

*Quitters Never Win:
How to Successfully Enforce a
Non-Compete Agreement Against a
Physician*



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INTRODUCTION

Imagine sitting in your office on a Friday afternoon, just hours away from the weekend, when your client, a physician whom you successfully defended in a medical malpractice case a few years ago, calls to tell you that his former loyal employee has just left the group, taking his lap top and patient list with him. Even worse, the former employee plans to open a competing medical practice just down the street. Your client is particularly upset because he had hired this physician just after his residency, and spent hours teaching him the practice. The court house closes in two hours, and your client, armed with a well-written non-competition agreement, is screaming for an injunction. You know a little bit about injunctions, but you are not really sure if non-competition agreements are even enforceable against doctors. The one thing you do know for sure is that you do not want your client to walk down the street to the big law firm. So, I offer this small article as a primer which you can perhaps keep in a near-by subfile to help you respond to that call from your client.

Here is what you need to know. First, non-competition covenants are enforceable against physicians provided the terms are reasonably designed to protect the employer's interests, and do not otherwise pose an undue hardship on the former employee or the public. Second, with good facts and some good lawyering, you should be able to convince the court to grant a preliminary injunction. Then, as a practical matter, you can approach opposing counsel from a position of strength to settle the case if appropriate.

In *Raimonde v. Van Vlerah* (1975), 42 Ohio St. 2d 21, which involved a doctor of veterinary medicine, the Supreme Court of Ohio recognized that restrictive covenants are enforceable, provided certain standards are met:

1. A covenant not to compete which imposes unreasonable restrictions upon an employee will be enforced to the extent necessary to protect an employer's legitimate interests.
2. A covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if the restraint is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public.

The *Raimond* decision in 1975 followed somewhat closely on the heels of the American Medical Association's 1960 resolution declaring that not all physician restrictive covenants were unethical, a change from the AMA's previous position. Breitenbach, Roy W., Esq. *Enforcement of Physician Restrictive Covenants*; see also Monahan, Patrick J, Esq. and Breitenbach, Roy W., Esq. *Physician Restrictive Covenants Enforced Somewhat Reluctantly*, The Connecticut Law Tribune, May 2007. Fast forward to today when the weight of authority holds that reasonable covenants not to compete entered into between physicians are enforceable. Annotation, Validity and Construction of Contractual Restrictions on Right of Medical Practitioner to Practice, Incident to Employment Agreement (1975 & Supp.), 62 A.L.R.3d 1014. See, also, Aspelund & Erikson, Employee Noncompetition Law (1990) 6-117, Section 6.04(16), fn. 366. Be aware however that some Ohio courts hold that non-competition agreements in the physician setting will be "strictly construed" for reasonableness since the physician-patient

relationship is entitled to special protection. *Ohio Urology, Inc. v. Poll*, 5(1991), 72 Ohio App.3d 446, 452-453. Courts, then, typically focus on the second paragraph of the *Raimonde* syllabus to determine whether or not to enforce a restrictive covenant (along with additional factors introduced in *Raimonde* and discussed towards the end of this article).

Whether The Restraint Is Greater Than Required For The Employer's Protection.

As to the first *Raimonde* element, the analysis starts with a simple reading of the covenant. Ideally, the covenant will be narrowly drafted to protect your physician client's existing practice from unfair competition. It may be that the covenant only restricts the departing physician from performing specialized procedures similar to your client's base practice, while still allowing the departing physician to offer general surgery. Determine whether the terms contain other exceptions under which the departing physician may be able to practice medicine, albeit on a limited basis, such as providing medical services on an emergency basis. The narrower the restriction, the more likely the court will be to enforce it.

Whether The Restraint Imposes Undue Hardship On The Employee.

Analysis of the second *Raimonde* element usually involves review of the time and geographic limitations contained in the covenant. Not surprisingly, there is no hard and fast rule (despite the common misperception that covenants cannot exceed two years for instance), and the case law is very fact specific. A handful of helpful decisions exist: *Wall v. Firelands Radiology, Inc.* (1995), 106 Ohio App. 3d 313, 331 (20 mile radius for up to 3 years); *Neer v. Clark*, 1993 Ohio App. LEXIS 5723 (20 mile radius for 3 years);

Kaeser v. Adamson, 1984 Ohio App. LEXIS 9549 (20 mile radius for 5 years). If you can demonstrate that the geographical boundaries of the restrictive covenant relate in some fashion to the area where your physician client draws patients, this will go a long way towards convincing the court that the restraint is reasonable.

Whether The Restraint Is Injurious To The Public.

