THEY STOLE OUR CUSTOMER LIST!
HOW TO NAVIGATE NONCOMPETE & NONSOLICITATION AGREEMENTS

Presented by
Greg Brown & Rob Gough
Our Facts
Two Companies Competing for Home Healthcare Business

HILL WARD HENDERSON
ATTORNEYS AT LAW

How to Navigate Noncompete & Nonsolicitation Agreements
Facts, continued
Flo Nightingale terminates employment with #1 and goes to work for #2
Employer #1 calls Rob Gough
Employer #2 calls Greg Brown
February 9, 2012
VIA UPS OVERNIGHT DELIVERY

Chairman,

Re: Cease & Desist

Dear Mr. Moxley:

This firm represents [name of client], and its subsidiaries (collectively, [company name]). It has come to our client’s attention that your company is employing former [position] employee in Citrus County. Please be advised that Ms. [name], who is subject to a non-competition/non-solicitation agreement, a copy of which is enclosed for your information. As you can see, the agreement prohibits her from, among other things, being engaged in a competing business within Citrus, Hernando, Sumter and Marion Counties. It is my client’s position that [name] is violating the above-mentioned agreement through her employment by your company.

I demand that your company immediately cease employing Ms. [name] in violation of her non-competition/non-solicitation agreement. Please advise me by no later than Friday, February 17, 2012, that your company has ceased so employing Ms. [name]. If I do not receive such confirmation, [name], and I will have no choice but to conclude that your company is engaged in a campaign to tortiously interfere with my client’s contractual and business relationships, in which case, I have been instructed to proceed against your company and Ms. [name] in order to protect those relationships.

Sincerely,

[Signature]

P.W.M./pm
Enclosure

6010894.13

Chicago  Cincinnati  Cleveland  Columbus  Costa Mesa
Denver  Houston  Las Angeles  New York  Orlando  Washington, DC

HILL WARD HENDERSON
ATTORNEYS AT LAW

How to Navigate Noncompete & Nonsolicitation Agreements
CONFIDENTIALITY AND NON-COMPETE AGREEMENT

This Confidentiality and Non-Compete Agreement is entered into between [redacted] (“Employee”) and [redacted], Inc. and its subsidiary companies, (collectively called [redacted]) on this [redacted] day of [redacted] 2010.

Employee and [redacted] agree as follows:

1. Need for Confidentiality and Non-Compete Agreement. As a result of Almost Family’s employment of the Employee,

   (a) Benefits to Employee. The Employee will learn [redacted], business, and acquire new skills, training and experience in this field, which he/she would not have but for his/her employment with [redacted].

   (b) Confidential Information, Customer Knowledge and Trade Secrets. Throughout his/her employment, [redacted] will entrust him/her, directly and indirectly, with trade secrets and confidential information, including knowledge of [redacted]’s referral sources, marketing techniques, employees, the identity of Almost Family’s present and specific, prospective customers and clients, as well as an understanding of the specific profile of Almost Family’s potential customers and clients, which is not generally known in the trade, or to the public.

   (c) Goodwill. [redacted] will empower Employee with business and professional contacts and a stature, as a representative of [redacted], which gives his/her comments about [redacted]’s product and its services, whether true or false, unique power and credibility in the marketplace. Further, one purpose of the Employee’s employment is to generate and expand the goodwill of [redacted]. This purpose will be undermined if the Employee is permitted to take this goodwill from [redacted] by competing against [redacted].

   (d) Risk of Unfair Competition. This knowledge, experience, and association, which [redacted] will entrust to the Employee, would give a competitor such an unfair advantage that [redacted] has an extraordinary need for protection from the Employee competing against [redacted] or using or disclosing [redacted]’s confidential information on behalf of anyone.

   (e) Protection of Trade Secrets and Confidential Information. As a practical matter, [redacted] is unlikely to discover or be able to prove that Employee is disclosing its trade secrets and confidential information to a competitor if the Employee were permitted to enter into a relationship with a competitor in violation of this agreement; whereas the Employee is
Confidentiality and Non-Compete Agreement

Confidentiality Agreement

Confidentiality and Non-Compete Agreement.

