ACCOUNTANTS AND RESTRICTIVE COVENANTS: THE CLIENT COMMODITY

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"Accounting firm sues employees under noncompete clause." This headline is not uncommon in a professional journals[1] because a restrictive covenant, or noncompetition clause, is often part of an accountant's employment agreement.[2] A restrictive covenant also may be incorporated into a partnership agreement for an accounting firm[3] or a shareholders' agreement among accountants practicing in a professional corporation.[4] Are these agreements enforceable? Does public policy insulate accountants and render void their promises not to compete? Are restrictive covenants involving accountants more easily enforceable than those involving other occupations? The answer to the first question is "yes;" to the second, "no;" and to the third, an equivocal "it depends."

I. Application to Professions Generally

Restrictive covenants are not favored creatures of the law. Where professionals are concerned, additional considerations come into play.[5] Restrictive covenants are unenforceable as to lawyers because

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[1] *See, e.g.*, 4 Pub. Accounting Rep. 1, 1 (1981). The headline there read, "Alexander Grant Sues Former Washington Employees Under Non-Compete Clause." *Id.*

[2] In Faw, Casson & Co. v. Cranston, 375 A.2d 463 (Del. Ch. 1977), the proofs showed that "a substantial number of accounting firms utilize" restrictive covenant agreements. *Id.* at 468.

[3] Hereafter when the term "accounting firm" is used, it is intended to include both a partnership and a professional corporation of accountants, and, where applicable, a sole practitioner who employs accountants subject to a restrictive covenant agreement. No distinction is drawn here between the enforcement of a covenant against a former employee and the enforcement of a covenant against a former partner or fellow shareholder. The court in Foti v. Cook, 220 Va. 800, 263 S.E.2d 430 (1980), however, suggested that such a distinction might be drawn when it noted: "We are not dealing here with employer and employee but with senior partners who stood upon equal footing at the bargaining table." *Id.* at 806, 263 S.E.2d at 433.

[4] A certified public accountant called as an expert witness in Foti v. Cook, 220 Va. 800, 263 S.E.2d 430 (1980), testified that the covenant in issue was similar to covenants contained in agreements of other accounting firms. *Id.* at 807, 263 S.E.2d at 434.

[5] *See* Mailman, Ross, Toyes & Shapiro v. Edelson, 183 N.J. Super. 434, 443-44, 444 A.2d 75, 80 (Ch. Div. 1982) (noting fiduciary relationship between accountant and client unlike relationship between "commercial business people"); Dwyer v. Jung, 133 N.J. Super. 343, 347, 336 A.2d 498, 500 (Ch. Div.), *aff'd per curiam*, 137 N.J. Super. 135, 348 A.2d 208 (App. Div. 1975) (recognizing "consensual, highly fiduciary" relationship between attorney and client); *see also* Gant v. Warr, 286 Ala. 387, 389, 240 So. 2d 353, 355-56 (1970) (discussing distinction

they violate DR 2-108(A),[6] one of the Disciplinary Rules of the Code of Professional Responsibility.[7] On the other hand, such agreements have been consistently enforced against physicians[8] despite strong public policy protests.[9] Courts have repeatedly rejected the argument that the application of a restrictive covenant to an accountant is void as against public policy or that it is unreasonable per se.[10] A Delaware court refused to extend to accountants the doctrine of *Dwyer v. Jung*,[11] which held restrictive covenants unenforceable against lawyers.[12] It found no rule regulating the conduct of accountants comparable to that of DR 2-108(A).[13] Moreover, the evidence showed not only that restrictive covenants are not considered unethical among

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between "profession" and "business" in Alabama statutes involving contracts in restraint of trade).

[6] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(A) (1981), provides: "A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits." *Id.*

[7] Dwyer v. Jung, 133 N.J. Super. 343, 347, 336 A.2d 498, 500 (Ch. Div.), *aff'd per curiam*, 137 N.J. Super. 135, 348 A.2d 208 (App. Div. 1975). In addition to DR 2-108(A), the trial judge cited opinions of the New Jersey Supreme Court's Advisory Committee on Professional Ethics and of the New York County Lawyers' Association Committee on Professional Ethics. *Id.* at 347-48, 336 A.2d at 500-01.

