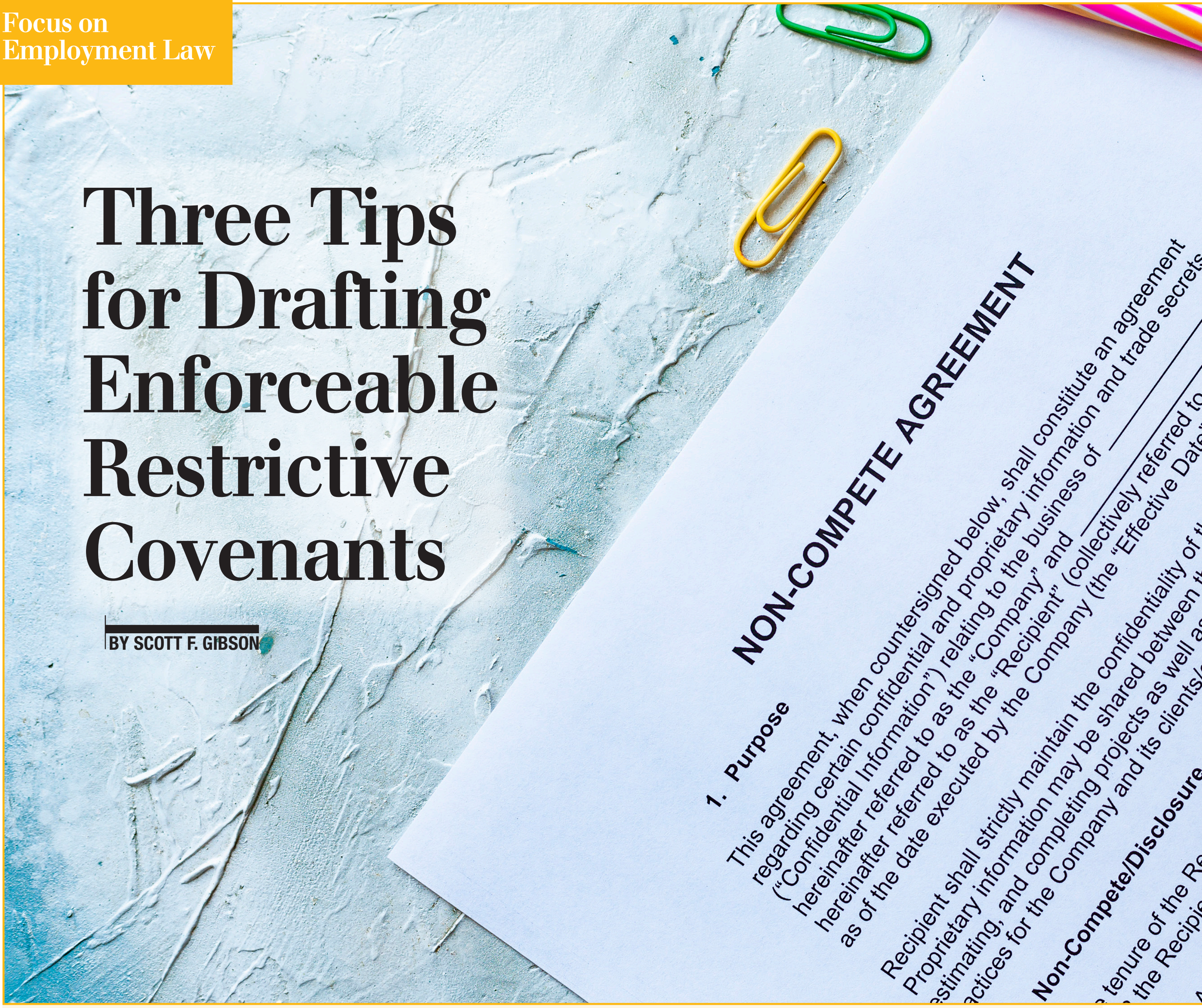
Focus on Employment Law



Three Tips for Drafting Enforceable Restrictive Covenants

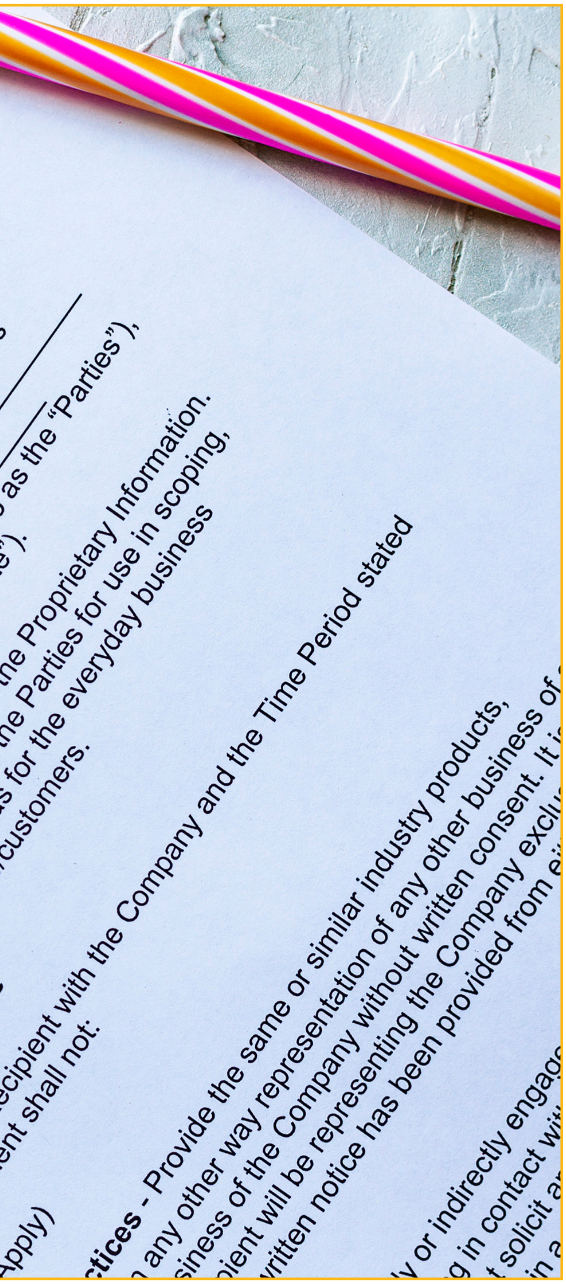
BY SCOTT F. GIBSON

Restrictive covenants are valuable tools that help a company protect its most important intangible assets: the ideas, innovations, goodwill and relationships that fuel a company's growth and prosperity.

But restrictive covenants frequently are misused, often with disastrous consequences. Consider, for example, Jimmy John's attempt to use non-compete agreements to keep its sandwich crews from working for competitors. Instead of protecting its business, the sandwich maker found itself on the wrong end of complaints filed by the attorneys general in multiple states.

Moreover, the overbroad restrictions reinvigorated a call for change that is sweeping the country. In an era when liberals and conservatives find it difficult to agree that the sky is blue, they find common ground in their opposition to restrictive covenants. In recent years, both Marco Rubio and Elizabeth Warren have introduced bills that would federalize and radically change the law of restrictive covenants. And in July 2021, President Biden issued an executive order asking the FTC to ban or dramatically limit the use of restrictive covenants.

I typically represent employers in drafting and enforcing restrictive covenants. As I talk with my colleagues representing employers across the country, we agree that poorly drafted restrictive covenants are the



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greatest threat to the ongoing use of restrictions. No one objects to using restrictions to prohibit *unfair* competition, but problems arise when poorly drafted agreements—sometimes unintentionally but often by design—seek to prevent competition *per se*. Those poorly drafted agreements make it more difficult for other employers to enforce even the most narrowly tailored agreements.

So as you draft restrictive covenants for your employer clients, I urge you to think small. Clearly and concisely identify what the employee can and cannot do post-termination, and make the list of "cannots" as small as possible. Draft narrow agreements focused on preventing *unfair* competition. Let former employees compete fairly once they leave your clients' employ. Stated simply, don't overreach.

When your client contacts you about drafting a restrictive covenant, she almost always wants you to do what the law expressly prohibits: draft a restrictive covenant that prevents competition *per se*. It's your job to explain why the restriction must be limited. You must overcome your client's inherent desire to overreach.

