Thou Shall Not Prohibit a Former Employee from Earning an Honest Living

by Hon. Robert L. Gottsfield and Timothy D. Keller

As we begin the new millennium, the great "American Dream" of equal opportunity to compete in the employment market stands ready to enter its most exciting era in history. Constant technological changes and the rapid growth of our service economy permit entrepreneurs and hard-working individuals to be more mobile in their careers than anyone ever dreamed possible. It is no longer the case that a person will graduate from college, find a decent-paying job, and stay with that company until the day she retires. In today's market, the typical employee will work for six or seven different employers, sometimes in vastly different areas, but more often than not in the same field of expertise. As should be expected, increased employee mobility creates much instability and unpredictability for employers, and this has caused a decrease in loyalty on both sides of the equation.

Our capitalist marketplace thrives on fair competition, but employers have every incentive to try to prevent their employees from leaving their company and going to work for a competitor, or from starting their own business and trying to take customers with them. In order to minimize the turmoil caused by departing employees, many companies require individuals to sign restrictive covenants, sometimes referred to as "noncompete clauses," to restrict future employment. Signing the covenant is usually a condition of employment. Attempts to proscribe future work have always been disfavored by courts, but recent trends in case law show that the 21st Century employer will not be able to restrict a departing employee's right to work beyond what is *absolutely* necessary to protect some legitimate interest of the employer. In fact, the Arizona Supreme Court in *Valley Medical Specialists v. Farber*,[1] to be discussed, has elevated the freedom of the public to choose a professional over the interest of remaining firm members.

Every trial lawyer should know, however, that restrictive covenant cases are highly fact intensive and will still be decided on a case-by-case basis. Courts will strictly construe what qualifies as a legitimate business interest. As demonstrated by *Farber*, simply citing to a similar case where a restrictive covenant was upheld will not be enough. Attorneys will need to prove why, in each particular case, the restriction at issue deserves to be enforced.

Farber Facts and Holdings

The Arizona Supreme Court recently issued a compelling and strongly worded opinion dealing with restrictive covenants between physicians in *Farber.* This case has

all but ended restrictive covenants between physicians in Arizona. *Farber* will have a far-reaching impact not just for doctors and other professionals, but for those in other occupations as well.

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Valley Medical Specialists (hereafter VMS), a professional corporation of internists and other specialties, hired Dr. Farber, a D.O. internist and pulmonologist, who after a few years became a shareholder, minority officer and director. In 1991, the three then directors, including Dr. Farber, entered into new stock and employment agreements, the latter containing a restrictive covenant. At the time Dr. Farber left in 1994, the restrictive covenant prohibited him from practicing any form of medicine for three years within a five-mile radius of any VMS office. (At the preliminary hearing it was shown that this language closely tracked a prior Arizona case, *Phoenix Orthopedic Surgeons v. Peairs*,[2] where such a restriction had been upheld.) There were three VMS offices at the time of Dr. Farber's departure and a five-mile radius from each office effectively prohibited him from practicing medicine within 235 square miles of the Valley.

When Dr. Farber began practicing in violation of the restrictive covenant, VMS sought a preliminary and permanent injunction. VMS also asked for liquidated damages pursuant to the employment agreement, which provided that VMS would be able to recover up to 40 percent of the gross receipts received by Dr. Farber for any medical services for a period of three years if any of the restrictive covenants were violated. The employment agreement which Dr. Farber signed had a provision stating: "The Employee expressly acknowledges and agrees that the covenants and agreement...are minimum and reasonable in scope and are necessary to protect the legitimate interest of the Employer and its goodwill."[3]

After six days of testimony, the trial court denied the request of VMS for a preliminary injunction, finding that the restrictive covenant violated public policy "because of the sensitive and personal nature of the doctor-patient relationship."[4] Alternatively, the trial court held the restriction unenforceable because it was unreasonable and overly broad. Specifically, the three-year duration was unreasonable because pulmonology patients typically required contact with a treating physician once every six months, so that any restriction over six months was unnecessary to protect VMS' economic interests. Patients would have had an opportunity within the six-month period to decide which doctor to see for continuing treatment. Moreover, the five-mile radius from each of the three VMS offices was unreasonable because it covered a total of 235 square miles. Finally, the restriction was overly broad because it did not provide an exception for emergency medical treatment and was not limited to the practice of pulmonology, but restricted Dr. Farber from practicing all medicine.