[8] *See, e.g.*, Bauer v. Sawyer, 8 Ill. 2d 351, 134 N.E.2d 329 (1956); Bradford v. Billington, 299 S.W.2d 601 (Ky. Ct. App. 1957); Willman v. Beheler, 499 S.W.2d 770 (Mo. 1973); McCallum v. Asbury, 238 Or. 257, 393 P.2d 774 (1964); Daniel v. Goesl, 161 Tex. 490, 341 S.W.2d 892 (1960). *See generally* Annot., 62 A.L.R.3d 970, 992 (1975).

In the leading New Jersey case, Karlin v. Weinberg, 77 N.J. 408, 390 A.2d 1161 (1978), the majority found that the application of a restrictive covenant to a physician was not unenforceable per se, and held that a physician has a legitimate interest in the protection of patient relationships, particularly where through "his efforts, expenditures, and reputation, [he] has developed a significant practice." *Id.* at 417, 390 A.2d at 1169.

[9] The three dissenting justices in Karlin v. Weinberg, 77 N.J. 408, 390 A.2d 1161 (1978), found the relationship between physician and patient "so personal and so sensitive" that anything that interferes with it should be held contrary to public policy. *Id.* at 426, 390 A.2d at 1170 (Sullivan, J., dissenting).

[10] *See* Faw, Casson & Co. v. Cranston, 375 A.2d 463, 466 (Del. Ch. 1977); Ebbeskotte v. Tyler, 127 Ind. App. 433, 438, 142 N.E.2d 905, 909 (Ct. App. 1957); Smith, Batchelder & Rugg v. Foster, 119 N.H. 679, 684, 406 A.2d 1310, 1313 (1979); Mailman, Ross, Toyes & Shapiro v. Edelson, 183 N.J. Super. 434, 439, 444 A.2d 75, 78 (Ch. Div. 1982). Although the court in *Smith* acknowledged that several other courts had enforced restrictive covenants in the accounting profession, it noted indications in the record that accountants were not in favor of restrictive covenants and that the evidence appeared to indicate that the American Institute of Certified Public Accountants was opposed to restrictive covenants "because it believes that the employee is put at a severe disadvantage." Smith, Batchelder & Rugg v. Foster, 119 N.H. 679, 684, 406 A.2d 1310, 1313 (1979).

[11] 133 N.J. Super. 343, 336 A.2d 498 (Ch. Div.), *aff'd per curiam*, 137 N.J. Super. 135, 348 A.2d 208 (App. Div. 1975).

[12] Faw, Casson & Co. v. Cranston, 375 A.2d 463 (Del. Ch. 1977).

[13] *Id.* at 467; *cf.* Karlin v. Weinberg, 148 N.J. Super. 243, 246, 372 A.2d 616, 618-19 (App. Div. 1977), *aff'd*, 77 N.J. 408, 390 A.2d 1161 (1978) (finding no comparable provision regulating medical profession).

accountants, but also that a substantial number of accounting firms do, in fact, appear to use them.[14]

II. Application to Accountants Specifically

The rules of law which determine the validity of a restrictive covenant as applied to an accountant are the same as those applied to other occupations.[15] A valid restriction "protects the legitimate interests of the employer, imposes no undue hardship on the employee, and is not injurious to the public."[16]

A. The Legitimate Interests Entitled to Protection

Courts have uniformly held that the accounting firm as an employer has a legitimate interest, inherent in the very nature of the practice of the profession, which is entitled to protection through a restrictive covenant.[17] Over fifty years ago a judge in the State of Washington remarked that often a client's major, if not sole, contact with an accounting firm is with the employee who is sent to service its needs.[18] The court described the personal relationship that a manager or other accountant employed by a firm develops with the firm's clients:

> Upon the hearing, evidence showed that the business of a certified public accountant is such that the person who actually performs the labor incident thereto acquires an intimate knowledge of the business of the client, preparing audits of the business, income tax returns, and other matters very confidential in their nature, and vital to the business itself. . . . [A]s the client learns to know the accountant, the desire of the client to have the particular accountant do his work increases to the point where it is almost impossible

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[14] Faw, Casson & Co. v. Cranston, 375 A.2d 463, 468 (Del. Ch. 1977).

