

It's enough to make your hair stand on end

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It's a good day. You graduated from your residency. You've been interviewing for jobs, and it looks like you nailed a great associate position. The pay is good, the benefits are good, the days and hours are good, the way the owner practices is right up your alley, everything is perfect. So, it's time to sign on the dotted line. The contract has a restrictive covenant in it as well as a nonsolicitation section. You're not really concerned, because the restrictions seem reasonable and, to be honest, you're not the type of person who would breach a contract you signed. As the old Woody Allen quote goes, "If you want to make God laugh, tell him about your plans."

Patricia Kennedy v The Shave Barber Company, LLC.; A18A1660 (GA Ct App, 3rd Div, Dec 20, 2018) should be must reading for every junior orthodontist planning to associate with a senior doctor. But, before going any further please note: Restrictive covenants are essentially a means of restricting trade. There are some very good arguments why they should be enforced, and there are also very persuasive arguments why they should not be allowed. State laws differ across the country and the current pendulum swing on this issue is toward nonenforceability. Having said that, in those states where they are still in favor, watch out. These clauses are not paper tigers, and their fangs have been noted to cause severe injury.

So, Kennedy, a master barber, goes to work for Shave, a high-end barber shop. Her duties are to provide hair cutting, shaving, and other grooming-related services and product sales. Shave's "connection" to its customers is through its barbers. It uses social media to inform customers of its barbers' schedules, to show before and after photos of their services, and to promote new products and services, and as a matter of fact, Kennedy had her own page titled "PK Does Hair." The bottom line for

us is, though it is not exactly like orthodontics, the fact pattern is pretty close.

Shave decided to begin using employment contracts after a couple of employees left and opened up competing businesses nearby. Kennedy's contract contained several restrictions regarding any postemployment activities should she decide to leave Shave. The parties agreed that the amount of damages suffered by Shave if the contract were to be breached would be very difficult to accurately ascertain; therefore, the contract called for the availability of injunctive relief should Shave need to enforce the contractual provisions. The restrictions as stated in the contract were as follows:

As part of the consideration for making this Agreement and in consideration of continued employment, for a period of one (1) year after termination of employment with THE SHAVE, Employee shall refrain from (i) interfering with or soliciting or attempting to solicit, for any business in the barber, salon or men's grooming industry, any customer or potential customer of THE SHAVE with whom Employee had any personal contact or learned of or was introduced to during the term hereof and (ii) recruiting or soliciting or attempting to recruit or solicit any employee or agent of THE SHAVE for any business in the barber, salon, or men's grooming industry within a three (3) mile radius of THE SHAVE ...

For a period of two (2) years after termination of employment with THE SHAVE, Employee shall not directly or indirectly compete with THE SHAVE by owning, managing, operating, representing, promoting, selling for, soliciting for, consulting for, controlling, or participating in the ownership, operation, acquisition, or management of a business selling or providing services the same or similar to that provided by THE SHAVE within a three (3) mile radius of any SHAVE location.

For whatever reason Kennedy decided to leave Shave and open her own shop 2.1 miles from the Shave location in breach of the restrictive covenant. She posted her opening information on social media, which alerted the Shave owner. He informed Kennedy that she would

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be in breach of the covenant if she opened up within the restricted area. She responded that she would be ruined financially if she could not open. Shave sued Kennedy, seeking among other things injunctive relief to prevent her from opening. Kennedy claimed the contract was unenforceable. At trial the court found the contract to be valid and as a result Shave was granted the injunction and Kennedy was prevented from opening her shop. The appeal ensued.

The Court of Appeals started by noting that the governing statute OCGA § 13-9-50 recognized the legality of restrictive covenants as long as they serve to “protect legitimate business interests.” As an aside, before 2011 restrictive covenants were unenforceable in Georgia. Among Kennedy’s claims were that the geographic area restriction was unreasonably excessive, that Shave did not have a legitimate business interest to protect, the scope of activities she would be prevented from performing was excessive, and that she was not the type of employee who should be subjected to the contractual restrictions.

Beginning with the last of Kennedy’s arguments the court noted that the act defines employees as: “any person or entity, including an independent contractor, in possession of selective or specialized skills, learning, or abilities or customer contacts, customer information, or confidential information” OCGA § 13-8-51 (5) (C); and the act is enforceable against employees who “customarily and regularly solicit for the employer customers or prospective customers.” OCGA § 13-8-53 (a) (1). Because Kennedy routinely solicited customers when she worked for Shave and saw approximately 230 repeat clients per month at Shave’s facility, the court had no problem deciding that the act applied to her.

As to Kennedy’s argument that the geographic area restricting her activities was excessive the court noted that the governing statute provided the following guidance:

A geographic territory which includes the areas in which the employer does business at any time during the parties’ relationship, even if not known at the time of entry into the restrictive covenant, is reasonable provided that: (A) The total distance encompassed by the provisions of the covenant also is reasonable ... OCGA § 13-8-56 (2) (A).