When I first began thinking seriously about restrictive covenants, I realized that drafting a restrictive covenant provided a unique opportunity to ethically shape the evidence that we would introduce at trial. And so I adapted my practices. Consider how these three tips might impact the way you draft restrictive covenants. (For more background, see sidebar on p. 38.)

1 Understand your client's legitimate business interests *before* you begin drafting the agreement.

Restrictive covenants are an unreasonable restraint on trade unless they are narrowly tailored to protect the employer's legitimate business interest. If you are going to draft an enforceable agreement, you must clearly understand the business interest you seek to protect.

A protectable business interest centers on information or relationships that "pertain peculiarly to the employer" and that the employee gained access to because of his relationship with the employer.[1] The employer has a legitimate interest in preventing a former employee from exploiting valuable business information or relationships that are unique to the employer and that the employee learned about solely because of her employment. Under these circumstances, the law recognizes that it is *unfair* for the employee to compete using this insider's advantage.

But the converse is true, as well. The employer does *not* have a legitimate business interest in protecting information or relationships that are *not* unique to the employer or that the employee gained access outside of her employment with the employer. That is why restrictive covenants cannot prevent an employee from using general skills and knowledge, even if the employee acquired those skills because of her employment.[2] Those skills and knowledge belong to every competent person working in the profession and do not belong uniquely to the employer.

Similarly, the employer cannot prohibit an employee from using information that is generally available to the public. It is not *unfair* for the employee to compete using the information that is generally available to the public; the employer has no legitimate interest in preventing the employee from using publicly available information.

Likewise, the employer does not have a business interest in relationships with potential customers,[3] customers who typically do business with multiple competitors[4] or former customers who terminated the relationship with the employer without any encouragement from the employee.[5] If the employee brought the customer relationship with him when he joined the employer,

—continued on p. 40

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Restrictive Covenants

Arizona's Law of Restrictive Covenants

Because "the right of an individual to follow and pursue the particular occupation for which he is best trained is a most fundamental right,"[1] our courts disfavor restrictive covenants, particularly when the covenant seeks to prevent an employee from pursuing a similar vocation after termination.[2] Regardless of the type of restrictive covenant involved, the covenant is not enforceable unless it meets certain formalities.

A restrictive covenant is enforceable *only* if it is no broader than the employer's legitimate business interests.[3] The employer has the burden of proving both the existence and extent of its protectable interest.[4] That protectable interest is found in information or relationships that "pertain peculiarly to the employer" and which the employee gained access to because of his relationship with the employer.[5]

"The test of validity of restrictive covenants is one of reasonableness."[6] Reasonableness requires employers to distinguish between *unfair* competition (which can be restricted) and competition *per se* (which cannot). It requires employers to have a compelling answer to the question, "Why is it *unfair* for *this person* to compete in *this way*?"

Reasonableness requires that the restriction last no longer than is necessary and, in the case of covenants not to compete, also have a reasonable geographic limitation.

In addition to these general principles, the following items are applicable to specific types of restrictive covenants.

1. **Covenants Not to Compete.** Covenants not to compete prohibit a person from engaging in a certain type of occupation or profession in a specific area for a specified time.

   A covenant not to compete may not unreasonably restrict the employee's right to work in his chosen occupation.[7] "An employer may not enforce a post-termination restriction on a former employee simply to eliminate competition *per se*."[8]

2. **Non-Solicitation Agreements.** Non-solicitation agreements "prevent former employees from using information learned during their employment to divert or to 'steal' customers from the former employer."[9]

   A non-solicitation agreement is unreasonable if it is "broader than necessary to protect the employer's legitimate business interests."[10] For example, an employer may not restrict a former employee from soliciting a customer who previously severed his business relationship with the employer.

   "Solicitation" contemplates that the employee initiated and sought out the relationship. "Merely informing customers of one's former employer of a change of employment, without more, is not solicitation."[11] Courts will not enjoin a former employee from accepting business from the customers of his former employer even though he could be enjoined from soliciting the business.

3. **Confidentiality Agreements.** Non-disclosure agreements protect an employer's confidential business information, such as trade secrets and customer lists.

   Trade secrets are defined and protected under both state and federal statutes.[12] As long as the owner of the trade secret takes "reasonable" efforts to maintain the secrecy of the information, trade secrets are protected indefinitely as a matter of law regardless of whether the employer has a written contract with the employee.