[15] *Compare* Whitmyer Bros. v. Doyle, 58 N.J. 25, 32-33, 274 A.2d 577, 581 (1971) (employment contract of construction company manager) *with* Foti v. Cook, 220 Va. 800, 263 S.E.2d 430 (1980) *and* Smith, Batchelder & Rugg v. Foster, 119 N.H. 679, 683, 406 A.2d 1310, 1312 (1979) (cases involving accountants' employment contracts); *see also* Mailman, Ross, Toyes & Shapiro v. Edelson, 183 N.J. Super. 434, 444 A.2d 75 (Ch. Div. 1982).

[16] Solari Indus. v. Malady, 55 N.J. 571, 576, 264 A.2d 53, 56 (1970). The court in *Solari* established this as the general test of the validity of covenants not to compete. The court held that it was "entirely satisfied that the time is well due for the abandonment of . . . [the] void *per se* rule in favor of a rule which permits the total or partial enforcement of non-competitive agreements to the extent reasonable under the circumstances." *Id.* at 585, 264 A.2d at 61.

[17] Faw, Casson & Co. v. Cranston, 375 A.2d 463 (Del. Ch. 1977); Ebbeskotte v. Tyler, 127 Ind. App. 433, 142 N.E.2d 905 (Ct. App. 1957); Scott v. Gillis, 197 N.C. 223, 148 S.E. 315 (1929); Racine v. Bender, 141 Wash. 606, 252 P. 115 (1927).

[18] Racine v. Bender, 141 Wash. 606, 608, 252 P. 115, 116 (1927).

> to change the accountant, owing to the confidential knowledge he has of all the important and vital matters concerning the business . . . .[19]

Two years later, on the other side of the continent, another court held that because an accountant had become so intimately associated with his employer's clients, it saw "no reason why in good conscience a court of equity would not enjoin him from a breach of his contract"[20] not to solicit or accept any business for three years from any other client for whom he had performed services while in the employ of plaintiff.[21] In expressing the rationale for its decision, the court quoted a now rather dated source whose teaching, nevertheless, is still valid:

> "Few professional men would take assistants and intrust them with their business, impart to them their knowledge and skill, bring them in contact with their clients and patients, unless they were assured that the knowledge and skill imparted and the friendships and associations formed would not be used, when the services were ended, to appropriate the very business such assistants were employed to maintain and enlarge."[22]

Cases in this area have held that the accounting firm has a legitimate interest in its relationships with its clients, and that these relationships are to be protected from a manager or other employee who has the opportunity to form professional and personal relationships with the firm's clients and to gain knowledge of their business and procedures which would otherwise be confidential.[23] Even when the court is not favorably disposed toward the restrictive covenant, the legitimate business interest in an employer's "ongoing professional relationships with its clients"[24] is recognized. In one case, the court noted that although clients' records are returned to them upon request, information established by an accounting firm about clients and audit programs is considered confidential, and a new auditor might need a period of six weeks to gain familiarity with the affairs of a client.[25] This "legitimate interest" of the accounting firm is to be

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[19] *Id.*, 252 P. at 115-16.

[20] Scott v. Gillis, 197 N.C. 223, 227, 148 S.E. 315, 317 (1929).

[21] *Id.*

[22] *Id.* (quoting 6 RULING CASE LAW (CONTRACTS) § 206, at 805 (1929)).

[23] Faw, Casson & Co. v. Cranston, 375 A.2d 463 (Del. Ch. 1977); *see also* Rhoads v. Clifton, Gunderson & Co., 89 Ill. App. 3d 751, 411 N.E.2d 1380 (App. Ct. 1980).

[24] Mailman, Ross, Toyes & Shapiro v. Edelson, 183 N.J. Super. 434, 439, 444 A.2d 75, 78 (Ch. Div. 1982).