The third *Raimonde* element can be very tough to satisfy, as opposing counsel quite compellingly will argue that each patient should be able to choose her own physician. One counter is to demonstrate that enforcement of the covenant will not significantly reduce the availability of the particular medical specialty which the restrained physician provides. For instance, there may be numerous other facilities where such services are available. Find out if the former employee is board certified, and if not, argue that the physician thus has no particular subspecialty of which the public would be unfairly deprived under the covenant. Another counter raises a public policy interest in favor of tougher enforcement of restrictive covenants. That is, an argument can and should be made that consistent enforcement of non-compete agreements actually serves to strengthen the health care system in a particular community by allowing an employer to effectively recruit physicians, grow a medical practice group, and protect that investment with tools such as a non-compete freely entered into by contract. Havens, Joey, C.P.A., *RNon-Compete Agreements Provide “Glue” For Stronger Health Care Systems (Especially in Rural America)*.

A Sampling Of Case Law.

The court’s analysis of *Raimonde* in *Wall v. Firelands Radiology, Inc.* (1995), 106 Ohio App. 3d 313, is instructive. In *Wall*, a radiologist physician and Firelands

Radiology, Inc. entered into an employment agreement which was negotiated by their respective attorneys. The employment agreement contained a restrictive covenant which prohibited the radiologist from any employment for three years within twenty miles of the two hospitals which Firelands served. When the radiologist later sued to rescind the contract, Firelands moved to enforce the restrictive covenant. The trial court granted summary judgment to Firelands, and ruled the covenant valid. In affirming, the court of appeals applied the *Raimonde* factors, and first ruled that the restraint was no greater than required for the protection of Firelands:

The covenant restricts appellant from competing with Firelands for a period of up to three years within a twenty mile radius of Firelands' office and the two hospitals. The covenant was designed to protect Firelands' relationship with the two hospitals and to protect Firelands' practice. This court finds that the restraint is no greater than required for Firelands' protection.

As to the second *Raimonde* factor, the court in *Wall* rejected the radiologist's claims of undue hardship:

Fireland's practice is dependent upon the contracts with the two hospitals. If the restrictive covenant were not enforced, appellant could seek to provide services at either or both hospitals. It would eviscerate entirely the protection of restrictive covenants to allow a physician to practice, contrary to the restrictive covenant, after her employment enabled her to establish the very contacts which would allow her to destroy a practice that was established before her employment. This is particularly so when she became an employee after negotiating an employment contract with the advice and assistance of an attorney. Furthermore, appellant is only barred from practicing within a twenty mile radius of the two hospitals and Firelands' office.

Notably, the court adopted the sentiment expressed by now Chief Justice Moyer in his dissent to *Williams v. Hobbs* (1983), Ohio App. 3d 331, 336:

To be sure, any person who is prevented from practicing his profession or trade for a period of time in an area in which it has been practiced, suffers some hardship. However, the Raimonde test requires more than just some hardship. Plaintiff did not show that he could not readily obtain a position or establish a practice elsewhere. *** Too often courts have attempted to rewrite contracts for parties that appear after the fact to be more equitable to one or more of the parties. The Raimonde opinion acknowledges that temptation and its test should therefore be strictly applied.

As to the third *Raimonde* factor, the court in *Wall* found that the covenant was not injurious to the public since the radiologist had no subspecialty, and Firelands was able to provide services to the community before the departing physician's employment and could do so again.

Clark v. Mt. Carmel Health (1997), 124 Ohio App. 3d 308, had a slightly different twist, and a fairly remarkable result. Mount Carmel had engaged in extensive negotiations through counsel to hire the plaintiff, a neurologist with a subspecialty in sleep disorders, to operate its sleep medicine practice. When Mount Carmel opted not to renew the contract after the initial term expired, the physician sought to enforce a restrictive covenant to preclude Mount Carmel from continuing to operate the sleep medicine practice with a new medical director, for a period of two years, at its present location or in any contiguous county. The trial court granted summary judgment to the physician, and granted an injunction ordering Mount Carmel to close its sleep center for two years. In following *Raimonde*, the court ruled that the physician had a legitimate interest to protect, especially since he was instrumental in establishing Mount Carmel's sleep disorder center, the same entity which now directly threatened to compete with him:

Dr. Clark brought to Mount Carmel twenty years of expertise, research, skill, knowledge, methods, and experience in the

area of sleep medicine. In addition, Dr. Clark brought with him his long-standing professional reputation for quality treatment of patients, as well as a significant referral base from other physicians. Mount Carmel's sleep disorders center has gained much of its success in large part due to the contributions of Dr. Clark. By allowing Mount Carmel's sleep disorders center to continue in operation contrary to the parties' negotiated agreement, Dr. Clark is forced in effect to compete against his own reputation as he starts up his new sleep center at Columbus Community Hospital. The restrictive covenant, one of the terms of the agreement that Dr. Clark insisted be included in the agreement, was designed to protect Dr. Clark's sleep medicine practice, his sole means of support.

