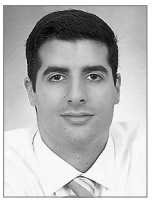
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Are Non-Compete Clauses Legal?

A non-compete clause in a contract *may* be enforceable by a court, but it will depend on various factors

Non-compete generally means that a dentist cannot practise dentistry within a certain geographic area and timeframe. These so-called "restrictive covenants" (i.e. promises that a person gives to not do something they would otherwise be able to do) appear as clauses in associate agreements and agreements of purchase and sale. But would a court enforce them? The answer, as is usually the case when it comes to the law, is "it depends." What follows is a review of some relevant Ontario cases and the legal principles and lessons that emerge from them.

Associate Agreement: Enforceable

In *Chen v. Kiss*, [1995] O.J. No. 2771, Dr. Utaca Chen signed an agreement to associate with Dr. Eva Kiss, who owned a dental practice in Georgetown. The agreement stated that, if Dr. Chen left the practice, he would not be able to practise dentistry within a three-mile radius of that practice for three years. Dr. Chen eventually left, but wanted to come back to Georgetown to establish a dental practice. As such, he asked the Court to declare that the non-compete was unenforceable.

Dr. Chen argued that he had established a reputation as a dentist in Georgetown, had a relationship with a number of patients who were never treated by Dr. Kiss, and had an unequal bargaining power at the time of signing the associate agreement.

The Ontario Court of Justice (General Division) disagreed with Dr. Chen and upheld the non-compete. The Court reasoned that Dr. Kiss had recently purchased her practice in Georgetown and needed to protect the goodwill. Furthermore, Dr. Chen was not restricted in establishing a practice in Mississauga where he lived. There was also no inequality of bargaining power. Finally, there was no restriction on any of Dr. Chen's former patients having access to his services: his Georgetown patients had no trouble getting to his other office in Mississauga and about 50 patients advised Dr. Kiss that they wanted to be treated by Dr. Chen in Mississauga.

Associate Agreement: Unenforceable

In *Lyons v. Multari* (2000), 50 O.R. (3d) 526, Dr. Bernard Lyons (as principal) and Dr. Joseph Multari (as associate) signed a short handwritten contract of less than a page. One of the provisions was a non-compete clause that simply stated: "Protective Covenant. 3 years. — 5 mi." When Dr. Multari left and opened up his own practice in breach of that provision, Dr. Lyons sued.

The Ontario Court of Appeal first noted that "non-competition clauses in employment contracts are void" because they are restraints on trade and hence contrary to public policy. The exception to this general rule is if the restraint was reasonable in the parties' interests and in the public interest. Factors that tend to make a non-compete reasonable in these regards include: the employer having a proprietary interest entitled to protection, the temporal and spatial limits of the non-compete not being overly broad, and the presence of an "exceptional case" where a non-solicitation would not suffice.

The Ontario Court of Appeal refused to enforce the non-compete for a number of reasons. First, Dr. Lyons could not justify the non-compete. He had no proprietary interest in dentists who had never referred patients to him in the past or who stopped referring patients to him before Dr. Multari arrived. And the non-compete was not required to protect confidential information given that, when Dr. Multari departed, he never took any such information with him (e.g. a list of Dr. Lyons' patients or referring dentists). The Court rejected the idea that this was an "exceptional case" for which a non-solicitation would not suffice: Dr. Lyons and Dr. Multari "made a great deal of money because of their association" and the role played by Dr. Multari was not special but was that of a

"normal associate". The Court concluded by saying that, even if Dr. Lyons had a proprietary interest in some of his referring dentists and patients, a non-solicitation would have sufficed.

Worth mentioning is, despite being more than 15 years old, this case still stands as good law today and is cited and followed frequently by Ontario Courts.

Purchase and Sale + Association = Enforceable

In *Button v. Jones,* [2001] O.J. No. 1976, Dr. A.R. (Dick) Jones sold his dental practice, including patient records, to Dr. Richard G. Button. After the sale, the parties entered into an associate agreement that restricted Dr. Jones from setting up a dental practice in the Kitchener-Waterloo area for four years after their association terminated. After their association terminated, Dr. Jones established a practice in Kitchener in contravention of that agreement. Dr. Button sued to enforce the non-compete.