2. Consideration for Confidentiality and Non-Compete Agreement. Employee acknowledges that he/she has no obligation to continue Employee's employment and Employee enters into this Agreement in consideration of the purposes of initiating or continuing his/her employment as an "at will" employee. This covenant is ancillary to the parties' "at will" employment relationship.

3. Non-Compete Agreement. Employee agrees that he/she will not:

(a) Enter into the employ of any person or entity which competes with [redacted] within the geographical area defined in the attached Exhibit A. The parties acknowledge that [redacted]'s need for protection extends at least as far as the area described in Exhibit A due to the Employee's active service for [redacted] within the territory described in Exhibit A.

(b) Engage, directly or indirectly, as a principal, advisor, investor, agent, or enter into any other relationship, with any business which competes with [redacted] within the geographical area defined in the attached Exhibit A.

(c) Solicit business from or contact, directly or indirectly, any of the current or former customers/clients of [redacted] wherever located.

(d) Discuss with any employee of [redacted] the subject of his/her leaving employment with [redacted].

4. Confidentiality Agreement. Employee agrees not to disclose to others, or use, at any time, in any way, or anywhere, any Confidential Information belonging to [redacted].
Confidentiality and Non-Compete Agreement

Employee acknowledges the confidential and fiduciary relationship he/she has with [redacted] throughout his/her employment.

For purposes of this paragraph, “Confidential Information” means information not generally known in the industry in which [redacted] is engaged, disclosed to Employee or known by the Employee, as a consequence of, or through, his/her employment with [redacted]. Confidential Information includes, but is not limited to, all information about products, services, customers/clients, potential customers/clients, the profile of its potential customers, its marketing techniques, business plan(s), the identity and compensation structure of its employees, pricing, market research, and all other information of a trade secret, proprietary, or confidential nature.

5. Return of Property and Materials. Employee agrees to deliver all Confidential Material that is in the Employee’s possession, custody or control, whether made, written or obtained by the Employee or others, as well as all equipment and property belonging to [redacted] immediately upon the conclusion of the Employee’s employment. Employee agrees that he/she shall retain no copies of such material, either for the Employee’s own use or otherwise. [redacted] shall have an absolute right to set off any money damages he/she suffers as a result of any breach of this Agreement from any monies, including salary and commissions, that would otherwise be due to Employee.

For purposes of this Agreement, “Confidential Material” means any writing, computer data, photograph, or other written material or tangible thing obtained by the Employee as a consequence of or through his/her employment with [redacted], containing any Confidential Information. It shall include, without limitation, all customer lists, price lists, financial data, computer programs, operating instructions, forms and manuals, procedure instructions, catalogs, records, drawings, notes, notebooks, and all other material of a trade secret, proprietary, or confidential nature.

6. Time Limitation. The above covenants shall be limited in time to the period of the Employee’s employment with [redacted] and for one (1) year after the Employee’s employment with [redacted] terminates, voluntarily or involuntarily, for any reason, with or without cause. In the event however that the Employee violates this Agreement, it is hereby expressly agreed that, in order that [redacted] may obtain the full benefit of this Agreement, the one (1) year limitation on the covenants will not expire until one (1) year following the date on which the Employee ceases to be in any violation of this Agreement.

7. Other Necessary Limitations. Any portion of this Agreement which may be deemed unenforceable by any court is severable and the rest of the Agreement shall be enforced without it. Accordingly, this Non-Competition and Confidentiality Agreement shall be limited by any other limitation (for example, reduced time or geographic limitations), which may be determined by a court to be necessary in order to enforce the Agreement under applicable law.

8. No Undue Hardship. Employee acknowledges and agrees that he/she possesses many marketable skills that will enable him/her to be gainfully employed at businesses other...
Confidentiality and Non-Compete Agreement

How to Navigate Noncompete & Nonsolicitation Agreements
Confidentiality and Non-Compete Agreement

IN WITNESS WHEREOF, and intending to be legally bound hereby, the Employee and [redacted] Inc., by its authorized corporate officer, sign this Agreement, after reading all of it, and intending to be legally bound by it.

