the covenant only when the employee has solicited a client’s business mitigates the hardship to the employee.\textsuperscript{74} In addition, some courts reason that requiring solicitation mitigates harm to the public.\textsuperscript{75}


\textsuperscript{67} Perry, 109 Wash. 2d at 701, 748 P.2d at 229.

\textsuperscript{68} Id.

\textsuperscript{69} \textit{See}, e.g., Faw, Casson & Co. v. Cranston, 375 A.2d 463, 467 (Del. Ch. 1977).

\textsuperscript{70} Id.

\textsuperscript{71} Id.


\textsuperscript{73} Smith, Batchelder & Rugg, 406 A.2d at 1313.

\textsuperscript{74} Id.

\textsuperscript{75} \textit{See}, e.g., Mailman, 444 A.2d at 79.
3. Is Personal Contact Necessary?

In Perry, the Washington Supreme Court enforced the noncompetition covenant even though the employee had significant personal contact with only some of the clients. The Perry court stated that personal contact gave the employee an unfair advantage, but upheld a restrictive covenant that was not limited to clients with whom the employee had contact. Thus, the Perry court implied that it was irrelevant that the accountant did not in all cases have significant personal contact. The Perry decision breaks with previous Washington cases implying that significant personal contact with an individual client is necessary before a postemployment restrictive covenant will be enforced.

Other jurisdictions generally require that some degree of significant personal contact exist before a covenant will be enforced. In Arthur Murray Dance Studios of Cleveland v. Witter, an Ohio court determined that a restrictive covenant was unreasonable because a dance instructor's personal contact with the employer's clients was too brief to provide the dance instructor with any ability to attract the clients. The court stated that reasonableness is determined from the contract and from the situation in which it is sought to be enforced. Once significant personal contact has been shown to have existed with some clients, many courts do not differentiate between these clients and clients with whom no significant personal contact existed. However, some courts have rewritten the covenant to include only the clients with whom the employee had significant personal contact.

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77. Id. at 697–98, 700, 748 P.2d at 227, 229.
78. Id. at 700, 748 P.2d at 229.
79. See infra note 128 and accompanying text (discussing earlier Washington cases and personal contact).
81. Id. 105 N.E.2d at 705, 712 (comparing the lack of significant contact to an elevator operator's ability to change buildings and lure away tenants). To determine if significant personal contact existed, giving the employee an unfair competitive advantage, the court asked many questions. For example: Did the employee's position give him or her an opportunity to become acquainted with the employer's clients? How many clients did the employee know? Was the employee's contact regular? Would the client be inclined to follow the employee? Id. 105 N.E.2d at 696–99.
82. Id. 105 N.E.2d at 692–94.
4. May the Employee Serve the Employer's Former Clients?

In *Perry*, the Washington Supreme Court did not distinguish between active and former clients. Some of the clients from whom the accountant accepted business had already terminated their relationships with the employer before the accountant left the employer. The court, without explanation, simply stated that it was reasonable for the restrictive covenant to preclude the accountant from accepting business from any client who had used the employer while the accountant was working there.

Only a few jurisdictions distinguish between former and active clients. A New Jersey court held that although a covenant may prevent an employee from soliciting former and present clients, a covenant cannot prevent the employee from merely accepting business from former clients. The court reasoned that the public has the right to terminate the employer's services and then to freely choose an accountant.

5. Liquidated Damages

In *Perry*, the Washington Supreme Court held that a covenant requiring the accountant to compensate the employer in liquidated damages for serving any of the employer's clients was reasonable. The clause stated that the accountant would pay the employer liquidated damages if, within five years after leaving the employer, the accountant served any client who had been the employer's client during the employee's tenure. The liquidated damages were set at fifty percent of the amount the accountant billed the employer's clients for the first three years of service. The court stated that the liquidated damages clause was reasonable for two reasons: the harm caused by the breach was difficult to ascertain and the amount of damages provided was a reasonable forecast of compensation for the actual harm.

