


BY BRUCE D. ARMON *and* CHRISTOPHER P. STIEF

"They Can't Enforce That…Can They?"

When conflict arises over a non-competition covenant, resolution can be achieved through several means.

THE "URBAN MYTHS" COME in many forms: "Those contracts are just a scare tactic," "They aren't enforceable, right?" "This is a right-to-work state," "I thought they couldn't use those with doctors."

The reality, as we discussed in the January/February issue, is very different. Physician non-competition agreements generally are enforceable to some degree in most states, although whether they will be enforced in any particular circumstance depends on a lot of factors.

In the last issue's article, we talked about the anatomy of a non-compete clause, and touched on some of the particular provisions that can make a difference for you if it ever comes time to leave your practice—whether it's by your choice or your employer's choice. Now, fast forward to the fateful time when your employer seeks to hold you to that non-compete clause. What happens then? Unfortunately, this is when too many physicians find out for the first time that there is no truth to the myth that "those things aren't enforceable."

Physician non-competition clauses typically include prohibitions on (a) practicing in your subspecialty within a certain geographic radius, (b) soliciting patients and staff to follow you, and (c) taking patient lists and proprietary practice information with you. These restrictions may last anywhere from as little as a few months to as much as a few years. However, a non-competition clause that is disproportionate to the length of employment may be problematic for the employer (e.g., a four-year non-compete clause for a one-year contract).

The contract may provide that asserted violations of a non-compete clause will be litigated either in court or arbitration. From an employee's perspective, arbitration may be a more affordable alternative. The arbitration route, however, does not provide any more certainty of the outcome. Unless your new employer is funding the litigation or arbitration, the former employer normally will have more financial resources and can make it expensive for you to go toe-to-toe with them. This is particularly true if the practice wants to teach the former employee "a lesson" or make an example for other employees lest they also elect to compete with the group.

Continued

Unless your new employer is funding the litigation or arbitration, the former employer normally will have more financial resources and can make it expensive for you to go toe-to-toe with them.

Continued from previous page

So what can you expect during litigation or arbitration proceedings to enforce the non-compete clause in your employment agreement? In rough chronological order, you could expect things to unfold like this:

• **Demand Letter.** The process usually starts when you receive a nasty letter from your former employer's attorney "demanding" that you immediately comply with the non-competition restrictions in your employment agreement, and threatening you with litigation if you do not cooperate. This so-called "demand letter" normally will impose a short deadline for response, and may insist that you share the letter and your contract with your new employer. Be aware that your employment agreement with the new employer may include your representation that there are no prohibitions from you beginning the new employment. Frequently, the demand letter triggers discussions among attorneys on both sides, which sometimes leads to a compromise resolution before any litigation even begins. Any compromise should be memorialized in writing and signed by you and your former employer.

• **Temporary Restraining Order.** If things don't get resolved at the demand letter stage, many employers will sue you in court and file a motion for a temporary restraining order. As its name implies, this is a temporary order that is issued on an emergency basis by a judge. If granted, it will restrain you from engaging in certain delineated conduct. This may happen even if your contract has an arbitration provision, because case law allows a party to seek emergency orders in court pending an arbitration.

In most states, judges have very wide-ranging discretion to grant or deny a motion for a temporary restraining order, or to issue a compromise order. For instance, in all but a few states, the judge has the power to decide that the hypothetical 20-mile radius on your non-competition agreement is too broad, and instead issue a temporary restraining order preventing you from working for a competing practice within 10 miles. Indeed, many non-compete clauses expressly allow a judge to modify a particular provision to make it "legal." Because these are emergency orders, the court typically holds a hearing on whether to grant the temporary order within a day or so of the former employer filing its papers with the court. Your attorney needs to be able to act quickly to assist you. When they are issued, temporary restraining orders can last for 10 to 20 days, until the court has an opportunity to conduct a more thorough hearing and decide whether to keep any restraints in place pending the final trial of your case. That next hearing, 10 to 20 days later, is called a "preliminary injunction hearing." But before you get to that next hearing, courts often order what is known as expedited discovery.

• **Expedited Discovery.** When the court is considering requests for temporary or preliminary orders, it frequently wants to have more factual information to work with—even though the trial itself won't happen for many more months. Frequently, the court will order the parties to engage in expedited discovery. The parties (through their respective attorneys) produce key documentary evidence to each other within a few days' time. Normally, there also will be depositions of key witnesses: usually you and the principals of your former employer. Depositions are sessions where witnesses give sworn testimony about the case. These take place outside of a courtroom, usually in a lawyer's conference room. All of this takes place on a compressed timetable: during the 10 to 20 days between issuance of a temporary order and the date of the follow-up preliminary injunction hearing.

