

Restraining Trade: Will a Court Enforce Your Non-Compete and Non-Disclosure Agreement?

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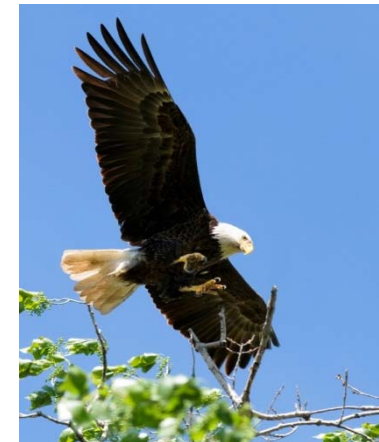
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Are Non-Competes Enforceable?

- Every client's favorite answer from its lawyer...

Maybe

You're Fired!

- Judges are very reluctant to keep an employee from his or her occupation.
- Public policy disfavors restraint on trade



Addressed by Statute in Alabama

- Alabama Code Section 8-1-1
 - (a) Voids all contracts that restrain “profession, trade or business”
 - (b) Carves out large exception for sale of business or employer/employee relationship
 - (c) Dissolution of a “partnership”

Elements of an Enforceable Noncompetition Agreement

- Consideration
- Protectable interest
- Relatedness
- Reasonableness as to scope – time and place
- Not against public interest or no undue hardship on employee



What is Consideration?

- Signature upon hire if employed after a reasonable time
- Continued employment of an at-will employee
- Change in terms of employment



Protectable Interest Is The Key

- Confidential information or trade secrets
- Customers identify employer by the employee, i.e. face of the employer
- Specialized training
- Uniqueness of the company
- Good will



Confidential and Proprietary Information?

- Client lists or identities?
- Not necessarily!
- Can someone determine clients through other means or identify potential clients?



Truly Confidential And Proprietary

- Having and using information would give employee an **unfair** competitive advantage



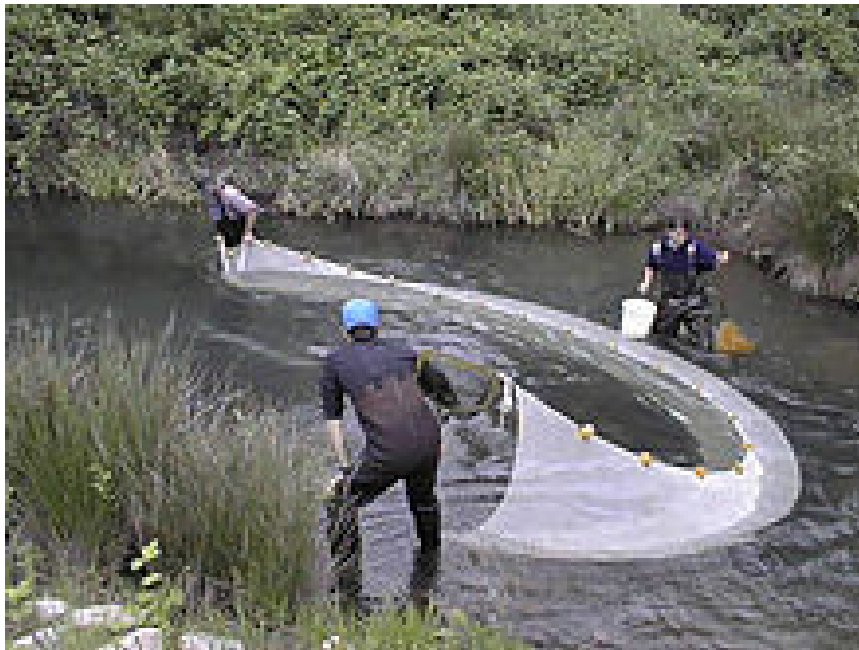
Inevitable Disclosure

- The employee will “inevitably disclose” confidential and proprietary information.



Reasonable Relatedness

- Is the restriction reasonably related to the protectable interest?
- Overbreadth



Reasonable Scope

- Reasonable Time
- Reasonable Geographic Area



Non-Competes for Professionals



What is a “Professional?”

- Vague, outdated definition
- Factors
 - Professional training, skill and experience required
 - Delicate nature of the services offered
 - Ability & need to make instantaneous decisions

Examples of “Professionals”

- YES:
 - Doctor
 - Accountant
 - Veterinarian
- NO:
 - Exterminator

Exception for Professionals

- Partial restraint of trade
 - No hire provisions
 - Limitation to existing customers
 - KEY: whether professional may continue to have an opportunity for meaningful employment