In determining whether a particular restriction is reasonable, OCGA 13-8-53 (c) (1) provides that “[w] herever a description of activities, products, and services, or geographic areas, is required by this Code section, any description that provides fair notice of the maximum reasonable scope of the restraint shall satisfy such requirement ...”

Additionally, the statute permits a court to modify, or “blue pencil,” a covenant that “is otherwise void and unenforceable so long as the modification does not render the covenant more restrictive with regard to the employee than as originally drafted by the parties.” OCGA § 13-8-53 (d); see also OCGA § 13-8-54 (b) (providing that, “if a court finds that a contractually specified restraint does not comply with [OCGA § 13-8-53], then the court may modify the restraint provision and grant only the relief reasonably necessary to protect such interest or interests and to achieve the original intent of the contracting parties to the extent possible”).

The bottom line is that the geographic restriction will be enforced as long as “the person or entity bound by the restraint can reasonably determine the maximum reasonable scope of the restraint at the time of the termination.” Because most of Shave’s customers lived or worked within 3 miles of The Shave’s location, the geographic restriction was found to be reasonably related to protecting the business’ legitimate interests. As another aside, even though The Shave had only 1 location, the contract contemplated that the restriction would apply to any Shave location. The court believed that this geographic area was too undefined and might overly restrict Kennedy if she were to open within 3 miles of a future location that she never worked in, so they blue penciled (struck out) that part of the restriction as per statutory authority.

Turning to Kennedy’s claim that the covenant was overbroad regarding its restrictions on the scope of activities that she would be able to pursue, the court again disagreed. The covenant only prevented Kennedy from selling grooming services and products to the extent that she would be in competition with Shave. The court noted that she could sell the same products in any retail establishment as long as that business did not provide styling services; furthermore, she was free to perform grooming and styling services outside of the 3-mile area.

Regarding Kennedy’s argument that Shave did not have legitimate business interests that needed to be protected, the court again disagreed. OCGA § 13-8-53 (b) clearly states that “an employee may agree to refrain, for a stated period of time following termination, from soliciting, or attempting to solicit, directly or by assisting others, any business from the employer’s customers, including actively seeking prospective customers, with whom the employee had material contact during his or her employment for purposes of providing products or services that are competitive with those provided by the employer’s business.” The evidence was clear that Kennedy actively solicited

Shave's customers through her social media posts and tags by announcing the opening of her store and offering discounts for services.

Kennedy also implored the court to consider the damages that she would suffer if the injunction were enforced. The court noted that the factors to be considered when granting an injunction are that (1) the party seeking the injunction will be irreparably harmed if the injunction is not granted, (2) the balance of harms that might be suffered by each party favors the party seeking the injunction, (3) the chances are good that the party seeking the injunction will prevail at trial, and (4) granting the injunction will not do a disservice to the public. The court reviewed these factors against the facts of the case and ultimately determined that equity demanded that Shave be granted injunctive relief and that Kennedy could not open in violation of the covenant.

COMMENTARY

I see this a lot. Young doctors and those in transition situations show me restrictive covenants that run the gamut from reasonable to totally outrageous. When I see the outrageous ones I tell the doctor that there is no way a court will enforce this, so if they go ahead and sign it they will ultimately win, but only after a protracted legal battle. What is outrageous? How about a 250-mile radius that extends until the end of time? I'm serious.

No, the better way is for everyone to recognize what is at stake and why each party needs the protections they are seeking. In reality, it comes down to this. Junior does not want to buy Senior's practice and have Senior decide that he retired too early and then decide

to reopen his practice down the block. Or, Senior shouldn't have to worry that if he hires Junior as an associate and things don't work out, Junior will open up down the block and take a fourth of his patients and half of his staff. These are serious considerations and are legitimate business concerns that warrant protection.

What's a reasonable amount of time? Well, we are orthodontists. Our cases take 2-3 years including retention; how long does it take to get the memory of a particular doctor erased or faded from a patient's or parent's memory? What's a reasonable geographic area? Do we practice in Metropolis, Smallville, or Podunk? The difference could result in a restrictive radius of several blocks to several miles, to several counties; it all depends. Should Junior be restricted from hiring away valued employees that Senior has months or years of training invested in? Probably.

These are all real issues that have real consequences in the real world. If you practice in a state that does not allow restrictive covenants, be absolutely sure of the motives of the person you are dealing with. Be legally creative with what you are buying and selling. Protections can be had but they are a little squirrely. Instead of buying patient records, think about buying contracts (its done in business all the time) and factoring the price based on the contracts that actually transfer over. If you practice in a state that does allow noncompete covenants, be careful, be mindful, and be respectful of the terms. Make sure you use an attorney who has experience with this kind of stuff. As the plaintiff in this case found out, sometimes these things are enough to make your hair stand on end.