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86. *Id.* at 700, 748 P.2d at 229.
87. *Mailman, Ross, Toyes & Shapiro v. Edelson*, 183 N.J. Super. 434, 444 A.2d 75, 79 (1982); see also *Smith, Batchelder & Rugg v. Foster*, 119 N.H. 679, 406 A.2d 1310, 1312 (1979) (restricting employee from all clients that the employer had ever served was too broad).
89. *Perry*, 109 Wash. 2d at 699, 748 P.2d at 228.
90. *Id.* at 693, 748 P.2d at 225.
91. *Id.*
92. *Id.* at 699, 748 P.2d at 228. The court originally held that the damages were reasonable and awarded them without remanding. The amount was derived from a formula that was linked
II. ANALYSIS: PROTECTING EMPLOYERS FROM A FORMER EMPLOYEE’S UNFAIR COMPETITIVE ADVANTAGE

A. The Rule of Reason Is the Most Appropriate Response to Postemployment Restrictive Covenants

In Perry v. Moran, the court correctly determined that in Washington courts should apply the Rule of Reason to postemployment restrictive covenants and uphold such covenants to the extent that they are reasonable. The Rule of Reason is preferable to either invalidation or the blue pencil method because the Rule of Reason is more likely to protect a business’s legitimate interests.

Strict invalidation is inappropriate because the employer’s legitimate interests deserve protection. Courts that apply invalidation emphasize the right of the employee to engage in his or her chosen occupation and the general policy against restraint of trade. Jurisdictions that apply invalidation have determined that postemployment agreements are simply an attempt to eliminate competition and, therefore, will not enforce the covenants. These jurisdictions erroneously ignore the employer’s legitimate interests and incorrectly reason that the advantage or goodwill acquired by the employee belongs to the employee, not to the business. They ignore that many of the clients originally approached the business because of the employer’s reputation. An employer, such as an accounting firm, invests effort and money into building a client base. The employer builds a client base through word of mouth regarding the employer’s fine reputation, through advertising, and through years of quality service. These

to the actual harm. Also, the percent and number of years used in the clause were similar to other employment agreements that the court had previously held were reasonable. Id.

On reconsideration, the court remanded to determine if the accountant had served the employer’s clients and if the amount of liquidated damages was reasonable. Perry v. Moran, 111 Wash. 2d 885, 887, 766 P.2d 1096, 1097 (1989), modifying 109 Wash. 2d 691, 748 P.2d 224 (1987), cert. denied, 109 S. Ct. 3228 (1989).


94. See supra notes 43-46 and accompanying text (discussing the invalidation method).

95. See supra notes 39-42 and accompanying text (discussing the blue pencil method).


97. See supra note 43 and accompanying text (discussing invalidation jurisdictions).

courts also ignore that the employer provided the means for the relationship between the employee and the client and that the employee was being paid for his or her contribution to the relationship.99

Jurisdictions that apply invalidation overemphasize the alleged anticompetitive purpose of restrictive covenants. As the court previously recognized in Racine v. Bender, a postemployment agreement that prevents an employee from using the employer's reputation to contact clients and take the clients' business does not necessarily demonstrate an intent to eliminate competition.100 A restrictive covenant has the effect of eliminating some competition and therefore restraining trade, but any business contract will restrain trade in some way.101

Finally, the trend towards awarding liquidated damages makes invalidation unnecessary.102 Liquidated damages mitigate harm suffered by the employee, the employer, and the public.103 When courts award liquidated damages the employee may choose to retain the client during the period of time stated in the restrictive covenant. Liquidated damages allow the public to also retain its freedom of choice. In addition, the employer's legitimate interests are protected because the employee compensates the employer for his investment in the client.

The Rule of Reason is not only preferable to invalidation, but it is also preferable to the blue pencil method. The Rule of Reason, used by the Perry court, provides greater flexibility than the blue pencil method.104 Under the Rule of Reason, the court simply rewrites unreasonable terms.105 By contrast, the blue pencil method can leave legitimate business interests unprotected.106 The court may strike a restrictive covenant that protects a legitimate business interest merely because the covenant also protects another unreasonable interest.107 In addition, concern over blue pencil invalidation may discourage employers from including in the agreement protections to which they

100. See id. at 611–12, 252 P. at 117.
101. See supra notes 12–14 and accompanying text (discussing reasonable restraint of trade).
103. Id.
105. See supra note 38 and accompanying text (discussing rewriting under the Rule of Reason).
106. Raimonde, 325 N.E.2d at 546.
107. Id.
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are entitled. These problems have led many jurisdictions to abandon the blue pencil test.