The Arizona Court of Appeals, Division One, unanimously reversed the trial court, concluding the restrictive covenant, *as modified by Division One*, was a reasonable restriction as to time and area; the restrictive covenant should not have been strictly construed against the corporation because Dr. Farber was a shareholder as well as an employee; and the agreement did not violate public policy.[5] It noted that the previous decision by Division Two in *Peairs* concerned three offices of a medical group and a three-year duration and was upheld by that Court. Division One further held that the severability clause contained in the employment agreement permitted the Court to modify the restrictions to allow Dr. Farber to provide emergency medical services within the restricted area.[6] Further, the Court of Appeals accepted the stipulation of VMS on appeal that Dr. Farber could continue to treat HIV- positive and AIDS patients and perform brachytherapy within the restricted area.[7]

The Arizona Supreme Court, in a unanimous opinion written by Justice Feldman, disagreed with Division One, vacated its opinion and affirmed the trial court. While *Farber* dealt with physicians, its holdings, in the authors' view, have general applicability to most post-employment restrictions, especially covenants concerning professionals, but also to those in other occupations. Some of its important conclusions are:

• It reaffirms prior law that while employer-employee restrictive covenants are disfavored and strictly construed against the employer, there is no such presumption when construing covenants not to compete connected with the sale of a business. In the latter case a reasonable restraint is necessary to assure that the buyer gets the full goodwill value for which he paid;[8]

• Notwithstanding that Dr. Farber was a partner (shareholder) in the medical group (professional corporation), his noncompete agreement was more analogous to an employer-employee agreement than to the sale of a business, so the strict construction and disfavored rules applied.[9] This issue had not been previously decided in Arizona.

• A post-employment restriction is unreasonable and unenforceable if the agreement is broader than necessary to protect the employer's legitimate interest, which interest must be more than the desire to prevent competition by the employee. What is reasonable will turn on a very fact-intensive inquiry and will depend on duration, geographic area and activity prohibited.[10]

• In the *commercial context, Farber* affirms prior Arizona case law that the focus of the inquiry is to provide the employer a reasonable period of time to train a new employee, and to give that new employee an opportu-

nity to establish herself with the company's clientele. Moreover, any restraint on activity must be limited to the former employee's particular job duties or specialty.[11]

• In the *professional context*, *Farber* significantly deviates from prior Arizona law holding, for the first time, that public policy concerns may outweigh any protectable interest the remaining firm members have in enforcing post-employment restrictions. Neither the hardship to the firm nor to the departing partner will be determining considerations, but rather the covenant's effect on the public, in this case Dr. Farber's patients, will be given the most weight.[12]

Three Types of Covenants

Transactional lawyers refer to three types of post-employment restrictions[13]: (1) anti-piracy provisions to protect customer goodwill (departing employee agrees not to solicit customers she previously serviced which is usually easier to enforce than a covenant not to compete); (2) covenants not to compete (will not engage in a competitive business for a period of time in a certain area, such as the three-year and five-mile radius of any VMS office found unreasonable and overly broad in *Farber*); and (3) confidentiality provisions (will not disclose confidential and/or trade secret information). *Farber* concerns and this article will focus on noncompete agreements. For a recent review of Arizona trade secret law see *Enterprise Leasing Co. of Phoenix v. Ehmke*.[14]

Restrictive Covenants in the Commercial Context vs. the Professional Context

Justice Feldman succinctly sets forth the still-applicable general rules governing post-employment restrictive covenants in Arizona:

> To be enforced, the restriction must do more than simply prohibit fair competition. In other words, a covenant not to compete is invalid unless it protects some legitimate interest beyond the employer's desire to protect itself from competition…The legitimate purpose of post-employment restraints is 'to prevent competitive use, for a time, of information or relationships which pertain peculiarly to the employer and which the employee acquired in the course of the employment… Despite the freedom to contract the law does not favor restrictive covenants.'[15]