[25] Wolf & Co. v. Waldron, 51 Ill. App. 3d 239, 242, 366 N.E.2d 603, 605 (App. Ct. 1977). In Racine v. Bender, 141 Wash. 606, 252 P. 115 (1927), some of the clients testified that they

protected not only from terminated employees but also from withdrawing partners and fellow shareholders.[26]

B. Enforcement

In deciding the effect of restrictive covenants in an accountant's employment contract, courts look to such traditional interests as the covenant's scope, geographic breadth, and duration.[27] A Delaware court, for example, enjoined an accountant from practicing public accounting in competition with his former employer for a fixed period of time in the Delmarva Peninsula.[28] The court held that the geo-

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asked the defendant accountant to do their work. *Id.* at 612, 252 P. at 117. The court pointed out: "They do not desire his services because he is the only person who has the ability to perform them, but because they know him well, and he knows all about their business." *Id. But see* Mailman, Ross, Toyes & Shapiro v. Edelson, 183 N.J. Super. 434, 444 A.2d 75 (Ch. Div. 1982), in which the court noted:

> It would not be reasonable . . . to preclude those of plaintiff's present clients from unilaterally exercising their free choice, first to leave plaintiff, and then to seek to continue a confidential business relationship with defendant—even though he is no longer associated with plaintiff firm. Nor would it be reasonable to bar plaintiff's former clients from independently seeking out defendant's services. The client's rights to select the custodians of their financial affairs is paramount, and may not be unreasonably encumbered.

Id. at 444, 444 A.2d at 80.

[26] In addition to finding that information gathered during previous audits concerning the various businesses of the clients of the firm to be a valuable asset, the court in Foti v. Cook, 220 Va. 800, 263 S.E.2d 430 (1980), recognized that a withdrawing partner would know which clients paid large fees and how promptly they paid. *Id.* at 805, 263 S.E.2d at 433; *see also* Rhoads v. Clifton, Gunderson & Co., 89 Ill. App. 3d 751, 411 N.E.2d 1380 (App. Ct. 1980).

[27] Some accountants' employment contracts contain a restrictive covenant that forbids the accountant from working for his former employer's clients for a stated period of time. *E.g.*, LaPorte v. Bott, 173 N.J. Super. 590, 592, 414 A.2d 1363, 1364 (App. Div. 1980) (accountant agreement not to solicit clients for five year period without written consent of former partner's estate). Although there is no hard and fast rule concerning the validity of the durational factor, it appears that the courts will enforce such a requirement as long as the time constraints are reasonable. *See, e.g.*, Faw, Casson & Co. v. Cranston, 375 A.2d at 465. In *Faw*, the accountant's employment contract contained both a covenant not to compete within a certain geographical area, see *infra* note 28, and a covenant not to compete for a period of two years. 375 A.2d at 465. The Delaware court based its decision to enforce the agreement on the validity of the geographical limitations, *id.* at 468-69, and did not discuss the issue of the durational limitation contained in the restrictive covenant. It can be inferred, though, that the two year time restriction was acceptable to the court.

Similarly, in Schultz v. Ingram, 38 N.C. App. 422, 248 S.E.2d 345 (Ct. App. 1978), the accountant was prohibited from practicing within a certain area for a period of two years. *Id.* at 425, 248 S.E.2d at 347. The court held that the time restriction was not unreasonable "in view of the nature of the plaintiff's business, because confidential information given to the defendant is viable for that period of time." *Id.* at 430, 248 S.E.2d at 350.

[28] Faw, Casson & Co. v. Cranston, 375 A.2d 463 (Del. Ch. 1977). The peninsula encompasses virtually all of the State of Delaware, as well as the eastern shores of Maryland and Virginia. *Id.* at 468.

graphical scope of the restriction was not overly broad when the plaintiff showed that it maintained offices and had the capability to service clients throughout the restricted area.[29]