One advantage of the blue pencil test is that the possibility of blue pencil invalidation may prevent overzealous employers from including unreasonable protection. However, the Rule of Reason does not leave the employee completely unprotected. The Rule of Reason still allows the employee to convince a court that the restrictive covenant should be rewritten.

B. Restrictions Not to Serve the Employer’s Clients Should Prevent the Employee from Using an Actual Competitive Advantage

Although the Rule of Reason is the proper method for evaluating postemployment restrictive covenants, the Washington Supreme Court’s application of the rule in Perry v. Moran was only partially correct. The court correctly determined that an employee may breach a noncompetition covenant even when he or she has not solicited the employer’s clients. The court incorrectly decided, however, that the restrictive covenant reasonably included clients with whom the employee had no significant personal contact. Finally, the court erred by enforcing the covenant even when the client had clearly left the employer’s services for reasons other than to follow the employee.

I. The Washington Supreme Court Is Correct Not to Require Solicitation

The Perry court correctly held that the employee’s solicitation of the employer’s clients is unnecessary for two reasons. First, solicitation is irrelevant to protecting the employer’s interests. Second, proving that solicitation occurred is difficult and is potentially harmful to the employer, the employee, and the public.


110. See supra notes 66-75 and accompanying text (discussing solicitation in various jurisdictions).

111. See supra notes 76-84 and accompanying text (discussing significant personal contact).

112. See supra notes 85-88 and accompanying text (discussing former clients in various jurisdictions).


114. See supra notes 67-68 and accompanying text (discussing proof of solicitation).
Solicitation is irrelevant because the covenant's purpose is to prevent the employee from taking advantage of his or her relationship with the employer's clients.116 As the court recognized in Racine v. Bender, an employee's unfair competitive advantage arises out of his or her personal contact with the employer's clients.117 Whether the personal relationship allows the employee a special opportunity to solicit the client, or gives the client an incentive to seek out the employee, is irrelevant.118 The advantage can harm the employer whether the employee solicits or merely accepts the client's business.

Furthermore, requiring solicitation creates problems of proof. First, proving solicitation can be difficult and expensive.119 Proving solicitation is especially difficult when the client has expressed a preference for the employee and would be reluctant to harm the employee by testifying. Further, drawing a line between whether the employee solicited the client or the client approached the employee is imprecise and would require expensive litigation.

In addition, proving solicitation would harm the employer, the employee, and the public, regardless of who ultimately prevails in the suit.120 Because the only realistic way to determine whether the employee solicited the client is to force the client to testify,121 the employer and the employee may gain a reputation in the community for dragging clients into unpleasant litigation. Although the employer has already lost the client, litigation could also cause the employee to lose the client. The client's testimony is likely to further harm the employer's reputation because the testimony will include the client's reasons for preferring the employee's services. Members of the public are harmed by the increased likelihood of being called into court to testify. Proving solicitation also harms the public by increasing trial length and further crowding court calendars.

The purported benefits of requiring solicitation are marginal at best. Allowing an employee to accept the business of a client, but not to solicit that business, does not significantly increase the public's freedom to choose a professional.122 The public does not have complete freedom of choice unless the client is informed of his or her choices.

118. Id.
120. Id.
121. Id.
122. See supra notes 66, 75 and accompanying text (discussing public's freedom of choice).
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Preventing a professional from informing any member of the public of that professional's services infringes on the client's freedom to make an informed choice. Thus, the incremental benefit to the public of requiring solicitation is so small that it does not outweigh the problems caused by requiring solicitation.

2. The Washington Supreme Court Should Require Significant Personal Contact with Each Client

The Perry court erroneously ignored the necessity of significant personal contact between the employee and each client. The court correctly recognized that personal contact is the source of an employee's advantage. However, the court failed to ask whether the employee actually had significant personal contact with each of the employer's clients that she served after leaving the employer. The court held that it was reasonable to restrict the accountant from serving all of the employer's clients.