• **Preliminary Injunction Hearing.** After the expedited discovery, the lawyers for each party compile evidence gained during the depositions and from the documents exchanged, and then make the best case they can to the judge for issuance or denial of the preliminary injunction. The judge may have witnesses testify on the stand at the preliminary injunction hearing, and essentially hold a mini-trial (without any jury). Alternatively, a judge may call for submission of documents, affidavits, and excerpts from deposition transcripts, but will hear no live witnesses at the hearing. The lawyers argue the law, and then the court decides whether the temporary restraining order ought to remain in effect pending the ultimate trial of the case, or if it should be modified or dissolved altogether.

To win the preliminary injunction, the former employer must prove that it is likely to win its case at trial, that it would be difficult to calculate money damages if violation of the contract continues during the months leading up to trial, and that the public interest will not be ad-

Continued from previous page

versely affected by issuance of an order. As a practical matter, the hearing on the preliminary injunction quite frequently is "the whole game," because the non-competition agreement frequently will expire before a final trial can be held.

• **Discovery.** If the preliminary injunction hearing is not the final disposition of the matter, there will be some form of additional discovery prior to the final hearing or trial. Any earlier expedited discovery will have covered only those issues necessary for the court to decide the preliminary injunction motion. There now may be more ancillary issues, additional witness depositions, and questions about damages that still need to be covered by document requests, written information requests, and deposition testimony.

• **Arbitration.** You will likely only go to arbitration if you and your former employer agreed to this in your employment contract. The parties select a mutually acceptable neutral arbitrator or panel of arbitrators to decide the case. The advantage? Arbitration is a less formal procedure. In theory, this can make it a less expensive and faster decision. But the reality is that time and cost savings depend on how the arbitrators conduct the proceedings, and you also must pay the arbitrators for their time.

A primary feature of arbitration is its relative finality: Unlike a court proceeding, there is no right to "appeal" if you lose. The arbitration decision can only be overturned in extreme circumstances, such as arbitrator bias or misconduct. Courts cannot overturn the result simply because the arbitrator made an error of law. This finality helps make the process cost-efficient by avoiding expensive appeals, but can be frustrating if you lose the case through what you believe was a misunderstanding of the law by the arbitrators. One final advantage of arbitration is that it is private. Any "dirty laundry" that comes out during the hearing will be in private. Neither the written filings nor the testimony will be available to the press, your professional peers, or patients under normal circumstances.

• **Trial in Court.** If your case goes to court, the ultimate decision will be made by a judge or jury. The court is a public form, which is both an advantage and a disadvantage. You don't have to pay the judge or jury for their time, and you get your proverbial "day in court," but the procedures may be longer and more expensive, and always are public. Most of what happens in court cases is open to public view.

• **What the Employer Can Seek.** Either in court or arbitration, the employer usually will ask for a continuation of any preliminary injunction that was issued, so that it continues for the duration of the time period in your non-competition clause. Alternatively, and sometimes in addition, a former employer may seek money damages from a breaching former employee. In fact, in some states, legislation makes money damages the only option with respect to departing physician employees (see, for example, Delaware: 6 Del.C. § 2707). If you are in a state like Delaware, or if the employer decides to seek only money and not an order forcing you to comply with the non-compete, the case will proceed on a slower track than the temporary order fire drill, but ultimately the same types of discovery and trial procedures will come into play.

• **Settlement.** Many non-compete cases ultimately settle for compromise restraints on competitive activity. In fact, one side-benefit of the temporary restraining order procedure is that it brings things to a head quickly. Parties often reach settlements after getting this initial ruling from the court on the parties' positions. Another factor that often leads to settlement is the overriding issues of patient welfare, and patient perceptions. Contested litigation can be a distraction from the practice of medicine, requiring time and focus dedicated to something other than treating patients. In addition, patients may be put off by an unseemly fight between a physician and his former practice. These factors often lead to discussions resulting in a compromise that provides some protection for the former employer, and some competitive freedom for the physician.

Litigation or arbitration over a non-competition agreement can be a stressful and expensive process. The former employer feels it must protect the practice's business and revenues by preventing an outflow of patients. The departing physician feels the patients are "hers" and that the former employer already has made plenty of money through her efforts over the years. This, of course, is a recipe for a vigorous fight.

Careful structuring of the non-competition clause(s) in your employment contract, and awareness of your short

Continued from previous page

and long-term objectives, can help insulate you from the time and expense of battling a non-competition provision.

While nothing lasts forever, the bitter feelings from a dispute regarding a non-competition clause can have a negative impact personally and professionally on both the departing physician and the employer. As a result, it is a good idea to discuss with any prospective new employer—and with legal counsel—how litigation will be handled with your former employer, what it may cost, and how to plan your conduct in ways that may limit your litigation exposure. ■

Bruce Armon is a partner and practices healthcare law for Saul Ewing LLP. He can be reached at barmon@saul.com. Chris Stief is a partner and litigator who chairs Saul Ewing's Employee Defection & Recruitment Practice Group and can be reached at cstief@saul.com.