   The employer has the burden of proving the existence and scope of its trade secrets. "The subject matter of the trade secret must be secret and be of such a character that it would not occur to persons in the trade with the knowledge of the state of art."[13] For that reason, "matters of public knowledge or of general knowledge in the industry cannot be appropriated to one as his secret."[14]

   Similarly, no trade secret exists for information that "is available in trade journals, reference books, or published materials."[15] Likewise, "Information that forms the general skill, knowledge, training, and experience of an employee cannot be claimed as a trade secret by a former employer even when the information is directly attributable to an investment of resources by the employer int he employee."[16]

   "[A] nondisclosure agreement prohibiting the use or disclosure of particular information can clarify and *extend* the scope of an employer's rights" beyond the protection afforded by trade secret statutes.[17] The key is whether the information actually is confidential.

   Although the law distinguishes confidential information from trade secrets, "the rules governing trade secrets are still relevant in analyzing the reasonableness and enforceability of non-disclosure provisions because, in order to justify the contractual restraint, information subject to non-disclosure provisions must share at least some characteristics with information protected by trade secret statutes."[18]

endnotes

1. *Amex Distrib. Co. Inc. v. Mascari*, 724 P.2d 596, 603 (Ariz. Ct. App. 1986), *quoting ILB Indus. Inc. v. Scott*, 273 N.E.2d 393, 396 (Ill. 1971); *see also* Restatement (Third) of Unfair Competition § 1, cmt. a (Am. Law Inst. 1995) (competition is fundamental to the American free enterprise system).
2. *E.g., Amex Distributing*, 724 P.2d 596 at 600-01.
3. *E.g., American Credit Bureau Inc. v. Carter*, 462 P.2d 838, 840 (Ariz. Ct. App. 1969).
4. *Olliver/Pilcher Ins. v. Daniels*, 715 P.2d 1218, 1220 (Ariz. 1986).
5. *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1281 ¶ 12 (Ariz. 1999), *quoting* Harlan M. Blake, *Employee Agreements Not To Compete*, 73 Harv. L. Rev. 625, 647 (1960); *see also Bryceland v. Northey*, 772 P.2d 36, 39 (Ariz. Ct. App. 1999).
6. *Lessner Dental Laboratories Inc. v. Kidney*, 492 P.2d 39, 40 (Ari. Ct. App. 1971).
7. *E.g., Olliver/Pilcher*, 715 P.2d at 1220.
8. *Bryceland*, 772 P.2d at 39.
9. *Olliver/Pilcher*, 715 P.2d at 1219.
10. *Hilb, Rogal and Hamilton Co. of Arizona Inc. v. McKinney,* 946 P.2d 464, 467 (Ariz. Ct. App. 1997).
11. *Alpha Tax Services Inc. v. Stuart*, 761 P.2d 1073, 1075 (Ariz. Ct. App. 1988).
12. *See, e.g.,* Arizona Uniform Trade Secrets Act, Ariz. Rev. Stat. Ann. §§ 44-401 to -407 (West 2019); Defend Trade Secrets Act, 18 U.S.C. §§1831-1839 (2018).
13. *Wright v. Palmer*, 464 P.2d 363, 366 (1970).
14. *Id.*
15. Uniform Trade Secrets Act, § 1 *Commissioners' Comment.*
16. Restatement (Third) of Unfair Competition § 42 cmt. d (Am. Law Inst. 1995).
17. *Id.* § 42 cmt. g (emphasis added)
18. *Orthofix Inc. v. Hunter*, 630 F.App'x 566, 568 (6th Cir. 2015) (citations omitted).

the protectable relationship belongs to the *employee* and not to the employer.

Once you have identified your client's protectable business interest, draft a restriction that protects that interest and nothing more than that interest. If your client provides only *services*, don't include language that protects *products* that your client does not provide. Some might argue that overinclusive language is of no concern because a court interpreting the restriction can disregard the unnecessary language. In reality, however, overinclusive language emphasizes that the restriction is overbroad, and overbroad restrictions are unenforceable.[6]

2 Ask yourself, "Why is it *unfair* for *this* person to compete in *this* way?

If you are going to protect your client's business, you must understand the difference between *unfair* competition (which can be restricted) and *fair* competition (which cannot). (See sidebar on p. 42.)