The nature of the restriction should be more important than its geographical coverage.[30] To this end, some courts will enforce a covenant seeking only to limit the "taking" of the firm's clients.[31] In a leading Indiana decision the court enforced a restrictive covenant against an accountant which sought only to prevent her from soliciting and accepting employment from her former firm's clients;[32] it did not bar her from practicing in any geographical area. In another case the former employee did not deny that he had violated the covenant,[33] but argued that because it contained no geographical limits, the covenant was overly broad. The court was not persuaded. It stressed instead that the restriction was limited to protecting the plaintiff from losing its clients.[34] Since its clients were doing business on a nationwide basis, and since the plaintiff firm had numerous offices throughout the United States, the court held that a geographical limitation would serve no purpose.[35] The former employee could practice accounting in any geographical area, but would be prohibited from contact with clients and former clients of the plaintiff firm.[36]

Other courts, however, stress the importance of geographical limits, and will not enforce a covenant without one.[37] In *Peat, Marwick, Mitchell & Co. v. Sharp*,[38] the court held unenforceable,

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[29] *Id.*; *see also* Schultz v. Ingram, 38 N.C. App. 422, 248 S.E.2d 345 (Ct. App. 1978), in which an accounts payable auditor was enjoined from competing with his former employer in six southern states for a period of two years.

[30] For a discussion concerning the nature of interests protected by a restrictive covenant and geographical limitations, see Mailman, Ross, Toyes & Shapiro v. Edelson, 183 N.J. Super. 435, 441-43, 444 A.2d 75, 78-79 (Ch. Div. 1982).

[31] Wolf & Co. v. Waldron, 51 Ill. App. 3d 239, 366 N.E.2d 603 (App. Ct. 1977); Ebbeskotte v. Tyler, 127 Ind. App. 433, 142 N.E.2d 905 (Ct. App. 1957); Scott v. Gillis, 197 N.C. 223, 148 S.E. 315 (1929); Racine v. Bender, 141 Wash. 606, 252 P. 115 (1927); *see also* Fuller v. Kolb, 238 Ga. 602, 605, 234 S.E.2d 517, 518 (1977) (Jordan, J., dissenting).

[32] Ebbeskotte v. Tyler, 127 Ind. App. 433, 434, 142 N.E.2d 905, 906 (Ct. App. 1957).

[33] Wolf & Co. v. Waldron, 51 Ill. App. 3d 239, 242, 366 N.E.2d 603, 605 (App. Ct. 1977). He had taken the files of 27 clients. Two of the accounts lost by the employer to the former employee had been serviced by it for 30 years and 10 years respectively. *Id.* Since his separation from the employer, the employee had obtained fees of $14,000 and $18,000 from those two accounts. *Id.*

[34] *Id.*

[35] *Id.* at 242, 366 N.E.2d at 606.

[36] *Id.*, 366 N.E.2d at 605; *accord* Foti v. Cook, 220 Va. 800, 263 S.E.2d 430 (1980).

[37] *E.g.*, Smith, Batchelder & Rugg v. Foster, 119 N.H. 679, 406 A.2d 1310 (1979).

[38] 585 S.W.2d 905 (Tex. Civ. App. 1979).

with substantial adverse consequence to the firm, a restrictive covenant against a former partner that did not specify a reasonable geographical area.[39] Stressing the absence of a space limitation may simply be the "peg" on which a court will "hang its hat" in order to hold unenforceable an otherwise valid covenant. This may be gleaned by comparing the majority and dissenting opinions in *Fuller v. Kolb*.[40] Despite the fact that the nature of the restriction sought was reasonable, the *Fuller* court held it void by primarily relying on the fact that the covenant had no territorial limits.[41] Justice Jordan, in his dissent, expressed the view that territorial limits were of no moment.[42] He stressed that in its agreement plaintiff had only asked the defendant to "'leave our clients alone'"[43] for a period of two years. As such, he said, the restriction could not be more reasonable in protecting the legitimate interests of the employer and in imposing no undue hardship on the employee.[44]

In determining whether to enforce a restrictive covenant in this area, courts exercise the same caution as is exercised in deciding similar questions involving employees or associates of other professions, trades, or businesses. Judges are hesitant to restrain an accountant from practicing his chosen profession.