Employee Signature: [redacted]
Name: [redacted]
Date: 11/22/2010

By: [redacted]
Authorized Officer (V.P.)
Date: 12/22/10

How to Navigate Noncompete & Nonsolicitation Agreements
Additional Demands

• Demand not to compete
• Demand for return/preservation of electronic, paper data and electronic devices, and discontinue use of same
• Demand to cease and desist from contacting customers
• Demand to prevent the use of trade secrets under Florida Statute 688.01, et seq.
• Demand to inspect computer network and employee’s devices
• Spoliation notice
VIA EMAIL AND U.S. MAIL

February 23, 2012

Re: [Redacted]

Dear Mr. [Redacted],

As you are aware, our firm represents [Redacted] with respect to the aforementioned matter. On February 10, 2012, we received your client [Redacted] Inc.'s demand that [Redacted] Inc. terminate its employee [Redacted] based on the Confidentiality and Non-Compete Agreement (“Agreement”) she executed while employed with [Redacted]. This letter is in response.

First, I want to thank you for your professional courtesy in granting our firm an extension to respond to your client’s demand. This extension gave us the opportunity to closely investigate the matter. [Redacted] takes the demand very seriously and has spent considerable time and energy investigating the matter on its own. Our firm has now interviewed [Redacted] at length - twice. We interviewed [Redacted] in order to verify all relevant facts, but more importantly, to confirm that she does not possess and therefore is not utilizing any of [Redacted]'s proprietary or confidential information. The protection of such information is important to [Redacted], and because it expects former employees to refrain from using its confidential and proprietary information, it demands that any employee hired from another company do the same.

[Redacted] has indicated that she did not retain any contact list, referral source, or other information acquired during her tenure at [Redacted]. She indicated that when she offered her resignation, she was asked to work an additional two weeks, and during that time she transitioned all of her referral accounts to the account representatives, who would be taking over those accounts. This included directly introducing her referral accounts of those representatives.
Response to Cease & Desist Letter

in face-to-face meetings. For what it is worth, most of her referral sources pre-dated her time at [Redacted] and were contacts she derived from her employment with a durable medical equipment company in the same territory.

Another reason for our discussions with [Redacted] was to confirm her obligation to protect [Redacted] confidential information and customer lists, and make clear that her employment is contingent upon her doing so. We are in the process of drafting a letter agreement between Infinity and [Redacted] in this regard, which we will share with you once it is executed.

Infinity also takes your client's demand that [Redacted] be terminated very seriously. I can assure you that if our firm was able to safely conclude that the applicable law required Infinity to do so, Infinity would honor this demand. However, we have studied the applicable law closely, and our firm has concluded that terminating [Redacted] is not required of Infinity, and, moreover, this step would be unnecessary and disproportionate to the rights at stake.

While we recognize that the Agreement contains a Kentucky choice of law provision, for the reasons addressed here, we are confident that any Florida court, would apply Florida law, and deem the noncompete restriction unenforceable. Even if the court were to apply Kentucky law, we are confident that the noncompete restriction is unenforceable under the balancing of the equities required under Kentucky law.

The Agreement is subject to Florida law because Florida courts will not apply a foreign state's law, if that law violates Florida public policy. Mazzoni Farms, Inc. v. E.I. DuPont De Nemours and Co., 761 So. 2d 306, 311 (Fla. 2000) (noting that Florida courts will not enforce choice-of-law provisions if they violate Florida public policy). By statutory construct, your client's noncompete is "unlawful" and is therefore unenforceable.

As you know, given your area of practice, the starting point for restrictive covenants in an employment context in Florida is that they are "unlawful." Under Florida law, "[e]very contract . . . in restraint of trade or commerce in this state is unlawful" §542.18, Florida Statutes (2011). Section 542.335 only permits a narrow carve-out for restrictions that are reasonably necessary to protect a "legitimate business interest" as enumerated in section 542.335, Florida Statutes. "Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable." §542.335(1)(b), Florida Statutes (2011) (emphasis added; see also Mazzoni, 761 So. 2d at 312 ("covenant not to compete claims . . . are vigorously disfavored by Florida Courts").

