

Non-Competes: Look This Way Before You Cross The Street

by Gregg P. Skall

Key to the success of many radio and television stations is the successful promotion of on-air talent. A broadcaster may invest substantial capital in the development of a morning team, for example, as key personalities to ensure station popularity. Once established, the station will want to protect its "personality" investment against a station that might try to "steal" the talent. When a station in the same market hires away such talent, they're not just taking the employee, they are taking the capital investment that went into promoting them to the pinnacle they occupy in the public's eye. Naturally, the competitor can afford to put a portion of that cost to additional compensation for the talent, since the hired-away employee comes with their public persona intact.

Historically, broadcasters have sought to protect against this by signing key personality employees to a covenant not to compete should they resign their positions or be fired for cause. But, covenants not to compete have never been popular in the law, and are becoming even less so year by year. Generally, principles of equity and public policy favor a person's ability to earn a living and require that such covenants, where honored, be drawn narrowly, confined only to terms considered by courts to be the most reasonable and as favorable as possible to employees.

Unions have lobbied state legislatures to void such contractual provisions and an increasing number of states have bought in. Over the very vocal objections of broadcasters, several state legislatures, for example Massachusetts and California, have enacted laws that makes such covenants not to compete illegal and unenforceable within that state, and such laws are becoming more popular. Generally, the courts have supported these laws.

For example, in one California case a local station hired and moved a husband and wife team from a mountain town in Colorado to Bakersfield, California where they became the new morning team and signed a non-competition agreement. The station invested heavily in promoting them within the market and they became quite popular.

The California Code 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." In a previous case, *Metro Traffic Control, Inc. v. Shadow Traffic Network*, despite a detailed non-competition agreement, a court allowed a radio traffic announcer to go to work for a competitor to report traffic conditions to the same client station. In the California case, even though the covenant was for only a 90 day period, it was still deemed invalid under the California code. Under the California law, contracts prohibiting work for competitors are valid only to protect trade secrets, or if made by the purchaser of an entire business and the selling principals of the business. This is typical of many states.

So. . . lessons learned: The legal environment is hostile to covenants not to compete. It is critical to be familiar with state law regarding covenants not to compete *before* making substantial

investments in personalities and other employees who are critical to their competitive position in the market.

It is general law across all states that covenants not to compete need to be limited in scope to a reasonable distance and term. Here are some general principles that boost enforceability:

- Limiting the area to places where the station's signal is actually heard and local advertising sales are actually made. Such a geographical area might be the 60 dBu radio contour.
- Restricting the length of time to as short a period as possible. Fore example, one year in the case of management employees, ninety to one hundred eighty days for personalities, or a period that might devalue the investment of their names is the community.
- Supporting the covenant not to compete with separate consideration, apart from salary and bonuses, perhaps as an inducement to the employee to obtain employment from the station at the time of initial hiring.
- Substituting a compensated consulting period following termination of the employment for a reasonable period of time, with or without actual consulting taking place.