You can't prevent a former employee from engaging in fair competition, so don't try to do so. Rather, focus on the ways that the employee can compete unfairly, and draft an agreement that is limited to preventing unfair competition. A valid restrictive covenant not only prohibits *unfair* competition, but it also allows the employee to compete *fairly*.

When a court analyzes the reasonableness of a restrictive covenant, it will focus on *who* is being restrained and *what* conduct is being restricted. The Director of Sales and Marketing typically has access to more specialized, unique company information than does a sales representative. For example, she likely has greater insights into the marketing strategies that the company will implement in the coming year. Because of that greater access, the company has a greater interest in preventing her from exploiting that information.

Distilled to its essence, your ability to enforce a restrictive covenant depends on your answer to a single question: "Why is it *unfair* for *this person* to compete in *this way*?" You need to answer that question before you draft the restriction. Ask your client why certain types of competition are unfair, but be prepared to push back against her initial answer. A court reviewing your restrictive covenant will view that answer skeptically. So should you.

Push back on your client's stated reasons. Determine the parameters of your client's legitimate business interests, then tighten the scope of the restriction around those interests. Cut back the scope of your restriction, then cut back some more. Critically explore the minimum geographic and temporal restrictions your client needs. Cut back your restriction to a minimum.

When you get to the courthouse, you will need an articulate corporate representative who can explain *why* the company needs the specific restriction and *how* the employee is competing unfairly. Begin preparing that witness *before* you start drafting.

Failure to prepare your witness can be disastrous. I once took the deposition of a corporate representative who had verified the complaint but could not tell me why the company needed the restrictions contained in the agreement. I was floored when I asked him why the company needed a two-year restriction. His candid answer: "I don't know. That's what my attorney put."

3 Don't count on "step-down" provisions to save a poorly drafted agreement.

Arizona is firmly committed to the "blue pencil rule" in interpreting and enforcing unreasonable restrictive covenants. Under the Arizona version of the blue pencil rule, the trial court may eliminate "grammatically severable, unreasonable provisions"[7] from the agreement, and then "enforce the lawful part and ignore the unlawful part."[8]

However, the court may not "add terms or rewrite an agreement to make it enforceable."[9] The court will not become a scrivener and draft the agreement that the parties could have (and should have) prepared if they had done their homework. Applied appropriately, the blue pencil rule "requires an *employer's counsel* to focus on the bottom line of post-serverance [sic] validity' and places the burden "*upon counsel rather than the court* to fashion a legitimate restriction."[10]

Step-down provisions often are used today to cover up slipshod and imprecise drafting.

Beginning in the early 1990s, employers attempted to exploit the blue pencil rule by drafting "step-down" provisions containing increasingly more limited restrictions.[11] No Arizona appellate court has directly considered whether step-down provisions are valid under Arizona law,[12] although the federal district court has held that "under limited circumstances carefully crafted step-down provisions are a permissible application of Arizona's blue-pencil rule, if they permit a Court to cross-out some unreasonable sections in favor of more reasonable ones without rewriting them."[13]

Although lawyers may have begun using step-down provisions "under limited circumstances" and "carefully crafted" the provisions to meet the requirements of the blue pencil rule, they often are used today to cover up slipshod and imprecise drafting. The step-down provisions from *Orca Communications* highlight the mischief that step-down provisions can create. The agreement identified 18 months as the duration of the restriction, with a step-down provision providing that:

in the event that a reviewing court finds the duration of eighteen (18) months to be unenforceable, for the longest of the following periods immediately following the termination of Employee's employment with The Company for any reasons that is found to be enforceable: fifteen (15) months; twelve (12) months; nine (9) months; six (6) months.[14]

Likewise, the agreement defines

Competition is a foundational right, a "fundamental premise of the free enterprise system."[1] We owe our high standard of living to our economic system that rewards innovation and provides incentives for entrepreneurs to build a better mousetrap. Fair competition is the American way.

But the same competition that boosts our standard of living can be cruel and messy, creating economic winners and losers in its path. Nonetheless, "competition is not a tort"[2] even though it may be "painful, fierce, frequently ruthless, sometimes Darwinian in its pitilessness."[3]

"The freedom to compete necessarily contemplates the probability of harm to the commercial relations of other participants in the market."[4] And so our courts have grappled with the idea of how far the right to compete extends.