This reluctance is illustrated in a decision of the Supreme Court of New Hampshire.[45] There, the defendants withdrew from plaintiff accounting firm and formed their own firm in violation of written employment contracts containing covenants not to compete.[46] Although ruling that accountants are not immune from enforcement of their restrictive covenants, the court nevertheless articulated three reasons in support of its decision not to enforce the covenants. First, the covenants were deemed to be too broad geographically.[47] Second, it was held that their coverage was over-extensive because the restric-

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[39] *Id.* at 908; *accord* Fuller v. Kolb, 238 Ga. 602, 234 S.E.2d 517 (1977); Mailman, Ross, Toyes & Shapiro v. Edelson, 183 N.J. Super. 434, 443, 444 A.2d 75, 79 (Ch. Div. 1982).

[40] 238 Ga. 602, 234 S.E.2d 517 (1977). *Fuller* was followed by the Georgia court in Heller v. Magaro, 148 Ga. App. 591, 252 S.E.2d 11 (Ct. App. 1978).

[41] 238 Ga. at 603, 234 S.E.2d at 518.

[42] *Id.* at 605, 234 S.E.2d at 518 (Jordan, J., dissenting).

[43] *Id.*, 234 S.E.2d at 519 (Jordan, J., dissenting).

[44] *Id.*

[45] Smith, Batchelder & Rugg v. Foster, 119 N.H. 679, 406 A.2d 1310 (1979).

[46] *Id.* at 681, 406 A.2d at 1311.

[47] The covenant in question, similar to the one in Wolf & Co. v. Waldron, 51 Ill. App. 3d 239, 366 N.E. 2d 603 (App. Ct. 1977), contained no geographical limitation. The master, who heard the case below, held that in the absence of a provision limiting the covenant geographically, the States of New Hampshire and Vermont would be established as the area covered. He went on to find that that area was "unreasonably large." Smith, Batchelder & Rugg v. Foster, 119 N.H. 679, 683, 406 A.2d 1310, 1312 (1979).

tions applied not only to current clients, but also to former clients who had been served by the plaintiff during its existence.[48]

The third reason given by the court, which may be described as "the comparative hardship test," is the one which is noteworthy. The court found that the plaintiff firm enjoyed a relationship with 3000 clients from whom it received over $2 million in earnings.[49] It compared this with the fact that the new firm formed by the defendants had earned gross fees of less than $48,000 in 7.5 months from only 207 clients and that only 40 of the 207 had been former clients of the plaintiff, and none of the clients had been "actively solicited" by the defendants.[50] The court reasoned that the hardship incurred by the plaintiff in losing 40 clients, as compared with the hardship which would be suffered by the defendants if compelled by the court to pay[51] for those 40 clients, was too disproportionate to permit the covenant to be enforced.[52]

III. Toward a More Appropriate and Enforceable Covenant

To give greater assurance to an accounting firm that its restrictive covenant agreement will be enforced, and to overcome the concern that damages resulting from breach could be hard to measure, the following is suggested.

First, the covenant should be limited in its coverage. The former employee should be restricted only from servicing clients of the employer. As such, "clients" must be defined. The term may be limited to those with whom the employee came in contact while employed, or might be expanded to include any clients of the employer during the period of employment. Other variations include whether the restrictions should apply only to those clients whom the firm was serving on the date the employee leaves, or former clients whom the firm had serviced within a reasonably fixed period of time (one, two, or three years) prior to the termination of employment. The precise terms of

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[48] For another decision stressing overbreadth, see Howard Schultz & Assoc. v. Broniec, 239 Ga. 181, 236 S.E.2d 265 (1977).

[49] Smith, Batchelder & Rugg v. Foster, 119 N.H. 679, 684, 406 A.2d 1310, 1312 (1979).

[50] *Id.*

[51] For a discussion of the methods of computing payments for clients, see *infra* text accompanying notes 54-68.

[52] Smith, Batchelder & Rugg v. Foster, 119 N.H. 679, 684, 406 A.2d 1310, 1313 (1979). The comparative hardship argument was not always successful. For example, the court was unpersuaded where a physician, seeking to avoid a restrictive covenant, contended that the plaintiff's practice would still be exceedingly large even if the plaintiff lost patients to him. Marvel v. Jonah, 83 N.J. Eq. 295, 90 A. 1004 (1914).

the restriction will vary depending upon the size and concerns of the employer and the relative bargaining position of the parties.[53]

Second, in addition to a clause prohibiting the employee from "taking" clients and the employee's acknowledgement that the promise not to "take" may be enforced in equity, the agreement should provide, as an alternative to injunctive relief, that should the employee breach the covenant, he will pay damages measured by the value of the clients taken.