The Ontario Superior Court of Justice upheld the non-compete. The Court noted that both dentists were in their 50s, had equal bargaining power, had self-sustaining practices, and carried on as independent businesses (i.e. there was no employment relationship). Furthermore, the restrictive covenant was meant to protect the goodwill (including patient records) in Dr. Button's practice, for which he had paid Dr. Jones $80,000. The Court also looked at the timing of the events and found that the purchase and sale agreement fed the associate agreement, which provided further justification for protecting Dr. Button's goodwill. Finally, the Court noted that it was more inclined to enforce the restrictive covenant in the associate agreement than it would be to enforce a similar covenant in an employment contract.

Purchase and Sale + Association = Enforceable

In *Dr. Jack Newton Dentistry Professional Corp. v. Towell,* [2005] O.J. No. 4415, Dr. Jack Newton's dentistry professional corporation purchased a dental practice from Dr. Samuel Towell. As part of the offer to purchase, Dr. Towell agreed not to compete within a 15 kilometre "radius" of the practice for a period of three years after the sale. The parties subsequently entered into an associate agreement, which prevented Dr. Towell from competing within a "distance" of 15 kilometres of the practice for three years after the termination of that agreement. After the sale, Dr. Towell planned to open a new dental office. Dr. Newton sued to enforce the non-compete.

Dr. Towell argued that the proposed site for his new dental practice was outside the restricted area described in the associate agreement, which replaced the non-compete in the offer to purchase. According to Dr. Towell, because the parties signed the associate agreement after the offer to purchase, and given that it contained slightly different non-compete terms than the offer to purchase, it cancelled and replaced the original non-compete. Furthermore, while the "radius" (as per the offer to purchase) between the practice and Dr. Towell's proposed practice location was 11.6 kilometres, the "distance" (as per the associate agreement) was 15.1 kilometers along the shortest and most convenient route by road. Therefore, Dr. Towell would not be in contravention of the non-compete.

The Court rejected the argument that the non-compete in the associate agreement replaced the one in the offer to purchase. The evidence showed that the parties intended the non-compete clauses in the two agreements to apply in parallel and not merge on closing. The two agreements also served different purposes and there was no indication that one replaced the other. Finally, one day after signing the associate agreement, Dr. Towell signed a document stating that the terms of the non-compete in the original offer to purchase continued and did not merge on closing.

Turning to the wording of the non-compete in the offer to purchase, the Court found that that definition of "radius" was clear and unambiguous and that Dr. Towell would be violating that agreement by opening up his practice at the proposed location. As such, the Court ordered that he be restrained from doing so.

Principles and Lessons

Principal dentists should proceed with caution when negotiating or relying upon non-compete clauses in associate agreements.

In employment or quasi-employment agreements, non-competes will generally only be upheld in "exceptional cases" where a non-solicitation would not suffice and only where, among other things, the party seeking to enforce it can establish a legitimate proprietary interest.

Courts will more readily uphold a non-compete contained in an agreement of purchase and sale or in an associate agreement that forms part of a purchase/sale transaction. That's because there is more likely to be an equality of bargaining power (unlike in many employment relationships) and because the goodwill of a business (i.e. patient charts) that has been purchased is a legitimate proprietary interest worthy of protection.

These principles help explain why Ontario Court refused to enforce the non-compete in the associate agreement in *Lyons v. Multari* (where the associate seemed to be an entry-level employee) but did so in *Chen v. Kiss* (the associate had his own patients and a separate practice) and in *Button v. Jones* (the associate was older and had his own self-sustaining practice).

As we learned from *Dr. Jack Newton Dentistry Professional Corp. v. Towell,* it is also important to ensure that your contracts are carefully drafted by legal professionals; doing so will help ensure that you avoid costly legal disputes.

This article is dedicated to U.S. dental lawyer and educator Peter Michael Sfikas (Aug.9, 1937 – Sept. 6, 2014). Mr. Sfikas wrote an article entitled, "Are Covenants Not to Compete Becoming Unenforceable? A Growing Trend Explored." *JADA*, Vol. 136, Sept. 2005, pp. 1309-1311.

Disclaimer: This article does not constitute legal advice. If you need legal advice, please consult a lawyer.

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