In the world of restrictive covenants, although an employer may protect her business interests with restrictive covenants, she "may not enforce a post-employment restriction on a former employee simply to eliminate competition *per se*."[5] Rather, the employer has the heavy burden of showing that the restrictions are limited, reasonable, and no greater than is required to prevent unfair competition. That burden requires he employer to distinguish *unfair* competition (which can be restricted) from competition *per se* (which cannot).[6]

The inherent "fairness" of a particular competitive activity is determined on a case-by-case basis. In general, competition is *unfair* when it exploits the employer's unique business interest (i.e., the employer's proprietary ideas, innovations, goodwill, and relationships) that the employee would not know but for his employment with the company.

Fairness depends on the extent of the employer's legitimate business interest. A protectable business interest has some aspect of novelty. It must not be commonly known in the industry or otherwise available through publicly available sources. The more novel the interest, the more likely the employer can protect it with a restrictive covenant.

For example, a mattress superstore had a legitimate business interest in its "Product Bible," which contained employer-specific information about merchandise, wholesale prices of the merchandise, and unique promotional deals that the suppliers offered the employer.[7] The six-month restriction was narrowly tailored to meet this business interest because (1) the employer needed approximately six months to hire and train a new employee to be profitable, and (2) the company updated its "Product Bible" approximately every six months.[8]

On the other hand, a restriction seeks to eliminate competition *per se* "when there is no other, valid interest of the employer to protect."[9] Because the employer may not restrict competition *per se,* "a restrictive covenant that goes beyond protecting a legitimate business interest and prevents a former employee from using skills and talents learned on the former job is unenforceable."[10]

If the employer's business interest is insufficiently novel, it is not *unfair* for the employee to exploit the information post-termination. That competition constitutes *fair* competition, no matter how painful, fierce, ruthless, and Darwinian it might be.

For example, employers may not use a non-disclosure agreement to prevent a former employee from using her general skills and knowledge -- i.e., those things that a competent person in field knows -- even she acquired those skills and knowledge as a result of her employment.[11] Because those skills and knowledge are not unique to the employer, the employer has no right to prevent others from using those skills and knowledge. As one Arizona court bluntly explained, the former employee "is not required to undergo a prefrontal lobotomy" when she leaves her job.[12]

Likewise, it is not *unfair* for an employee to do business with a former customer of the employer when the employee is not responsible for the termination of the relationship. "Although [an employer] has a protectable interest in customer relationships when an employee leaves, an employer has no protectable interest in persons or entities as customers when the employer has no business ties to them."[13]

endnotes

1. Restatement (Third) of Unfair Competition § 1 cmt. 1 (Am. Law Inst. 1995).
2. *Frandsen v. Jensen-Sundquist Agency Inc.,* 802 F.2d 941, 947 (7th Cir. 1986).
3. *Speakers of Sport Inc. v. ProServ Inc.,* 178 F.3d 862 (7th Cir. 1999).
4. Restatement (Third) of Unfair Competition § 1 cmt. 1 (Am. Law Inst. 1995).
5. *Bryceland v. Northey*, 772 P.2d 36, 39 (Ariz. Ct. App. 1989).
6. *See, e.g., id.*
7. *Bed Mart Inc. v. Kelley,* 45 P.3d 1219, 1222 ¶ 14 (Ariz. Ct. App. 2002).
8. *Id.*
9. *Amex Distrib. Co. Inc. v. Mascari*, 724 P.2d 596, 604 (Ariz. Ct. App. 1986).
10. *Orca Commc'ns Unlimited LLC v. Noder*, 314 P.3d 89, 95 ¶ 19 (Ariz. Ct. App. 2013), *aff'd in part, depublished in part by* 337 P.3d 545 (Ariz. 2014).
11. *See, e.g., Lessner Dental Labs. Inc. v. Kidney*, 492 P.2d 39, 42 (Ariz. Ct. App. 1971) (the restrictive covenant violated public policy because it prevented the employee from using her skill and general knowledge).
12. *Amex Distrib.*, 724 P.2d at 603.
13. *Orca*, 314 P.3d at 96 ¶ 21.