Based on our interviews of [Redacted], it appears clear that the State of Kentucky would not have personal jurisdiction over her. We suspect this is why Almost Family has engaged your firm to handle this matter.
Response to Cease & Desist Letter

Given that [redacted] received no "specialized training" as that statutory term has been defined under Florida common law, and does not possess any confidential or proprietary information, we assume that if your client were to assert the existence of a legitimate business interest here, it would be in its referral accounts with physician groups and the like. However, as our client is already painfully aware, Florida courts will not protect referral sources as legitimate business interests under section 542.335. The Fifth District Court of Appeal has analyzed the identical issue this matter raises, and has held that referral sources do not constitute "legitimate business interests". Fia. Hematology & Oncology v. Tumma, 927 So. 2d 133, 139 ("[T]o accept referring physicians as a statutory 'legitimate business interest,' would completely circumvent the clear statutory directive . . . ."). Incidentally, [redacted] lives in the Fifth District, her past and current territory is located there and this is also where she executed the Agreement. A Florida court will not impose Kentucky law on a Florida citizen, were they doing so would not only be contrary to Florida statutes, but "unlawful" under the applicable statutes.

Even if a Florida court were to apply Kentucky law, we are confident the court would hold the noncompete restriction unenforceable because Kentucky law does not permit injunctive relief where the equities lie with the employee rather than the employer. Lantech.com v. Yorkborough, 247 Fed. Appx. 769, 770 (6th Cir. 2007) (affirming District Court's application of Kentucky law and holding that where equities lie with employee, employer cannot enforce noncompete agreement). As noted by the Lantech Court, a "balance of the equities" must support the issuance of an injunction. Id. at 772. "[A] court sitting in equity will not grant an injunction to enjoin a covenant not to compete when the party seeking the injunction has itself acted unfairly toward the defendant."

Kentucky law applies a broad, discretionary balance of the equities when analyzing restrictive covenants. We are confident that in this case, the equities lie with [redacted] the circumstances which caused her to depart [redacted] family, and we are confident that any court applying Kentucky law would find that the equities lie in her favor. [redacted] outlined events and circumstances relating to a senior manager with whom she co-marketed her territory. While it is not worth chronicling [redacted]'s experience, it is worth noting that her work-place was sufficiently "hostile" that her immediate supervisor indicated that her departure was probably necessary despite her exceptional performance. [redacted] feels she did not have a choice but to depart [redacted] because she could not adequately perform her job functions there.

It is our firm’s belief that both [redacted] and [redacted] would successfully defeat any legal or equitable claims made against them under these circumstances and, of course, it would be our firm’s mission to recover any fees associated with having to litigate those claims.
Employee Letter

• Prophylactic Measure

• Best practice re: employee compliance

April 16, 2012

Re: Continued Employment

Dear: [Redacted]

I apologize for the delay in sending this letter, but I did want to memorialize the agreement that we reached back in mid-February. As you are aware, our firm represents [Redacted] with respect to a current dispute with your former employer [Redacted]. This letter is to memorialize the agreement we reached back in mid-February and confirm the multiple conversations we have had regarding your continued employment with [Redacted]. As we have discussed, you do not possess any proprietary or confidential information, contact lists, referral sources, or any other information acquired during your tenure with [Redacted] ("Protected Information").

To confirm our multiple discussions, your continued employment with [Redacted] is wholly contingent on the representations you have made to [Redacted] that you neither possess, nor intend to utilize any of the Protected Information.

Moreover, you agree not to solicit any new referrals within Citrus, Hernando, Sumter, and Marion Counties for _____ months from the date of this letter.

If you violate the terms of this letter, please be advised that you will be terminated immediately and [Redacted] will not pay for your legal representation with regards to any action initiated by [Redacted] or any other related entity; and b) [Redacted] will seek indemnification for all attorneys’ fees and costs incurred in defending the action brought by [Redacted] and currently pending in Sarasota County, Florida.

Sincerely,

HILL WARD HENDERSON

Gregory P. Brown

GPB:jk

cc: [Redacted]
Florida’s Noncompete Statute 542.335

The 2011 Florida Statutes

Title XXXIII Chapter 542 View Entire
REGULATION OF TRADE, COMMERCE, COMBINATIONS RESTRICTING
INVESTMENTS, AND SOLICITATIONS TRADE OR COMMERCE

542.335 Valid restraints of trade or commerce.—

(1) Notwithstanding s. 542.18 and subsection (2), enforcement of contracts that restrict or prohibit competition during or after the term of restrictive covenants, so long as such contracts are reasonable in time, area, and line of business, is not prohibited. In any action concerning enforcement of a restrictive covenant:

(a) A court shall not enforce a restrictive covenant unless it is set forth in a writing signed by the person against whom enforcement is sought.