The court in *Clark* also found that injunctive relief was particularly appropriate to preclude the unfair competition:

Further, the very purpose of an injunction is to prevent such irreparable harm from occurring. Failure to recognize the potential for serious injury undermines the basic purpose of a covenant-not-to-compete, which is to prevent, as far as possible, unfair competition from the use of someone else's information, experience, expertise or skills. It would eviscerate entirely the protection of the restrictive covenant to allow Mount Carmel to continue operation of its sleep disorders center, contrary to the restrictive covenant, after Dr. Clark's association with Mount Carmel enabled it to establish a highly successful sleep disorders center, which, in turn, could destroy the sleep medicine practice established by Dr. Clark prior to his association with Mount Carmel. This is particularly so when Mount Carmel negotiated the agreement containing the restrictive covenant with the advice and assistance of an attorney.

As to the second *Raimonde* element, the court rejected Mount Carmel's argument that forcing it to close its \$1.75 million sleep disorder center would impose an undue hardship, and ruled that "a determination that a covenant is unduly harsh requires a much greater standard than determining whether the covenant is merely unfair." Finally, the court in *Clark* found that enforcing the covenant would not be injurious to the public since adequate other sleep disorder centers were readily available.

In contrast, cases in Ohio that have modified or invalidated restrictive covenants have dealt with either extremely rural areas or highly specialized physicians, whose services in a particular specialty would be unavailable in a certain geographical region. *Ohio Urology Inc. v. Poll* (1991), 72 Ohio App. 3d 446 (doctor was kidney stone specialist accomplished in lithotripsy); *Lewis v. Surgery & Gynecology, Inc.*, 1991 Ohio App. LEXIS 1086 (osteopathic urologic surgeon had specialty training in lithotripsy); *Darrow v. Kolczun*, 1991 Ohio App. LEXIS 970 (covenant was unrestricted as to time and orthopedic hand specialty was in demand in two rural counties).

Other *Raimonde* Factors May Also Justify Enforcement Of The Covenant.

Note, *Raimonde* identified several additional factors to be considered when determining reasonableness of the restrictions a covenant imposes including: (1) the existence of time and geographic limitations; (2) whether the employee represents the sole contact with the customer; (3) whether the employee possesses confidential information or trade secrets; (4) whether the covenant seeks to eliminate competition which would be unfair to the employer or merely seeks to eliminate ordinary competition; (5) whether the covenant seeks to stifle the inherent skill and experience of the employee; (6) whether the benefit to the employer is disproportional to the detriment to the employee; (7) whether the covenant operates as a bar to the employee's sole means of support; (8) whether the employee's talent which the employer seeks to restrict was actually developed during the period of employment; and (9) whether the forbidden employment is merely incidental to the main employment. *Raimonde*, at 25. Be prepared to show in your case how these factors, if applicable, weigh in favor of enforcement.

Injunctive Relief Is Necessary To Prevent Irreparable Harm.

It is beyond the scope of this article to discuss in any real detail whether or not you will be entitled to injunctive relief to enforce your client physician's non-competition agreement and prevent his disloyal former employee from practicing medicine. This type of litigation is as challenging as it is exciting, and the outcome is often determined by which physician has the "cleanest hands." Corrigan, William M., Esq. And Kass, Michael B., Esq., *Noncompete Agreements and Unfair Competition*, DRI In-House Defense Quarterly, Winter 2007. In any event, you should obviously look to Civil Rule 65, and remind your judge that the issuance of an injunction lies within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Garono v. State* (1988), 37 Ohio St. 3d 171, 173. Be prepared to demonstrate that your client is likely to succeed on the merits and is thus entitled to preliminary injunctive relief at this stage to prevent irreparable harm. *State ex rel. Great Lakes College v. Medical Bd.* (1972), 29 Ohio St. 2d 198. Argue that unfair competition, especially in violation of a non-compete freely negotiated with aid of counsel is just the type of activity that injunctive relief is designed to prevent. *Manchester v. Cleveland Trust Co.*, 95 Ohio App. 201, 215-18 (1953); 56 Ohio Jur.3d §66.

CONCLUSION

So, take your physician client's telephone call, and his case, with confidence, since we all know that "quitters never win."