The "good will" cases first demonstrated that such damages may be accurately determined. Traditionally, there was a philosophical, if not practical, dispute as to whether good will should be attributed to an accounting firm or to the individual accountants who comprised the firm. Two leading cases reached opposite results. In *Cook v. Lauten*,[54] the court adhered to the traditional rule that the reputation of a professional partnership depends upon the individual skill of the partners. The partnership was determined to have no good will[55] to be distributed as a firm asset on dissolution. In *Evans v. Gunnip*,[56] the court reached the opposite conclusion. When Evans withdrew from the partnership and claimed his share of the firm's good will, Gunnip argued that good will belonged to the individual partners and was not a partnership asset subject to distribution.[57] The court rejected *Cook* and ruled that good will adhered to the partnership.[58] This was demonstrated by the fact that most of the accounts were recurring, that the information contained in the files was valuable, and the accounts of a retiring partner remained with the partnership.[59]

Accountants, who value their clients in more than one sense of the word, have long acknowledged that an accounting practice has a value that exceeds its physical assets of furniture and equipment. It is

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[53] Drafting should be done with care. For example, where an accountant claimed he was not violating the covenant because he had not solicited the clients, the court was quick to point out that that made no difference since he had agreed to neither solicit nor service for a five year period. LaPorte v. Bott, 173 N.J. Super. 590, 595-96, 414 A.2d 1363, 1365 (App. Div. 1980). *But see* Mailman, Ross, Toyes & Shapiro v. Edelson, 183 N.J. Super. 434, 444, 444 A.2d 75, 80 (Ch. Div. 1982) (recognizing "client's right to select the custodians of their financial affairs").

[54] 1 Ill. App. 2d 255, 117 N.E.2d 414 (App. Ct. 1954).

[55] *Id.* at 259, 117 N.E.2d at 416; *see also* Jackson v. Caldwell, 18 Utah 281, 415 P.2d 667 (1966).

[56] 36 Del. Ch. 589, 135 A.2d 128 (Ch. 1957).

[57] *Id.* at 592, 135 A.2d at 130-31.

[58] *Id.*, 135 A.2d at 131.

[59] *Id.*

not unusual for all or a portion of an accounting practice to be bought or sold.[60] A Virginia decision candidly recognizes that this practice exists,[61] and a New Jersey decision demonstrates that the practice is entitled to judicial protection.[62] The purchase price reflects the value of the clients involved, which is often expressed as a multiple or percentage of the annual billings generated by those clients.[63]

To assist a court in measuring damages, a restrictive covenant should contain an agreed value or an agreed formula for measuring the value, or price, of clients "taken" in violation of the restriction. In other words, the covenant should provide that if the covenantee, whether a former employee, partner, or shareholder, leaves the firm and opens his or her own practice or joins with others, he or she will pay for those clients lost to the firm and gained by the former associate just as if those clients had been purchased. The agreement not only should provide the agreed "purchase price" as the measure of damages, but also the terms on which that price is to be paid.

Foti v. Cook[64] illustrates that this type of covenant is both workable and enforceable. Foti, who was a partner in the Andrews firm, withdrew from the firm and joined another.[65] The Andrews' partnership agreement recognized that the clients belonged to the firm and not to the individual partners.[66] As part of that agreement, Foti, and each other partner, promised that during the twenty-four months

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[60] *See* George William Hoffman & Co. v. Capital Servs. Co., 101 Ill. App. 3d 487, 428 N.E.2d 600 (App. Ct. 1981). A lawyer's clients, however, "may not be offered for sale." *Dwyer*, 133 N.J. Super. at 346, 336 A.2d at 499.

[61] Foti v. Cook, 220 Va. 800, 807, 263 S.E.2d 430, 434 (1980).

