Lawyers who act reasonably serve both their clients’ interests and the interest of justice. While the adversarial system often involves confrontation and litigation to resolve disputes, a little reason goes a long way in avoiding litigation and bringing successful, cost-effective resolution to many matters. This is especially true when drafting noncompete agreements in the employment setting. A reasonably drafted noncompete agreement is less likely to be challenged in court and, if challenged, is more likely to be enforced.

Many courts “apply an overarching requirement of ‘reasonableness’ when determining the validity of covenants not to compete.”1 Section 186 of the Restatement Second of Contracts outlines the law governing noncompete agreements, and provides that a noncompete agreement will be found “unenforceable on grounds of public policy if it … unreasonably” restrains trade.2 This provision is referred to as “the rule of reason.”3 A number of courts, using this rule, have determined the reasonable-ness of a noncompete agreement using the following three-pronged test:

1. Is the restraint, from the standpoint of the employer, reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate business interest?

2. From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing the employ-ee’s legitimate efforts to earn a livelihood?

3. Is the restraint reasonable from the standpoint of a sound public policy?

In Mathias v. Jacobs, for example, the U.S. District Court for the Southern District of New York addressed the rule of reason by “balancing public policies in favor of robust competition and freedom to contract” in the context of noncompete clauses in employment contracts.4 The Mathias court noted that “[p]ublic policy favors economic competition and individual liberty and seeks to shield employees from the superior bargaining position of employers.” However, because courts must perform a balancing test, they must also consider the employee’s right to “freedom of contract” and be guided by a sense of fair play. In Mathias, the court ultimately ruled against the employer, because it was overzealous in seeking overly broad protections under the relevant noncompete agreement. Specifically, the agreement sought to prohibit the employee from having any contact whatsoever (including purely social interaction) with the employer’s customers and/or prospective customers, the employer’s employees, and any entity that might be the subject of a future acquisition by the employer. Accordingly, the Mathias court determined that the relevant noncompete agreement was unreasonable.

Lawyers should take into account a number of key points when drafting noncompete agreements on behalf of employers. First, the lawyer should review the client’s underlying business justification for the noncompete agreement in order to determine whether a protectable interest exists. For example, the employer’s business justification may be that the agreement protects confidential information, such as trade secrets or customer lists, which are the property of the employer.5 Where the noncompete agreement seeks to protect interests that, in fact, merit protection, the agreement gains legitimacy to the extent that the inter-ests and protections therein are reasonable. However, because noncompete agreements may be perceived as preventing individuals from working, some courts do not favor them and will strictly construe noncom-pete agreements against employers.6

Second, the lawyer should determine whether the noncompete agreement is temporally reasonable—that is, how long the agreement will restrict the employee from working for a competitor. Generally, courts will not enforce a noncompete agreement if the agreement restricts an employee’s ability to work in an industry for an unreasonable period of time. Some courts hold this period to be two years, while others permit only one year.7 Such determinations are largely fact-intensive. Accordingly, if the time period set forth in the agreement is reasonable in light of the employee’s particular employment situation, it is more likely that the agreement will survive a court challenge and accomplish the employer’s goal of restrict-ing unfair competition.

Third, the lawyer should determine if the restric-tions imposed in the noncompete agreement are geo-graphically reasonable. Courts are less likely to en-force an agreement that restricts an employee’s ability...
to work in an industry on a regional basis or nationwide. Depending on the nature of the employee's position and duties, such a restraint might inhibit the employee from contributing his or her talents to the workforce as a whole. Thus, the lawyer should work with the client to define the relevant marketplace in which the noncompete agreement can effectively and reasonably protect the employer's interests.

While some may argue that noncompete agreements are inconsistent with a competitive marketplace and create unfair restrictions on an individual's right to work, others maintain that such agreements enhance fair competition and are compatible with the individual's right to contract freely. The former perspective has found support in the California Business and Professions Code, which, except for limited circumstances, voids "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind." The latter found a home in Florida's statutory scheme, which enforces restrictive covenants in employment as long as the employer has a legitimate business interest and the temporal duration of the agreement is not unreasonable. No matter the jurisdiction, noncompete agreements allow businesses to prosper by virtue of continued growth without competitors gaining knowledge of confidential business information. Noncompete agreements also allow individual employees to gain employment and increase their skills, for the employer is secure in the fact that the employee cannot use information to a competitor's benefit.

At the outset of drafting a noncompete agreement it is important to recognize that both sides—employer and employee—have an interest in the substance of the agreement. In adopting the rule of reason, courts generally recognize that employees have a right to earn a living in the profession for which they have been trained. Courts also recognize that they cannot ignore the business owner's interests by allowing an employee to misuse confidential information in order to compete against that employer. These interests must be balanced against each other.

If employment lawyers apply reason to the drafting of noncompete agreements, they are likely to save their clients time and money in the long run. In sum, more reason should equal less litigation. **TFL**

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**Endnotes**


2Restatement (Second) of Contracts § 186(1) (1981).

3Id. § 188 cmt. a.


7Blue Ridge Anesthesia, supra note 4, 389 S.E.2d at 469.

8The Employment Law Deskbook § 15.03[7][d][ii] (Bender 2005).


11*Bradford, supra* note 1, 501 F.2d at 58 (noting that “it is distasteful to curtail [an employee’s] opportunity to make a living”); *Faces Boutique, supra* note 4, 455 S.E.2d at 709 (finding that a noncompete agreement cannot be “unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood”).

12See, e.g., St. Clair Medical P.C. v. Borgiel, 715 N.W.2d 914, 919 (Mich. Ct. App. 2006) (holding that “noncompete agreements must protect against the employee’s gaining some unfair advantage in competition with the employer”).