its Restricted Territory as "the largest of the following geographic areas or combinations thereof that is found to [be] enforceable by a reviewing court."[15] The agreement then lists in alphabetical order all 50 states and the District of Columbia, with the additional step-down provisions of:

> within 150 radial miles of the Company's offices in Phoenix Arizona; within 100 miles of the Company's offices in Phoenix Arizona; within 50 radial miles of the Company's offices in Phoenix Arizona; within 25 radial miles of the Company's offices in Phoenix Arizona; or within 10 radial miles of the Company's offices in Phoenix Arizona.[16]

These broad restrictions highlight the problem with step-down provisions: No one (not even the employer) can identify what the parties intended by their agreement. And if the parties don't know what they intended, they cannot abide by the terms of the agreement.

I predict that when our appellate courts thoughtfully consider the validity of step-down provisions, they will condemn the provisions as being antithetical to well-established Arizona law in at least five different ways:[17]

- Arizona law requires the employer to both prove the scope of its protectable business interest *and* narrowly tailor the restriction so that it solely covers that interest. Step-down provisions allow the employer to improperly transfer those burdens to the court.
- Basic contract principles require an offer, acceptance of that offer, consideration and sufficiently specific terms so that the parties can ascertain what their rights and obligations are. An employee cannot tell what her obligations are when the step-down provision requires her to not engage in her chosen field for either 18 months or 15 months or 12 months or 9 months or 6 months, depending on what a court finds to be "reasonable." A step-down provision lacks the specificity required under Arizona law.
- The employer has a duty to act in good faith when drafting a restrictive covenant. A step-down provision is not procured in good faith because the employer tacitly acknowledges that at least some of the provisions are overbroad. After all, if the employer were confident that a 15-month restriction is reasonable, she would not need to include provisions authorizing a restriction of 12 or 9 or 6 months. The fact that she is willing to accept a 6-month restriction signals that the 15-month restriction is unreasonable and unenforceable.

Heed the injunction that a restrictive covenant must be narrowly tailored to cover no more than the employer's legitimate interest.

- The blue pencil rule allows courts to edit but not rewrite restrictive covenants. Step-down provisions encourage the court to rewrite the provision, particularly when the provisions contain multiple steps.
- Arizona courts repeatedly denounce the *in terrorem* effect of overly broad restrictive covenants. Step-down provisions—particularly those with multiple steps—highlight the mischief that overly broad restrictions create. An honorable employee attempting to comply with her contractual obligations will defer to the broader restriction (e.g., 15 months instead of 6 months) even though that broader restriction is in fact unreasonable and unenforceable. As Professor Harlan Blake wrote in his masterful study of restrictive covenants more than 60 years ago, "This smacks of having one's employee's cake, and eating it too."[18]

Heed the injunction that a restrictive covenant must be narrowly tailored to cover no more than the employer's legitimate interest. *Tailoring* requires that you fit the restriction to the specific employee rather than use a general "off-the-shelf" restrictive covenant. It contemplates that you will need to cut the agreement and fit it to cover the particular employee.

In the same way that a tailor must customize a suit to properly fit his customer, you must customize your restrictive covenant so that it appropriately fits the employee. A tailor uses only as much material as is needed to cover the customer who will wear the suit. A suit for a 150-pound man uses much less material than does a suit for a 300-pound man. A skilled tailor uses no more and no less material than is required to prepare a suit that fits his customer exquisitely.

In similar vein, a well-tailored restrictive covenant contains no greater or lesser coverage than is required in the particular circumstance. A restrictive covenant that is not well tailored is overbroad, unreasonable and unenforceable. And you cannot "fix" the unenforceable agreement with step-down provisions.

Conclusion

Spend the time necessary to create an enforceable restrictive covenant for your client. Define the scope of her legitimate business interest. Make sure that you restrict only *unfair* competition with covenants that allow former employees to compete fairly. Avoid step-down provisions, and take responsibility to limit the scope of the restrictions.