While the above states the general rule, the *Farber* Court, for the first time in Arizona law, makes a distinction between restrictive covenants in the commercial context and such restrictions in the professional context.[16] In the commercial context, a legitimate employer interest is retaining customers so that reasonable restrictions protecting a business' *customer base* will be permissible for a time under the above-quoted general rule. This no longer true "in cases involving the professions" where "public policy concerns"[17] dictate that in our society the right of the patient/client to choose a professional of one's own choice is the paramount interest to be protected. Our society places ultimate value on the consensual and highly fiduciary nature of choosing a professional in which to repose confidence. Fostering professional mobility and access to professional help aids competition among professionals, which in the long run nurtures the proper rendering of professional services and ethical practices.[18] According to *Farber*, "strong public policy considerations"[19] dictate that the relationships between professionals and their patients/clients be treated as "special and entitled to unique protection. [20]

The *Farber* Court recognized the legitimate interest of the employer VMS in its "referral sources,"[21] but significantly not in retaining its present patients (patient/client/customer base), which gave way to the interest of those patients in choosing whether to stay with VMS or continue treatment with Dr. Farber.[22] At the hearing on the preliminary injunction, referral sources of physicians were said to be based in the relationships developed by the physician with health providers, his own patients and especially with other physicians, all of which fostered the physician's reputation in his specialty.

There is no doubt that until *Farber* transactional lawyers firmly believed, and with good reason because a prior case said so,[23] that a covenant not to compete concerning physicians (and by extension any professional except lawyers) was valid for a period of three years and five miles from any office of the remaining partners. In *Farber*, VMS argued that it would take another VMS pulmonologist at least three to five years to develop referral sources comparable to those possessed by Dr. Farber.[24] What is significant in *Farber* is that unlike in prior cases dealing with covenants in the commercial context, the court was not concerned with how long it would take a pulmonologist to develop referral sources and establish herself with the professional corporation's patients, but in how much time patients would require to exercise their freedom to choose.[25] As noted by the Supreme Court, in the professional context, unlike often in the commercial context, the professional comes to the firm with her professional education and skills, which the firm has not paid for or taught.[26] And, it is her personal skill and ability which usually accounts for her building and retaining a client base.[27]

The trial court in *Farber* in essence determined that VMS should have a six-month window during which Dr. Farber could be restricted from practicing pulmonology within a reasonable area (never defined).[28] This was because "pulmonology patients typically require contact with the treating physician once every six months" and this was sufficient time to give the patients an "opportunity…to decide which doctor to see for continuing treatment."[29]

Transactional lawyers should take no solace in this trial court finding be-

cause it was not adopted by the Supreme Court. Instead the authors believe that while the Supreme Court in *Farber* agreed with the trial court's approach in elevating the patient's right to choose over the interest of the medical practice in establishing and keeping its patient base, the language of the opinion forecloses any valid post-employment restrictions in the case of professionals except for protection of trade secrets and confidential information. While the Supreme Court in *Farber* declined to hold restrictive covenants in the medical profession void per se as against public policy, it effectively did so.

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Undecided Issues

In addition to an injunction to prevent competition with it, VMS brought claims against Dr. Farber, inter alia, for damages for breach of contract (for actual damages or in the alternative based on a liquidated damage clause), breach of fiduciary duty, conversion, intentional interference with contractual and/or business relations and unjust enrichment.[30] The trial court dismissed the claims for breach of contract, conversion and unjust enrichment on the basis that such claims were valid only if there was an enforceable covenant not to compete, which there was not.[31] The Arizona Supreme Court remanded these unaddressed issues to Division One.

