Asset Protection

If your desire to hire an assistant is outweighed by fear of losing your practice to a competitor, you're overlooking the value of a restrictive covenant.

Jennifer Kirschenbaum, J.D.

"Vacation sounds nice. It would sound even nicer if I had adequate practice coverage, someone I could trust in the office with patients and the staff, someone responsible who knows my practice, my methods and my patients." Sound familiar? Possibly something you've said yourself countless times? It's a sentiment that is shared among your colleagues, who have also built a successful practice and now find that they are their practice.

The desire to have assistance is often outweighed by another dominant concern: the threat of someone coming in and taking what is yours—your practice, your staff, your patients and your revenue. These contradictory and tantamount considerations—autonomy and freedom vs. protecting income and, often, a life's work—are difficult to balance. One form of protection is to address these issues through agreement, that is, agreeing on certain safeguards related to your practice's proprietary value, specifically through implementation of restrictive covenants. They would have the effect of prohibiting solicitation of staff and patient base, protecting confidential information and, the most controversial protection, restricting an individual's ability to work within a geographic range for a specified period of time during and potentially after the termination of the relationship, commonly known as, although in actuality only one type of, "restrictive covenant."

In dentistry there is a lot of confusion surrounding the appropriate use of restrictive covenants with employees and independent contractors, such as, when is the right time to attempt to implement such a restraint on another individual? Will the individual elect to pass on working with me and instead elect to go somewhere else where he or she is not restricted? And, finally, are restrictive covenants enforceable? This article will discuss and, I hope, clarify certain of these considerations.

Based in Law

Consideration of using restrictive covenants in general is moot if they are not enforceable. So, we start by addressing this question. In fact, New York courts have a long history of enforcing restrictive covenants for dental professionals, with some limitations. In 1971, the Court of Appeals of New York issued a landmark ruling in Karpinski v. Ingrasci, 28 N.Y.2d 45 (N.Y. 1971). In that case, Dr. Karpinski, an oral surgeon, had operated a solo practice in Auburn, Cayuga County, for many years. In 1953, he decided to expand, which he did by marketing successfully in the four neighboring counties of Tompkins, Seneca, Cortland and Ontario. He subsequently opened a second office in Ithaca and recruited an employee, Dr. Ingrasci, a local oral surgeon who had just completed his training. The two entered into an employment agreement in June

1962 with a three-year term, that contained a restrictive covenant prohibiting Ingrasci during the term of his employment and forever thereafter from practicing oral surgery and/or dentistry in Cayuga, Cortland, Seneca, Tompkins or Ontario counties, except in association with Karpinski or if Karpinski terminated Ingrasci's employment and hired another oral surgeon.

When the employment agreement expired after the third year, Ingrasci elected to leave the practice and open his own office, which he did in Ithaca. As a result, the majority of Karpinski's referral sources changed their referral patterns and started referring patients to Ingrasci. Karpinski was forced to close his Ithaca practice.

Not taking the course of events lightly, Karpinski initiated a lawsuit to enforce the restrictive covenant. In its analysis, the Court acknowledged Ingrasci clearly breached his restrictive covenant; however, the mere fact of the violation did not immediately warrant recovery by Karpinski, mainly because of the "powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood." Purchasing Assoc. v. Weitz, 13 N Y 2d 267, 272; see Millet v. Slocum, 5 N Y 2d 734, affg. 4 A D 2d 528; Lynch v. Bailey, 300 N. Y. 615, affg. 275 App. Div. 527; Interstate Tea Co. v. Alt, 271 N. Y. 76, 80. Prior to determining whether to restrict Karpinski, the Court looked to the "reasonableness" of the sought restriction. It noted that it is firmly established doctrine that:

> *"a member of one of the learned professions, upon becoming assistant to another member thereof, may, upon a sufficient consideration, bind himself not to engage in the practice of his profession upon the termination of his contract of employment, within a reasonable territorial extent, as such an agreement is not in restraint of trade or against public policy" (Ann., Restriction on Practice of Physician, 58 A. L. R. 156, 162).*

The Court explained that each case depends to a "great extent" upon its own facts. In the Karpinski case, the Court found that the restricted territory, "five small rural counties," which comprised the very area from which Karpinski obtained his patients and in which Ingrasci would be in direct competition with him, was "manifestly reasonable." Also, in its review, the Court determined that the restriction would not be declared invalid because it is unlimited as to time, forever restricting Ingrasci; in fact, under the circumstances, as nearly all of Ingrasci's practice was and would be directly attributable to his association with his former employer, the restriction was enforceable despite the unlimited time.

