FORMAL OPINION NO. 108*

The Ethics Committee has been requested to rule on the propriety of covenants not to compete between attorneys. Specifically, the Committee has been asked:

> What is the status of non-shareholder employees who are attorneys employed by a professional legal association with regard to restrictions after termination of employment as to either a geographical area or to past and previous clientele of the professional association?

Lawyers may form a professional association. DR 2-102(B). The association must be between attorneys; no non-lawyers may be partners if any of the activities of the partnership consist of the practice of law. DR 3-103. Of course, the association may employ attorneys as associates to perform legal services for the association's clientele.

No case law was found which addresses the question placed before the Committee; however, several ABA opinions have been found upon which the Ethics Committee relies.

If an associate attorney leaves the employ of the association, his right to practice law cannot be restricted either as to the geographical area in which he practices or with respect to the clientele he will or may represent. DR 2-108(A); ABA Formal Opinion 300 (1961). The only exception to this in the Rule is if the restriction is a condition to payment of retirement benefits. The rationale for this exception is the requirement that a lawyer not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm, except in certain circumstances. DR 2-107(A). A former partner or associate may receive monies pursuant to a separate agreement (the former partner or associate being entitled to the monies as a result of his work) or retirement agreement. DR 2-107(B).

DR 2-108(A) states, in part:

> "Shareholders of a bona fide professional service corporation duly organized for the practice of law shall be considered and deemed partners and principals of the firm by which they are employed and their arrangement shall not be considered such an 'employment agreement.'"

This sentence is merely a definition of the term "employment agreement," and distinguishes such an agreement from a "partnership agreement" where the attorneys are on equal footing. No covenant restricting a partner's right to practice, upon disassociating himself from the partnership is allowed. ABA Informal Opinion 1171 (1971); ABA Informal Opinion 1072 (1968). Nor is an agreement which restricts the right of association between attorneys allowed as this is an indirect restriction of the right to practice law which also falls within the prohibition of DR 2-108(A). ABA Informal Opinion 1417 (1978).

Of course, when the associate leaves the association's employ, he cannot take with hin client files which are the property of the association. Canon 7. The associate can inform the clientele that he is leaving and advise them of his new address. He cannot solicit their business. DR 2-103. The client, not the association or the associate, has the right to choose his attorney. An agreement whereby the associate's right to practice is prohibited would affect significantly the client's right to make this choice.

In the opinion of the Committee, agreements restricting an attorney's right to practice law would be improper, whether an associate or partner is involved.

DATED this 28th day of August, 1981.

COMMITTEE ON ETHICS AND
PROFESSIONAL RESPONSIBILITY
OF THE IDAHO STATE BAR

Alfred C. Hagan, Chairman

Frank E. Chalfant, Jr.

Dean J. Miller

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*See also, I.S.B. Opinion No. 44 (December, 1964).