That Court, in a Memorandum Decision (which may not be cited as authority but which is discussed here to finish the story), contrary to the argument of VMS, held that contract damages would not lie; the liquidated damage clause (VMS entitled to 40 percent of Dr. Farber's gross receipts for any medical services performed for three years beginning on his departure) was not severable from the unenforceable restrictive covenant; logically it made sense that VMS should not be able to recover damages for breach of an *invalid* covenant which was also true of the claim for unjust enrichment; and, in any event, permitting an award of damages would interfere with the physician/patient relationship just as effectively as an injunction.[32] Division One did remand VMS's conversion claim to the trial court for further proceedings, as Dr. Farber, at the hearing on the injunction, admitted he wrote down phone numbers and addresses of his own patients which he used to inform them where he would be practicing. Division One implicitly found this to be permissible but that VMS should be given the opportunity to show Dr. Farber took confidential information which did not pertain to servicing his own clients. Division One referred to material relating to VMS's referral sources, which were found to be a protectable interest by the Arizona Supreme Court.[33]

The most intriguing undecided issue is probably whether the VMS restrictive covenant "violates public policy because of the sensitive and personal nature of the doctor-patient relationship,"[34] as found by the trial court. The Arizona Supreme Court declined to resolve this issue because the covenant not to compete was unenforceable in any event as unreasonable and overly broad.[35] As noted above, the authors take the position that for all intents and purposes the Supreme Court has strongly implied in *Farber*, by its very language and emphasis,[36] that post-employment restrictive covenants concerning professionals will not be approved in the future and that it can no longer justify the distinction between the post-employment protection granted lawyers (and now physicians) and other professionals. As discussed by the Arizona Supreme Court in *Farber*, and relied on as a basis for its holding striking down the noncompete, lawyers, by long-standing disciplinary and ethical rules,[37] are prohibited from requiring or entering into restrictive covenants between themselves. The right to practice their profession after termination of employment may not be restricted and the remaining employer/partner may not deny benefits or previously earned income[38] to the departing employer/associate/partner or extract any form of damages (except for violations of confidentiality or trade secrets), or attempt to do indirectly what can not be done directly.

Limited Use of Blue Pencil Rule

The "blue pencil" rule or "blue lining" permits a court to strike invalid or objectionable terms from a contract or covenant where it is clear the contractual terms were intended to be severable.[39] It permits a court, in effect, to "enforce the lawful part and ignore the unlawful part."[40] But as is true under the parol evidence rule in the law of contracts applied in other contexts, a court may not by extrinsic evidence add to, detract from or vary the terms of a written contract that the parties actually intended to make.[41] In *Farber*, the agreement contained a severance clause. Because of this Division One accepted on appeal the employer's stipulation that the noncompete clause would not prohibit Dr. Farber from treating HIV-positive and AIDS patients or from performing brachytherapy.[42] The covenant not to compete, however, on its face prohibited Dr. Farber from providing any medical care for persons who were patients of VMS during the period Dr. Farber was employed by VMS.[43] The Supreme Court noted:[44]

> Arizona courts will "blue pencil" restrictive covenants, eliminating grammatically severable, unreasonable provisions…Here, however, the modifications go further than cutting grammatically severable portions. The court of appeals, in essence, rewrote the agreement in an attempt to make it enforceable. This goes too far. 'Where the severability of the agreement is

not evident from the contract itself, the court cannot create a new agreement for the parties to uphold the contract.'

Conclusion

In *Farber,* the Arizona Supreme Court, by striking down the noncompete clause entered into by physician partners and shareholders of a medical practice, has elevated the freedom of the patient to choose a physician over both the interest of remaining firm members in retaining their patient base and the hardships to the departing professional herself. Although some observers regard the decision as merely restating prior principles of law,[45] its distinction, made for the first time in Arizona, between relationships in the professional context and in the commercial context, makes it a landmark case, and strongly implies that the reasoning of *Farber* will govern future cases involving *all* professionals. Although the public policy issue—that noncompete clauses between physicians are void per se as violative of public policy—was left undecided in *Farber,* it will be difficult to argue that the post-employment protection now afforded physicians under *Farber,* and afforded lawyers for many years, should not also be granted all professionals. Thus the issue in future cases may well be whether the particular occupation before the Court is a recognized profession entitled to *Farber*-like protection. Moreover, it is doubtful that any actual or liquidated damages provision or the withholding of revenue earned or benefits accrued would be upheld in a case involving professionals where the noncompete is not enforceable, as the same would constitute an in terrorem clause and would interfere with the client/professional relationship almost as effectively as an injunction would. In the professional context, retaining client base is not a protectable interest, while referral sources, confidential information and trade secrets (if any) of the practice will be afforded protection. In the commercial context, the focus of the reasonableness inquiry remains, as stated in prior cases, to afford the employer a reasonable period of time to train a new employee and to give that employee an opportunity to establish herself with the company's customers. In the professional context, the covenant's effect on the public's right to choose a professional in which to repose confidence, with its attendant benefits, is the paramount consideration.