The Perry court ignored the importance that Washington courts have given personal contact. The court cited two earlier Washington cases, Racine v. Bender, and Knight, Vale and Gregory v. McDaniel, for the proposition that personal contact gave the accountant an unfair competitive advantage to take the client from the employer. However, the Perry court failed to recognize that Racine and Knight enforced restrictive covenants only when personal contact with each client actually existed.

The Perry court awarded the employer more protection than it deserved. The court reasoned that the accountant had sufficient personal contact with her employer's clients because the accountant was the head of a department in her employer's firm. The court erred when it did not allow the accountant to demonstrate that she did not have significant personal contact with all of her employer's clients. Although the reasonableness of a restrictive covenant is to be determined from the facts of each case, the Perry court failed to look at

123. See supra note 81 and accompanying text (discussing significant personal contact).
124. Perry, 109 Wash. 2d at 700, 748 P.2d at 229.
125. 141 Wash. 606, 252 P. 115 (1927).
127. Perry, 109 Wash. 2d at 695, 748 P.2d at 227.
128. Racine, 141 Wash. at 607, 252 P. at 115; Knight, 37 Wash. App. at 369-370 n.1, 680 P.2d at 451-452 n.1 (noting that the court would have had reservations if the employer had sought enforcement regarding clients with whom the employee did not have significant personal contact).
129. Perry, 109 Wash. 2d at 692, 696, 748 P.2d at 225, 227.
the facts of this case. As the dissent in *Perry* stated, an employee's unfair competitive advantage arises only where there has been personal contact between the employee and the employer's clients. A court should adjust a covenant that disregards personal contact so that the restriction includes only clients with whom the employee had personal contact.

Unlike solicitation, proving personal contact does not create serious problems. Putting the burden of proof on the employee protects the employer's interests, while allowing the employee to demonstrate that he or she did not have an unfair competitive advantage. The employee can prove that he or she did not have significant personal contact with an individual client without requiring the client's testimony and alienating the client. Instead, the employee can use the employer's business records to establish whether sufficient contact existed.

3. *The Washington Supreme Court Is Wrong to Restrict the Employee From Serving All Former Clients of the Employer*

The *Perry* court erred by enforcing a covenant when the client left the employer before the employee, or the client used another professional's services before using the employee's services. The employer does not have a legitimate interest in prohibiting an employee from taking clients that the employer has already lost. Restricting an employee from serving all of the employer's former clients violates the Washington policy of protecting the employer's legitimate interests only. The court should have rewritten the covenant to exclude former clients who had left the employer before the employee or who had used another professional's services before using the employee's.

The employer in *Perry* provided two arguments for not distinguishing between former and active clients. First, the employer argued that

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132. *Id.* at 706, 748 P.2d at 232–233.
133. *Wood*, 73 Wash. 2d. at 312, 438 P.2d at 590 (it could be proper for the trial court to limit a restrictive covenant to include only those clients with whom the employee had personal contact).
134. *See supra* notes 120–21 and accompanying text (discussing client testimony).
136. *See supra* note 6 (defining "clients").
Postemployment Restrictive Covenants

a client does not always notify the employer when the client terminates his services. The lack of notification, the employer argued, is particularly troublesome in professions in which the client only occasionally requires services. Second, the employer argued that the accountant set up a "screen." A screen is another professional who works as an accomplice to the employee. The accounting firm argued that the accountant had induced an accomplice to serve the client for a short time. The client then began to use the employee's services without appearing to have left the employer to follow the employee.

The employer's arguments are not persuasive. First, concerns over difficulty of proof can be alleviated by shifting the burden of proof to the employee. The employee would have to demonstrate that the client had terminated his relationship with the firm before the employee left the firm, or that the client had used another professional's services before using the employee. The employee could prove both through a client's testimony or through business records. The employee would decide if using the client's testimony was worth the possibility of alienating the client. The employee could also use the employer's business records or a third professional's business records to prove that the client did not leave the employer to follow the employee. Second, the possibility of employee fraud through the use of a screen does not justify enforcing a covenant where the employer has no legitimate interest. Although it might be possible for the employee to prove that he or she did not set up a screen, the law should not assume dishonesty on the part of the employee. Furthermore, if an employee has set up a screen, the employer would have the opportunity to prove it. The reasonableness of a restrictive covenant in Washington is to be determined from the facts of each case. An employee should be allowed to present facts that prove that the client had already left and was therefore not within the legitimate interests of the employer.