[62] LaPorte v. Bott, 173 N.J. Super. 590, 414 A.2d 1363 (App. Div. 1980). LaPorte and Bott had been partners practicing accounting. *Id.* at 591, 414 A.2d at 1363. When LaPorte died, the clients of the partnership devolved upon his estate pursuant to the agreement under which the partnership was dissolved. *Id.* at 592, 414 A.2d at 1363. Bott became a partner in H&C, another accounting firm, and LaPorte's estate sold the clients to H&C. *Id.*, 414 A.2d at 1364. The price to be paid by H&C was a 15% commission on all sums collected by H&C from those clients over a period of five years. *Id.* Bott had agreed with LaPorte's estate not to solicit those clients for the same five year period without the consent of the estate or H&C. *Id.* Because not all of the agreements were before the trial court, the matter had to be remanded. The appellate division, however, held that the estate had an interest in receiving the price for which it had sold the clients to H&C, and this interest should be protected by allowing it to recover damages from Bott for violating the restrictive covenant. *Id.* at 593-94, 414 A.2d at 1364-65.

[63] George William Hoffman & Co. v. Capital Servs. Co., 101 Ill. App. 3d 487, 428 N.E.2d 600 (App. Ct. 1981). In Foti v. Cook, 220 Va. 800, 263 S.E.2d 430 (1980), a certified public accountant, testifying as an expert witness described "the custom in the accounting profession for firms to buy the practices of other individual accountants or accounting firms and that payment is customarily based upon the fees or business of the selling accountant." *Id.* at 807, 263 S.E.2d at 434.

[64] 220 Va. 800, 263 S.E.2d 430 (1980).

[65] *Id.* at 801-02, 263 S.E.2d at 431.

[66] *Id.* at 802, 263 S.E.2d at 431.

immediately following withdrawal, none would offer to perform or would perform accounting services for any client of the partnership.[67] The agreement also provided that if the promise were breached, the former partner would, for a period of three years, pay to the partnership an amount equal to one-third of each year's fees collected from each client taken from the partnership.[68]

The *Foti* court had no difficulty enforcing the covenant and held Foti liable to his former firm for the sum of $40,264.31.[69] Foti had argued that the covenant should not be applied because another member of his new firm, rather than he, was performing the accounting services for the clients who were formerly Andrews'.[70] The court held that to adopt such an interpretation would render the covenant meaningless.[71]

CONCLUSION

The rules of the law that surround restrictive covenants strive to achieve a balance between the rights and duties of contending interests. By restricting the accountant covenantee from rendering professional services to clients of his or her former firm, the court is within the ambit of the traditional rules of restrictive covenant law although there may be some adverse effect on the public; that is, those clients who would prefer to enjoy the continued services of the accountant leaving the firm.[72] That effect, however, is avoided or lessened if instead of granting injunctive relief, the court requires the former employee or partner to pay for the clients "taken." By providing the purchase price and terms in the agreement, the court's task is made easier and the likelihood of enforcement is enhanced. Thus, the legitimate interest of the employer is protected without imposing undue hardship on the employee or being overly injurious to the public.

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[67] *Id.*

[68] The agreed value of a client was one times one year's billings. *Id.* If a withdrawing partner "took" a client, he was to pay the firm the value or price of that client over a period of three years. *Id.* at 802 n.1, 263 S.E.2d at 431 n.1. In *Foti*, the price to be paid pursuant to the agreement was based upon the withdrawing partner's collections. *Id.* at 802, 263 S.E.2d at 431. Other ways by which "the purchase price" may be measured are the withdrawing partner's billings to the client, or the former firm's billings during the last year or years it rendered services to the client.

[69] *Id.* at 804, 807, 263 S.E.2d at 432, 434.

[70] *Id.* at 807, 263 S.E.2d at 434.

[71] *Id.*

[72] *Compare* Rhoads v. Clifton, Gunderson & Co., 89 Ill. App. 3d 751, 411 N.E.2d 1380 (App. Ct. 1980), *with* Mailman, Ross, Toyes & Shapiro v. Edelson, 183 N.J. Super. 434, 444 A.2d 75 (Ch. Div. 1982). See *supra* note 25 discussing the conflicting considerations that courts must weigh.