It is important to state that Karpinski did not win his entire case. The Court struck down a major portion of the restriction against Ingrasci, specifically that Ingrasci could not be prohibited from practicing "dentistry." The Court explained that since Karpinski practiced only oral surgery and it was for this practice that Ingrasci was hired, Karpinski went beyond permissible limits restricting Ingrasci from dentistry stating, "it is not reasonable for a man to be excluded from a profession for which he has been trained when he does not compete with his former employer by practicing it." Karpinski v. Ingrasci, 28 N.Y.2d 45 (N.Y. 1971).

Since Karpinski, restrictive covenants have been repeatedly upheld in New York, so long as the restriction is: reasonably limited in time, geographic area and scope; viewed as necessary to protect the employer's interests; not harmful to the public; and not unduly burdensome (see Battenkill Veterinary Equine P.C. v. Cangelosi, 1 A.D.3d 856 (N.Y. App. Div. 3d Dep't 2003)). In the enforcement of restrictive covenants among professionals, great weight is given to the interests of the employer in restricting competition within a confined geographic area. The rationale, therefore, is that professionals are deemed to provide unique or extraordinary services (see Bdo Seidman v. Hirshberg, 93 N.Y.2d 382, 389 (N.Y. 1999)). In fact, the interests of the employer have enjoyed solicitous consideration by the courts when the restrictive covenant is in an employment agreement between doctors (see Gelder Medical Group v. Webber, 41 N.Y.2d 680 (N.Y. 1977); Albany Med. College v. Lobel, 296 A.D.2d 701 (N.Y. App. Div. 3d Dep't 2002); North Shore Hematology/Oncology v. Zervos, 278 A.D.2d 210 (N.Y. App. Div. 2d Dep't 2000).

That's not to say that every restriction will be upheld, however. More recently, in 2005, the Supreme Court of Monroe County struck down a restrictive covenant as unreasonable because the defendant was "not in a position to use any means of unfair competition." In Oak Orchard Community Health Ctr. v. Blasco, 8 Misc. 3d 927 (N.Y. Sup. Ct. 2005), the defendant pediatrician signed a contract containing a restrictive covenant that prevented her from setting up a pediatric practice within 10 miles of the one she left. But when her former employer sued her for trying to set up a practice only eight miles away, the Court again looked to the

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surrounding circumstances in order to decide not to enforce the restriction. In that case, the defendant planned to set up a practice targeting a different patient population than her former employer. She also expressly promised not to target any potential patients in the immediate area of her former office, and planned to set up her own practice in an area that did not, at that time, have a pediatrician nearby. Considering all of those factors, the Court decided that to prevent her from opening her new office was not reasonable, and so the defendant prevailed.

So, to answer our first question, whether restrictive covenants are enforceable, the answer is "yes," depending upon the scope and duration of the restriction, as well as the attenuating circumstances. We can now address the practicalities of entering into a restrictive covenant.

Based in Contract

For many of us, presenting terms of employment and expressing our expectations is not always a simple task; however, my recommendation is to be upfront and transparent with expectations and terms. The restrictions accompanying the job benefits should be presented early on in your discussions, whether conveyed verbally or documented in a letter of intent, offer letter, email of job terms or the first draft of the employee's contract. While potentially uncomfortable for the employer, restrictions limiting another person's ability to practice are expected by new hires and are enforceable by New York State courts in order to protect the employer from a recognized and unacceptable threat to his or her livelihood. Our standing precedent also steers us in our drafting of such restrictions and guides us to keep such provisions within reason.

That being said, the initial iteration of the proposed restriction can be on the broader side, with the employee responsible for negotiating, upholding or challenging enforceability. As the employer with the patient base, ask for what you think is reasonable and work with your counsel on a middle ground or compromise if challenged. You may be surprised to find the individual you are considering for hire understands and appreciates your years of patient development and will agree to the range or, alternatively, be willing to negotiate an acceptable modification, possibly the contractual right to notify patients treated exclusively by them by agreed-upon notice of any change in location or employment (which may or may not be acceptable to you).

Of course a contractual provision may not actually serve to stop an employee from leaving and trying to open up across the street, but it will give you the right, if drafted properly, to enjoin the employee from doing so and will entitle you to damages upon such attempt. Most employees do abide by agreed-upon restrictions because they fear they will be enforced and know the potentially massive expense of defense. In that regard, a restrictive covenant is an extremely successful tool to dissuade such activity.

As an owner, electing to hire and not avail yourself of contractual protections against patient theft and competition could be the equivalent of my brushing my teeth with a pure sugar paste. Sure, I'm trying to help myself, but I'm really just setting the stage for potential trouble in the future. The most common reason why many dental professionals elect to proceed with a restriction or, for that matter, a proper contract, is they do not want to pay a lawyer for assistance. Well, being penny-wise and pound foolish in this scenario may just cost you your autonomy and freedom (because you may elect not to hire) or your patient base (hiring without properly worded restrictions). Creating a properly worded employment agreement is a basic task for an experienced healthcare attorney, for which the cost is minimal compared to the alternative. ⌘

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