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ENDNOTES:

1. 194 Ariz. 363, 982 P.2d 1277 (1999), reversing, 190 Ariz. 563, 950 P.2d 1184 (App. 1997).
2. 164 Ariz. 54, 790 P.2d 752 (App. 1989), rev. denied May 8, 1990.
3. 982 P.2d at 1279-80.
4. *Id.* at 1285.
5. 950 P.2d at 1184.
6. 950 P.2d at 1188.
7. *Id.* VMS stipulated that Dr. Farber's treatment of HIV-positive and AIDS patients and performance of brachytherapy (a procedure that radiates the inside of the lung in lung cancer patients which can only be performed at certain hospitals which have the proper equipment) are not covered by the restrictive covenant "because they do not involve competition with the corporation and thus may be done at hospitals within the restricted area." The testimony before the trial court revealed that no other VMS doctor performed brachytherapy and that Dr. Farber had a heavy caseload of HIV-positive and AIDS patients.
8. 982 P.2d at 1282.
9. *Id.*
10. *Id.* at 982 P.2d 1281.
11. *Id.* at 982 P.2d 1282-5.
12. *Id.* See also n. 36 infra.
13. *See generally*, excellent recent discussion by Heidi J. Richter, *Restrictive Covenants/Protecting Trade Secrets and Confidential Information*, MCBA Seminar Materials, 11/19/99, of seminar of same name, held at ASU Downtown. See also discussion in *Farber* at 5-6.
14. 309 Ariz. Adv. Rep. 16 (CA1, 12/2/99). See also *Richter*, supra n. 13 at 17-22.
15. 982 P.2d at 1281 (citations omitted).
16. See notes 11 and 12 supra and note 42 infra. No such distinction is made in such prior cases as *Phoenix Orthopedic Surgeons v. Peairs*, 164 Ariz. 54, 790 P.2d 752 (App. 1989) (physician; 5 miles from three offices and 3 years; enforced); *Bryceland v. Northey*, 160 Ariz. 213, 772 P.2d 36 (App. 1989) (disc jockey; 50 miles of Phoenix and 2 years; unenforceable); *Mattison v. Johnston*, 152 Ariz. 109, 730 P.2d 286 (App. 1986) (beautician; six square mile radius of Hidden Hills Salon (Sun City) and 1 year; enforceable); *Amex Distributing Co., Inc. v. Mascari*, 150 Ariz. 510, 724 P.2d 596 (App. 1986) (lettuce broker; entire United States and 3 years; unenforceable); *Oliver/Pilcher Ins., Inc. v. Daniels*, 148 Ariz. 530, 715 P.2d 1218 (1986) (insurance agent; Arizona and 3 years; unenforceable); *Truly Nolen Exterminating, Inc. v. Blackwell*, 125 Ariz. 481, 610 P.2d 483 (App. 1980) (pest control salesman; Tucson metro area and 2 years; unenforceable); *Lessner Dental Laboratories, Inc. v. Kidney*, 16 Ariz. App. 159, 492 P.2d 39 (App. 1971) (dental technician; Pima County and 2 years; enforceable); *Wright v. Palmer*, 11 Ariz. App. 292, 464 P.2d 363 (App. 1970) (mgr. of printing business; oral noncompete silent as to limitations of time and space; unenforceable; sale of business involved; former customers not a trade secret); *American Credit Bureau, Inc. v. Carter*, 11 Ariz. App. 145, 462 P.2d 838 (1969) (collection agency; Maricopa County and 5 years; unenforceable); *Titus v. Superior Court of Maricopa County*, 91 Ariz. 18, 368 P. 2d 874 (1962) (disc jockey; 50 miles of Phoenix and 1 year; enforceable); *Lassen v. Benton*, 86 Ariz. 323, 346 P.2d 137 (1959) (veterinarian; 12 miles of Mesa and 5 years; enforceable). The authors express their appreciation to Ron Kilgard for his breakdown of cases found in his seminar materials at page 14, 1999 Supreme Court Update (Educ. Serv. Div. Ariz. Supreme Court), 10/22/99.
17. 982 P.2d at 1282.
18. *Id.* at 1282-3.