(b) The person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. The term “legitimate business interest” includes, but is not limited to:

1. Trade secrets, as defined in s. 688.002(4).
2. Valuable confidential business or professional information that otherwise does not qualify as trade secrets.
3. Substantial relationships with specific prospective or existing customers, patients, or clients.
4. Customer, patient, or client goodwill associated with:
   a. An ongoing business or professional practice, by way of trade name, trademark, service mark, or “trade dress”;
   b. A specific geographic location; or
   c. A specific marketing or trade area.
5. Extraordinary or specialized training.
Florida’s Noncompete Statute 542.335

(j) A court shall enforce a restrictive covenant by any appropriate and effective remedy, including, but not limited to, temporary and permanent injunctions. The violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant. No temporary injunction shall be entered unless the person seeking enforcement of a restrictive covenant gives a proper bond, and the court shall not enforce any contractual provision waiving the requirement of an injunction bond or limiting the amount of such bond.
Florida’s Uniform Trade Secrets Act
Fla. Stat. Chapter 688

“Trade Secret” is information that...

- Derives economic value from not being readily ascertainable by others, and
- Is the subject of reasonable efforts to maintain its secrecy.
Attorneys’ Fees

• Fees may dictate whether to pursue or defend an action.

• The noncompete and trade secret statutes provide for an award of fees.
Plaintiff Decides to File Suit

• Likelihood of a fee award and collecting that award (from Employee or Subsequent Employer)
• The economic value of the right at stake
• The litigation budget
Motion for Temporary Injunction

IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT, IN AND
FOR SARASOTA COUNTY, FLORIDA

Case No.:
Division:

[Redacted]

v.

[Redacted]

a Delaware Corporation,

Plaintiffs,

v.

[Redacted]

a Florida Limited Liability Company,

Defendants.

PLAINTIFFS’ MOTION FOR TEMPORARY INJUNCTION

1. The Plaintiffs, [Redacted], d/b/a [Redacted], pursuant to Rule 1.610 of the Florida Rules of Civil Procedure, move this Court to enter a temporary injunction against Defendant [Redacted], enjoining her, during the pendency of this lawsuit, from: (a) associating herself or working for Defendant [Redacted], (b) disclosing or utilizing Plaintiffs’ valuable confidential information; (c) soliciting, directly or indirectly, for herself or on behalf of Infinity or any other person or entity, any health care providers or institutions that do business with Plaintiffs, and any other clients, customers, referral sources, employees, or business opportunities of Plaintiffs; and (d) otherwise violating the Confidentiality

How to Navigate Noncompete & Nonsolicitation Agreements
Timing of Litigation of this Nature

- Ability to obtain Temporary Injunction on an Ex Parte Basis
- Typically no discovery, absent emergency motion
- 2 – 3 weeks “gorilla warfare” evidentiary hearing
- Irreparable harm presumed
- Likelihood of success on the merits
- Necessity of posting injunction bond (typically 100% collateralized with 1.5% premium)
IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT, IN AND
FOR VOLUSIA COUNTY, FLORIDA
CASE NO.:

Plaintiff,

v.

Defendants.


STIPULATION AND ORDER

Plaintiff, and Defendants,

hereby stipulate and agree as follows:

1. A temporary restraining order shall temporarily restrain and enjoin

and any persons or entities acting in concert with him or on his behalf, including Defendant

(i) using or divulging confidential information of which

obtained from , or otherwise through his employment at

(ii) directly or indirectly soliciting, by

mail, phone, electronic communication, personal meeting or other means the business of any

customers that were serviced by Laskowitz or whose names became known

virtue of his employment with and (iii) otherwise using

Information to interfere with the relationships between

and its customers or other persons or entities, and from encouraging or aiding anyone in doing
Conclusion

• Hard place to spend litigation dollars in a tough economy
• Be proactive
• Several opportunities for compromise and avoidance of expense
Q & A

When you worked here, you signed a non-compete agreement.

It clearly states that you are not allowed to earn money, sleep indoors, procreate or seek medical care.

Section 5B describes what you must now do with this ceremonial dagger.
For more information:

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