

Covenants Not to Compete

By Gregg P. Skall

Key to the success of many radio and television stations is the successful promotion of on-air talent. Whether it be news anchors for television stations or morning teams for radio, broadcasters frequently invest substantial capital in the development of these employees as key personalities to ensure station popularity. Once established, stations need to protect against misappropriation of their "personality" investment by other stations in the market who might try to "steal" the talent with higher salaries. Such competitors can afford to pay higher salaries because they save the capital required to build the personality recognition in the first place.

Broadcasters normally seek to prevent such unfair competitive practices by signing key personality employees to a covenant not to compete should they resign their positions or be fired for cause. However, covenants not to compete have never been popular in the law. Principles of equity and public policy generally favor a person's ability to earn a living and require that such covenants be drawn narrowly, confined only to terms considered by courts to be the most reasonable and as favorable as possible to employees.

Recently, over the very vocal objections of its broadcasters, the state of Massachusetts enacted a law which makes such covenants not to compete illegal and unenforceable within that state. Now comes another case in California which submits station KISV-FM to the same executioner's axe. KISV hired and moved a husband and wife team from a mountain town in Colorado to Bakersfield, California where they became the new morning team. The station invested substantial sums in promoting them within the market and they became quite popular. The team was subject to a non-competition agreement found in a programming memo outlining the terms of employment between the station and the team. The memo was later affirmed verbally by both parties. Unfortunately, Section 16600 of the Business and Professions Code of California 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 provision had been previously tested in *Metro Traffic Control, Inc. v. Shadow Traffic Network* where, 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. The *Metro* court did seem to make a distinction between the "at-will" type of employees in that case and employees subject to a longer term employment agreement. In the KISV case, the covenant was for only a 90 day period, but was still deemed invalid under the California code. Under Business and Professions Code Section 16600, contracts prohibiting work for competitors are valid only to protect trade secrets, or if made by the purchaser of an entire business is being sold and the selling principals of the business..

Clearly, the environment is getting hostile to protecting your franchise in personalities developed by the station. Increasingly, it is critical for broadcasters to be familiar with their own state law regarding covenants not to compete **before** making substantial investments in personalities presenting them with covenants not to compete. It is general law across all states that covenants not to compete be limited in scope to a reasonable distance and term. Here are some general guidelines:

- Limit the area to places where your signal is actually heard and local advertising sales are actually made. Such a geographical area might be the grade B television or 60 dBu radio contour.

- Restrict the length of time to as short a period as possible. Ninety to 180 days would be preferable.
- Support the covenant not to compete with separate consideration either as 1) an inducement by the employee to obtain employment from the station at the time of initial hiring, or 2) with separate monetary consideration apart from salary and bonuses.

Even though KISV followed these guidelines, California refused to recognize the covenant. This area is drawing increasing attention across the country and will be quite troublesome to broadcasters who rely upon personal services for business goodwill. You should do your best to educate state legislators on the problems inherent and invalidating covenants not to compete and urge them to resist the temptation to adopt sweeping legislation as a quick fix for any abuses that may have been brought to their attention.