Cut the restrictions until they are no greater than what is required to protect the legitimate business interest. You can prevent *unfair* competition without restricting competition *per se.*

endnotes

1. *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1281 ¶ 12 (Ariz. 1999) *quoting* Harlan M. Blake, *Employee Agreements Not to Compete,* 73 Harv. L. Rev. 625, 647 (1960); *see also Bryceland v. Northey*, 772 P.2d 36, 39 (Ariz. Ct. App. 1999).
2. *Lessner Dental Labs. Inc. v. Kidney*, 492 P.2d 39, 42 (Ariz. Ct. App. 1971).
3. *Orca Commc'ns Unlimited LLC v. Noder*, 314 P.3d 89, 96 ¶ 21 (Ariz. Ct. App. 2013), *aff'd in part, depublished in part by* 337 P.3d 545 (Ariz. 2014).

4. *Amex Distrib. Co. Inc. v. Mascari*, 724 P.2d 596, 603 (Ariz. Ct. App. 1986).
5. *Hilb, Rogal & Hamilton Co. of Arizona v. McKinney*, 946 P.2d 464, 467 (Ariz. Ct. App. 1997).
6. *See Valley Med. Specialists*, 982 P.2d at 1281 ¶ 12, *quoting Mandeville v. Harman*, 7 A. 37, 39 (N.J. Ch. 1886) ("Whatever restraint is larger than the necessary protection of the [employer] can be of no benefit to either [the employer or the employee]; it can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable and void, on the ground of public policy, as being injurious to the interests of the public").
7. *Valley Med. Specialists*, 982 P.2d at 1286 ¶ 30.
8. *Olliver/Pilcher Ins. v. Daniels*, 715 P.2d 1218, 1221 (Ariz. 1986).
9. *Orca Communic'ns*, 314 P.3d at 96 ¶ 23.
10. *Amex. Distrib.*, 721 P.2d at 605 n.6 (emphasis added).
11. A typical step-down provision might read as follows:

    Non-Compete Covenant. During Employee's employment with the Company and throughout the Restricted Period, Employee will not compete in the Business of Employer within the Restricted Area.

    Definitions. For purposes of this Agreement, the following terms have the definitions indicated below:

    "Restricted Period" means the 18 months immediately following the termination of Employee's employment with the Company for any reason. In the event that a court of competent jurisdiction finds this duration to be unreasonable for any reason, the temporal limitation shall be limited to the 12 months immediately following the termination of Employees employment with Company for any reason.

    "Restricted Area" means the area within 150 radial miles of the Company's offices in Phoenix, Arizona. If a court of competent jurisdiction finds this geographic scope to be unreasonable for any reason, the geographic restriction shall be 50 radial miles of the Company's offices in Phoenix, Arizona.
12. In *Orca Communications,* the Court of Appeals declined to rule on the enforceability of step-down provisions, holding instead that the restrictive covenants involved were unenforceable "because the covenants' content is too broad: the covenants restrict too much information and too much activity." *Orca Communications*, 314 P.3d at 96 ¶ 22 n.3.
13. *Compass Bank v. Hartley*, 430 F.Supp. 2d 973, 981 (D. Ariz. 2006).
14. Confidentiality, Non-Solicitation, and Non-Competition Agreement between Ann Noder and Orca Communications Unlimited LLC, 4 (Oct. 27, 2005) (on file with author).
15. *Id.*
16. *Id.*
17. For a more detailed description of the legal inadequacy of step-down provision, *see* Scott F. Gibson, *Restrictive Covenants Under Arizona Law: Step Away from the Step-Down Provisions* 51 Ariz. St. L.J. 593 (2019). For additional thoughts on step-down provisions, *see* Ali J. Farhang & Ray K. Harris, *Non-Compete Agreements with Step-Down Provisions: Will Arizona Court Enforce Them?* Ariz. Att'y, Dec. 2005 at 26; David G. Bray & David N. Ferrucci, *Top 3 Unanswered Questions in Arizona Non-Compete Law,* Ariz. Att'y, Sept. 2012 at 22.
18. Blake, *supra* note 1, at 682-83. The *in terrorem* effect is real. "Many employees are deterred from testing the legality of unreasonably onerous restrictions because of the expense and vicissitudes of litigation. Thus they are condemned to have legitimate options forever foreclosed because of the fear of a violation of an unreasonable and excessive restriction." *Sidco Paper Co. v. Aaron,* 351 A.2d 250, 261 n.1 (Pa. 1976) (Nix, J., dissenting).