

What Nephrologists Should Know About Non-Compete Agreements

By Jack Ahern, MBA

A non-compete is a little like a pre-nuptial agreement. The euphoria of union can, over a period of time, be replaced by painful and acrimonious separation. If a business relationship ends, a non-compete dictates how the parties must behave after the breakup. In both cases, a little advance planning can greatly minimize difficulty for all concerned. To gain some insight to this matter, I asked legal expert Dan Share, Esq., some questions about physician non-competes.

It is my hope that this article will help you position yourself for success, and ensure that you protect both yourself, and your group practice. As always, I invite you to send me your comments at Jahern@ahernconsulting.com and let me know what you think.

Dan, Can you explain for our readers, a little bit about your education, background, and expertise and experience in legal issues pertaining to healthcare, and in particular with regards to physician non-compete agreements?

Jack, I have been a practicing attorney for more than 30 years. During that time I have represented a wide range of healthcare providers in both dispute resolution and transactional settings. I have represented individuals and entities in the sale of physician practices and in employment agreements; both situations where non-compete agreements frequently arise. I am licensed to practice law in Michigan and Florida.

Non-Compete Basics

Dan, what basics should every nephrologist know about non-compete agreements before entering into or challenging such an agreement?

Jack, first let me clarify for your readers, that non-compete agreements are generally governed by state law. Each state has its own laws and court decisions such that no two states will necessarily have identical laws or legal outcomes. The laws vary from state to state. The answers provided here are based upon the general laws in Michigan, and no other state. The answers are not intended as legal advice under Michigan or any other state's law. You should consult an attorney in your state with specific questions that may pertain to you, as specific circumstances can greatly affect the advice and analysis that an attorney provides. This article is not intended as legal advice, and no attorney-client relationship is being established by answering the questions in this article.

1. Assume Enforcement

My advice to any nephrologist is that you should assume that any non-compete agreement you sign will be enforced. You should not sign one simply to either get or keep a job unless you are willing to comply with its terms. If the job does not work out and you leave, can you really afford not to compete in the same line of work and in the same geographical area for six months, one year or possibly longer? If the answer is no, then you should not sign a non-compete, or you should negotiate one up-front that you can live with. For instance, if the employer insists that you cannot compete for six months after termination, then consider negotiating a clause that the employer pay you for sitting out those six months.

2. Protect Yourself

Consider negotiating a provision that if you are fired, the non-compete agreement does not apply. It is also in the employer's interest to have fair and reasonable restrictions in a non-compete agreement, because it increases the likelihood that a court will enforce it as written. Depending on a state's specific law, courts can sometimes rewrite the non-compete restrictions to what they think are reasonable. The legal expenses of enforcing and/or avoiding non-compete agreements can quickly become very high. Litigating should be the last option, as the outcome is difficult to predict and it is usually very expensive.

Enforceability Can Vary

Dan, in the unfortunate event that a nephrologist is terminated or leaves a group, how enforceable are noncompete agreements involving nephrologists, and are there any legal limitations on how restrictive non-compete agreements can be for nephrologists?

Jack, Nephrologists are not materially different than other physicians. If the non-compete agreement is reasonable in duration, geographical restriction, and scope of work it will likely be enforced. A non-compete agreement prohibiting a doctor from competing in the same line of work with his or her prior employer within two miles from the prior employer's office for a period of six months will likely be enforced. The longer the time period, distance from the prior employer's office, and the broader the restriction on the line of work, the more likely a court will not enforce the non-compete in whole or in part.

Speed Affects Enforceability

Another important factor is whether the employer is consistent and fast-acting in enforcing non-compete agreements generally. If it is not, this can raise questions of whether such agreements are necessary to protect a legitimate business interest. There is also the issue of patient choice with respect to physicians. Notwithstanding a non-compete agreement, if patients choose to use the departing physician, a court is unlikely to issue an injunction against the departing physician from treating those patients. In that instance, the prior employer may be limited to pursuing monetary damages from the practitioner who violates the non-compete agreement.

Non-Competes vs. Confidentiality

Also, be aware of the difference between agreements not to compete and agreements to keep certain matters confidential. The two are often treated separately. Even if a non-compete agreement is not enforceable; physicians are still expected to honor agreements to keep private information or trade secrets, like patient lists or financial results, confidential.

Pre-Existing Agreements

Dan, if a nephrology practice, as corporation or partnership, enters into a non-compete, and later on a nephrologist joins the practice, is he/she always bound by the pre-existing non-compete?

Normally an obligation not to compete only arises from a specific agreement between the physician and the nephrology practice. Non-compete agreements that run for more than a year are likely not enforceable unless they are in writing. When a new physician joins an existing practice, that physician may be asked to sign a non-compete agreement either as a standalone document or as part of agreeing to be bound by existing corporate, partnership or other employment-related agreements or policies. The non-compete restrictions generally arise out of and are contained in these documents, which the new physician signs. There are also non-compete restrictions generally imposed by law, such as a partner in a medical practice not competing with his medical practice while working for that medical practice. Such obligations generally arise out of fiduciary duties to one's partners.

Facility vs. Practice

Dan, are there any substantial legal differences between non-compete agreements referencing dialysis facilities and those that simply address nephrology services?

There can be. The distinction may be significant when a court is determining the reasonableness of the scope of the restriction. A court's decision could be different if there are many dialysis facilities available to a physician and his/her patients or if there is only one in the area. Likewise, the nature of the restriction could be determinative. Is the physician prohibited from following his/her patients in a dialysis facility or only from serving as a quality control officer? This will be fact-specific and depend upon each circumstance.

Mergers and Acquisitions

Dan, how do the mergers and acquisitions we have seen in the dialysis industry affect the non-compete agreements signed by nephrologists with the either acquired or pre-merged entities? For instance, if a physician owned a facility, then sold it to a large chain, would this sale nullify non-compete agreements he or his group practice had entered into as the original owner of the facility?

In most cases, non-compete agreements will continue to be effective and enforceable with the new entity. Usually, there are contract provisions that allow the employer to assign the non-compete agreement to an employer's successors. Also, when a practice is sold, broader restrictions in non-compete agreements (longer time period, further geographical reach, and broader line of business) are more generally allowed and enforced against the selling physicians than apply to an employee.

Common Mistakes: What to Avoid

Dan, what common pitfalls should nephrologists take care to avoid when it comes to non-compete agreements?

Jack, my advice to any nephrologist is that you should not immediately sign whatever agreements are placed before you by the employer at the outset of or during your employment. Read the documents. If you cannot live with or do not understand the non-compete agreement, deal with it before you sign it. Do not assume that you will be able to get out of it later. Also, watch out for provisions requiring you to pay for the other side's attorney fees.

Consulting an Expert

Dan, should a nephrologist always consult with a legal expert before entering into a non-compete?

Yes, yes and yes.

Dan, non-compete agreements are very sensitive items, and I know some of our readers would like to contact a legal expert directly with specific questions. What would be the best way for our readers to contact you?

Jack, my telephone number is (313) 965-9725, and e-mail is dshare@bsdd.com. My firm's website is www.bsdd.com. Keep in mind I cannot give legal advice in states I am not licensed in, so your readers should contact qualified attorneys in the states in which they live and work. **RBT**

With offices located in Chicago and in the Washington, DC, Jack Ahern provides cutting edge financial and management consulting services to the healthcare community. He has an MBA from the University of Chicago, and undergraduate degrees in both Chemistry and Engineering. He can be reached at (312) 997- 2177.