19. *Id.* at 1283 quoting language from *Dwyer v. Jung*, 336 A.2d 498, 500 (Ct. Ch. Div.), aff'd, 348 A.2d 208 (App. Div. 1975) holding restrictive covenants are prohibited between attorneys.
20. 982 P.2d at 1283.
21. *Id.* at 1284.
22. *Id.*
23. *Phoenix Orthopedic Surgeons v. Peairs*, 164 Ariz. 54.
24. 982 P.2d at 1280. This was adopted by Division One as a basis for upholding the noncompete. *See* 950 P.2d at 1188-89.
25. 982 P.2d at 1284-5.
26. *Id.* at 1284.
27. *Id.*
28. *Id.* at 1285.
29. *Id.*
30. *Id.* at 1280.
31. 950 P.2d at 1186.
32. Division One Memorandum Decision in *Farber*, October 19, 1999.
33. *Id.*
34. 982 P.2d at 1285.
35. *Id.* at 1283, n.1.
36. *See* n. 11 supra. In view of present space limitations we refer you to the entire paragraphs numbered in the Opinion as *15* (982 P.2d at 1282); *19* (at 1283); *22* (at 1284); *23* (at 1284); *28-29* (at 1285); and the Supreme Court's approval of the trial court finding that the "covenant violates public policy because of the sensitive and personal nature of the doctor-patient relationship." The authors contend that substituting the word "client" for the word "patient" and "professional" for "physician" in the above paragraphs give a good indication where the Supreme Court is headed in future cases dealing with professionals.
37. 982 P.2d at 1282.
38. *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W. 2d 528 (Tenn. 1991) (cannot withhold deferred compensation owed lawyer); *Cohen v. Lord, Day & Lord*, 550 N.E. 2d 410 (N.Y. 1989) (against public policy to withhold revenues from person who competes with firm); *Gray v. Martin*, 663 P.2d 1285 (Or. App. 1983) (cannot restrict the right to practice law by requiring party to give up benefits).
39. 982 P.2d at 1286.
40. *Id.* quoting from *Oliver/Pilcher Ins. v. Daniels*, 148 Ariz. 530.
41. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). See also Gottsfield, *Darner Motor Sales v. Universal Underwriters: Corbin, Williston and the Continued Viability of the Parol Evidence Rule in Arizona*, 25 Ariz. St.L.J. 377 at 379-80 (1993).
42. 982 P.2d at 1286. The *Peairs* Court permitted the modification of a restrictive covenant involving a medical professional "whose services are necessary for the welfare of the public." Supra n.2 at 164 Ariz. 61. However the Supreme Court in *Farber* specifically disapproved of that portion of *Peairs*. 982 P.2d at 1286. For an explanation of brachytherapy see n. 7 supra.
43. *Id.*
44. *Id.* (citations omitted).
45. Richter, supra n.13 at 6. It is interesting to note that California prohibits restrictive covenants by statute which declares that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Cal. Bus. & Prof. Code, Section 16600. But there are numerous exceptions including that partners and shareholders of a corporation may be restrained when a partner/shareholder leaves or sells or otherwise disposes of all of his shares in the corporation (Sections 16601 and 16602), which also applies to lawyers. See *Monogram Industries, Inc. v. SAR Industries, Inc.* 134 Cal. Rptr. 714, 64 Cal. App. 3rd 692 (App. 2 Dist. 1976); *Howard v. Babcock*, 25 Cal. Rptr. 2d 80, 863 P.2d 150 (Cal. 1993) (provision between lawyers providing actual (as distinct from liquidated) damages to remaining partners when departing partner chooses to compete with them is enforceable and does not violate rule of professional conduct prohibiting right to practice). For more detailed discussion of *Howard* see Robert W. Hillman, *The Law Firm as Jurassic Park: Comments on Howard v. Babcock*, 27 U.C. Davis L. Rev. 533 (1994).