139. Id.
140. Id. at 25–26.
141. Id.
142. Id.
143. Id.
146. Requiring the employee to demonstrate that the client left the employer's services before the employee or that the client used another professional's services before using the employee's
4. The Washington Supreme Court Should Award Liquidated Damages Only for Clients with Whom the Employee Had a Competitive Advantage

The Perry court correctly determined that the accountant should pay the employer liquidated damages, rather than enjoining the accountant from serving the employer's clients. Liquidated damages mitigate the restrictive covenant's harm to the employee and the public. However, the court erroneously awarded liquidated damages to the employer for clients with whom the accountant did not have a competitive advantage.

The Perry court correctly determined that liquidated damages are preferable to injunctive relief in noncompetition cases. Enjoining an employee from serving the employer's clients harms the public, the employer, and the employee. The public is harmed because the employer's clients are barred from using a particular professional. Although the law presumes that another competent professional is available, the relationship between a professional and a client can be highly personal. Liquidated damages allow the public freedom to choose a particular professional. By infringing on the public's freedom to choose, injunctive relief can harm the employer. A client who has been enjoined from using a preferred employee probably will not return to the employer. In contrast, liquidated damages compensate the employer for loss of the client's business. Finally, injunctive relief harms the employee because the employee may not work for a client who prefers the employee. Liquidated damages allow the employee to continue his or her successful relationship with the client.

Liquidated damages are especially appropriate for violations of postemployment restrictive covenants because expert testimony can establish an amount that reasonably compensates the employer for the loss of clients. Clients are frequently bought and sold. Expert testimony can establish the amount that is generally used in a particular

provides objective evidence that the employee was not using an unfair competitive advantage to lure the client. The employee may argue that the client was dissatisfied with the employer's services and that the employee did not use an unfair advantage. However, without more objective proof, the result is a contest of which side can bring in the most clients to testify about the employer's reputation.

147. See supra notes 89-92 and accompanying text (discussing reasonable liquidated damages).
148. Wood, 73 Wash. 2d at 310, 438 P.2d at 589.
149. See supra notes 11, 66 and accompanying text (discussing public's freedom of choice).
profession for the purchase of an ongoing practice. Using the market price for clients is particularly fair because the businessperson negotiating the purchase of clients does not experience the same pressure that employees sometimes feel when entering an employment contract.

Although the Perry court was correct to award liquidated damages, the court was wrong to award damages greater than the harm caused by the accountant’s breach. Liquidated damages should be provided only where the employee had an unfair competitive advantage. In Perry, the accountant had no unfair competitive advantage with many of her employer’s clients. Liquidated damages should not have been awarded for clients with whom she had no significant personal contact. The court also erred when it awarded liquidated damages for clients who had terminated the employer’s services before the accountant left the employer or clients who had used the services of another professional before using the employee’s services.

III. CONCLUSION

In Perry v. Moran, the court enforced an unreasonable restrictive covenant. The Perry court correctly selected the Rule of Reason to determine whether a restrictive covenant that prevented the employee from serving the employer’s clients was reasonable. Further, the court correctly held that the employee could not solicit or accept business from the employer’s clients. The court, however, erred when it failed to distinguish between clients with whom the employee had significant personal contact and clients who had merely used the employer while the employee was working for the employer. The court also erred by failing to recognize the difference between former and active clients. The Perry court correctly determined that liquidated damages are less harmful to the employee than injunctive relief. However, the court allowed liquidated damages to be awarded for clients with whom the employee had no unfair competitive advantage.

The unfortunate result is that Washington law now extends too much protection to the employer, at the expense of the employee and

151. See supra notes 123–46 and accompanying text (discussing covenant’s overbreadth).
152. See supra note 129 and accompanying text (employee was the head of only one of the firm’s departments).
153. See supra notes 136–37 and accompanying text (discussing former clients).
the public. Postemployment restrictive covenants should only allow the employer to protect its legitimate business interests, while not allowing an employer simply to remove a competitor. The court should allow the employee to prove that he or she did not have an unfair competitive advantage with a particular client. The employer deserves liquidated damages only for clients with whom the employee had an unfair competitive advantage.

Susan E. Corisis