Blue Penciling



Multi-state Agreements Choice of Law

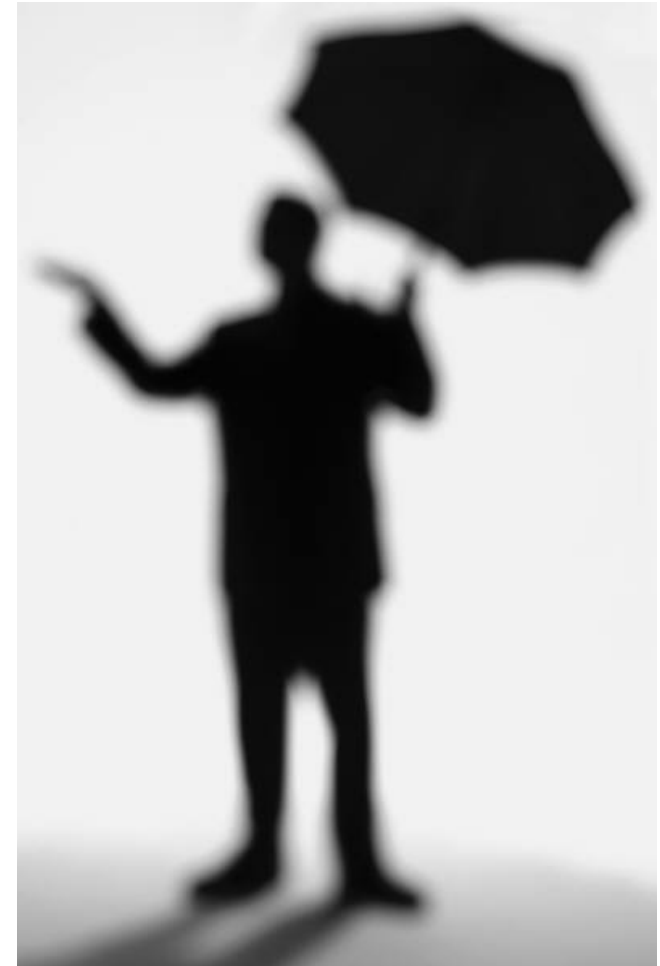
Recommendations and Practical Tips



- Consult with a lawyer
- Execute at inception of employment
- Prohibit solicitation of customers & employees
- Beware tortious interference with contracts
- Keep agreement in secure location
- Weigh costs of litigation

Other Ways To Protect Against Employee Competition

- Stay bonus & other incentives
- Confidentiality agreement/Non-disclosure agreement



Confidential Information

- Whenever a business shares its confidential information, it should consider having the person or entity to whom or which it discloses such information execute a confidentiality agreement
- Ways we share confidential information:
 - Internally
 - With customers, suppliers, and other third parties
 - New corporate opportunities, strategic alliances, and finance arrangements

What is a Confidentiality Agreement?

- Contracts entered into by two or more parties when confidential information will pass from one or both of the parties to the other, and the discloser wants the information it discloses to the other party to remain confidential.
- Various Names for Confidentiality Agreements
 - Confidentiality Agreement
 - Confidentiality and Non-Disclosure Agreement
 - Non-Disclosure Agreement
 - NDA
 - Secrecy Agreement

What goes into a NDA?

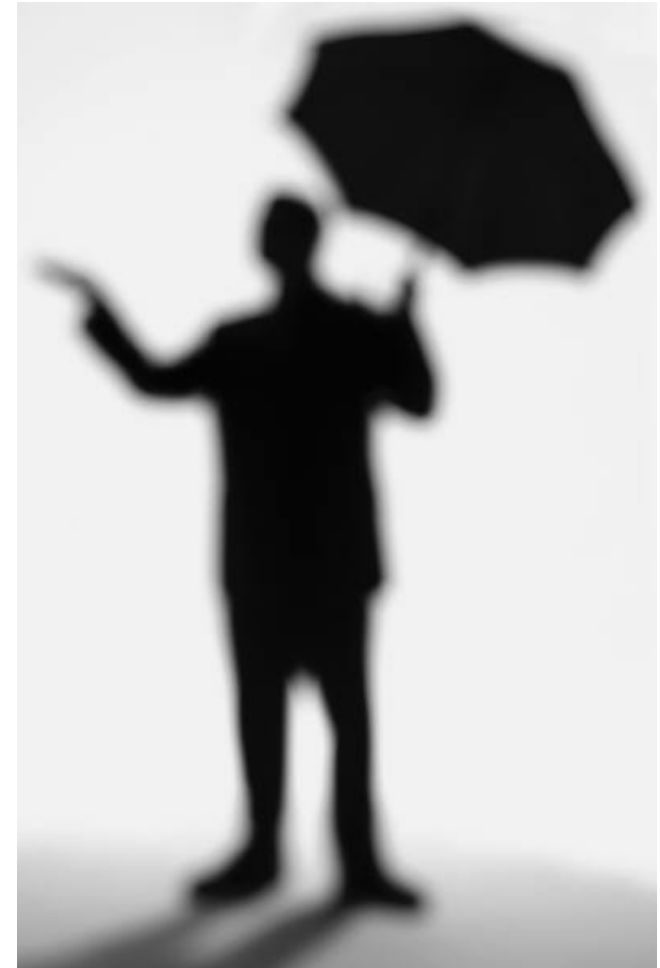
- Clearly identifiable parties including any affiliates of the parties
- Possible limiting of disclosure to specified business purpose
- Clear definition of confidential information
 - Written
 - Electronic
 - Verbal
- “Confidential”
- Carve outs for exclusions
- Exceptions
- Degree of care
- Safety and return
- Retention of rights

What should NDA's limit?

- Access to the confidential information within the recipient's organization and for a limited purpose
- Use of confidential information by the recipient
- Prohibit appropriation of the discloser's confidential information to the recipient's benefit
- Prohibit the duplication, reproduction, reverse engineering, disassembling, copying and decompiling of the confidential information

Other Legal Protections

- Trade Secret Law
- Law on the Duty of Loyalty
- Breach of Fiduciary Duty
- Interference with Business or Contractual Relations



QUESTIONS?

