Employment Agreements – Non-Compete Clauses

written by Richard Leslie | November 1, 2020

Avoiding Liability Bulletin – November 2020

NOTE: The following information was first published on the CPH & Associates' website in March, 2009. It appears below with minor changes. A telephone call from a licensed mental health practitioner regarding a non –compete clause prompted the republication of this article. The practitioner was planning to leave her employment and to start a private practice that was to be conducted wholly via telehealth. The usual questions were asked -is the non-compete clause valid and enforceable, should I let patients know that I am leaving and can they choose to follow me to my new practice. This article will hopefully help readers to identify the issues when they arise and to navigate their way through similar situations.

EMPLOYMENT AGREEMENTS – NON-COMPETE CLAUSES

Counselors and therapists may be employed by any number of business entities (e.g., nonprofit organizations, sole proprietorships, professional corporations, partnerships). Sometimes the employer requires, as a condition of employment, that the practitioner sign a written employment contract that contains a clause that seeks to limit the post-employment activities of the employee. Usually, these clauses attempt to limit or prevent a departing practitioner from competing with the employer's business by specifying that the employee shall not conduct his or her practice in a specified geographic location for a specified period of time following departure. Sometimes these clauses contain provisions prohibiting the departing practitioner from seeing clients of the employer or from contacting other employees in an effort to recruit them to the new business of the departing practitioner. Generally, such clauses are referred to as non-compete clauses or employee non-competition agreements.

I have reviewed many non-compete clauses for mental health practitioners practicing in California. The question usually asked is whether such a clause is enforceable in court. Sometimes the question is asked prior to the signing of such an agreement, but most of the time the question is asked after the practitioner has worked for the employer for some period of time and prior to (or upon) termination of the employment. While each case is different, I have typically pointed out that the courts in California are generally reluctant to enforce such clauses. The broader the prohibition or limitation in the clause, both in terms of the time period involved and the geographic sweep, the more likely it is that a California court would not enforce such a clause.

A 2008 California Supreme Court decision states: "this court generally condemns non-competition agreements." The Court was interpreting a California statute governing this subject matter that has

been in effect for over 130 years. The statute essentially provides that “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.” The Court also stated that this section of law, together with various prior court decisions interpreting its language, establishes “a settled legislative policy in favor of open competition and employee mobility.” This California Supreme Court decision also states that the section of law “protects the important legal right of persons to engage in business and occupations of their choosing.”

The Supreme Court noted that other states permit non-compete provisions provided that they are reasonably imposed. In fact, prior to this California Supreme Court decision, California did allow for non-compete agreements that were constructed in a narrow way – that is, the agreement did not reach too far in terms of its geographic breadth and the amount of time the non-compete clause would last was reasonable. While there are some unanswered questions and a few statutory exceptions (e.g., in a dissolution of a partnership, non-compete clauses are permissible) to the general rule, and while it may still be possible for an employer to draft an agreement that will pass legal muster, it is clear that California law strongly disfavors non-compete agreements. Other states may or may not have a similar bias.

Non-compete clauses contained in employment contracts in the other forty-nine states may or may not be enforceable in court by the employer, but likely, such agreements or non-compete clauses will need to be narrowly drawn and reasonable in their reach. It is important to point out that this is a rather nuanced area of the law and that each state will either have a governing statute or a body of case law, or both, that addresses the subject. Practitioners may want to consult with a lawyer, when faced with the prospect of signing an employment agreement containing a non-competition clause, to determine whether the agreement is enforceable by the employer. Sometimes the prospective employee will be reluctant to confront the employer about the clause because he or she wants the job and doesn’t want to make waves. In that case, the practitioner may choose to accept employment despite the presence of an overly broad and restrictive non-compete clause because the practitioner has been advised that the clause is likely unenforceable. This situation can then be addressed upon termination of the employment.

As indicated above, the employee may decide that it is better to address the issue upon termination of the employment relationship – which might last for a number of years. If the agreement is determined to be valid and enforceable, the therapist or counselor will probably abide by the agreement that he or she signed, so it is important to understand the full breadth of the non-compete clause at the beginning of the relationship. If the agreement is later determined to be invalid and unenforceable, then the employee can leave the employment (giving whatever notice is required) and commence employment for some other entity or become self employed, even if such action may violate one or more aspects of the non-compete clause. Of course, consultation with a lawyer is advisable since the aggrieved employer may decide to take the matter to court. In most of these disputes, these matters do not get to court, although the employer often threatens a lawsuit.

The therapist or counselor who signs such an agreement will usually contend that he or she signed the

contract because he or she needed a job and that negotiating with the prospective employer prior to signing the agreement may alert or concern the employer about the therapist's future intentions. While most practitioners choose to take the offered employment without making the clause an issue, some may attempt to resolve the issue before employment. In the latter case, the opportunity for employment may be compromised. An employer may be reluctant to hire someone who asks for an opportunity to consult his or her own attorney about the clause or someone who seeks to negotiate the language of the non-competition clause. Even more problematic are situations where the employer asks the employee to sign a non-competition agreement after employment has begun. The employee may believe that if the agreement is not signed, the employer will be displeased. In many of these situations, the employee will feel forced to sign. These post-employment non-compete agreements that are signed under some duress, especially those where no additional benefits are provided to the employee, are more likely to be unenforceable.

I sometimes advise practitioners to discuss the non-competition clause with the employer at or near termination in order to attempt an amicable resolution of the problem before departure. Initially, the employer may become angry and may threaten the employee with litigation or other action. Often, however, employers back away from litigation once they understand, for example, that the clause in question is overly broad and restrictive and not likely to be enforced by a court. The issue is often raised when the employee first informs patients of the impending termination of employment. Patients may want to continue with the practitioner at the new location and employers may claim some kind of "ownership" of the patient. In most situations that I have dealt with in California, the patient's wishes are ultimately determinative. Sometimes, the employer will seek a payment from the departing practitioner for each patient "taken." Such arrangements may be problematic or unlawful (they raise the issue of payment for referrals, which in California, is unlawful). Each case is different and each state has its own body of law regarding such clauses and agreements. The advice of an attorney is often necessary due to the complexity and nuances of such matters.

ADVERTISING – PROTECTED OR PROHIBITED WORDS?

As mentioned in a prior piece on advertising, the general rule in most states is that mental health professionals can advertise freely, so long as the advertisement is not false, fraudulent, misleading or deceptive. An advertisement that contains a misrepresentation of fact or a failure to disclose a material fact, or that is likely to create false or unjustified expectations of favorable results, will typically be considered to be a false, fraudulent, misleading or deceptive statement. Similarly, claims of professional superiority or claims of performing services in a superior manner may be deemed to be such a statement. If the advertisement is not in conformity with this general rule, many states make such an advertisement a crime (usually a misdemeanor) and a violation of the licensing law, which means that licensees may be disciplined by their licensing boards and may be criminally prosecuted.

In addition to this general rule, there may be other limitations on advertising by a therapist or counselor that are specified in law. In one state for example, psychologists have established through legislation that certain words are protected and cannot be used by other mental health professionals (or others) in

advertising. Words that are protected in that state include “psychologist,” “psychology,” “psychometrics,” “psychometry,” and “psychological.” There may also be limitations with respect to certain words that cannot be used when advertising fees or prices for services. In the same state as referred to above, phrases such as “as low as,” “and up” and “lowest prices” are specifically prohibited by statute. Practitioners who advertise their credentials, curriculum vitae, or their experience must be certain that exaggerations and inaccuracies are avoided.