

Noncompete Agreements:

PART 1

By Michael L. Antoline, J.D.

When your relationship with an employee ends, the battle for client custody may begin.

Salon owners take pains to earn and keep their clients. So do nail techs. But what happens when the two parties part company? Are their clients fair game? Let's take a look at how such a scene can play out.



Mary and Karen had been working together at a busy salon for almost two years. Mary was a nail tech at the salon and Karen was her immediate supervisor. Mary adored Karen; they not only worked well together, but they'd also become close friends. One day, Karen told Mary that she was leaving to take a higher-paying salon director job at a competing salon across town. Mary was beside herself over Karen's departure.

One day, three months after she'd left her former salon, Mary received a surprise visitor. It was a sheriff's deputy with a summons requiring her to come to court and answer a complaint against her. A quick look at the summons told the story: Mary's former boss, Nancy, was alleging violation of a noncompete contract. Mary's new employer, Jeanne, was also being named in the complaint as inducing the breach of contract.

Now, the two took time to look over Nancy's complaint. "It seems like we are both in the soup," Karen admitted, assuming she too would soon receive a summons. Meanwhile, Jeanne, who'd also been named in the complaint, had enlisted a lawyer to defend herself. She graciously arranged for him to defend Mary as well.

Sounds like trouble for our protagonists, huh? Not really. Nancy's

Enforce your rights under a contract and enforce them consistently.

Later that day, she became all the more upset when she learned that the salon owner, Nancy, had no plans to replace Karen; she intended to assume Karen's supervisory duties herself. This meant Mary would be working directly with the owner—a micromanager who seemed to assume that employees like Mary needed constant, hands-on supervision. Not surprisingly, about six months after Karen's departure, the relationship between Mary and Nancy had reached the breaking point. Mary called Karen and asked if there was a spot for another nail tech at the salon across town.

Karen was delighted at the prospect of working with Mary again. She hadn't suggested the idea earlier because she'd been sure that Mary would balk at the longer commute. But the nail tech was more than happy to make the adjustment; she turned in her resignation, giving reasonable notice to enable Nancy to find a replacement. The owner was livid, but allowed Mary to work out her final days of employment while she set about the task of hiring a new nail tech. Mary completed her employment without incident, transitioned her way into the new salon staff easily and, before long, had her nail business back in full swing.



What Is Reasonable?

Mary immediately called Karen and the women put the pieces together. Nearly two years earlier, about three months after Mary had come to work at Nancy's salon, one of Nancy's employees had resigned and taken some very lucrative clients with her. The owner had been determined not to let that happen again, so she'd found a noncompete contract on the Internet, printed out copies and asked her staff members to sign them. "Remember signing that, Mary?" Karen asked. "We all had to." Mary admitted that she remembered signing a paper, but the owner had approached her at a very busy time and she hadn't paid much attention to what she was signing.

case against the women was thrown out of court.

You might ask, "How did the women get around the noncompete contract? Aren't those things binding?" Only sometimes. Noncompete agreements between employers and employees may be enforced by the courts—but only as long as they are reasonable in temporal and geographic scope. Let's look at a standard clause:

Employee agrees that as a condition of her employment, in the event of separation from employment for any cause, and for a period of 10 years, Employee will not solicit or attempt to solicit any business or trade from Employer's actual or prospective customers or clients and will not directly or indirectly participate in a business, within the same state, that is similar to a business now or later operated by Employer. This includes participating in Employee's own business or as a co-owner, director, officer, consultant, independent contractor, employee or agent of another business.

The temporal scope of this clause is 10 years and the geographical scope is an entire state. The first question any court will ask is whether this clause is reasonable. And the answer depends on the type of business involved. The geographical limitation of an entire state might be perfectly acceptable in

an unusual or unique business where competitors might only operate in adjacent states or regions. (Toupee tape manufacturers come to mind—not from personal experience, mind you, but from the fact that there couldn't be too many of them left and I suspect that the few that remain have their regional markets pretty well established.) In the case of nail salons, where locations are numerous and widespread, an entire state would probably be considered unreasonable.

A noncompete is a contract, and contracts must be supported by what is called “consideration.” Consideration means a quid pro quo, that is, something of value exchanged by the parties to the contract. If a noncompete is signed during the hiring process, the employer is giving the employee a job in exchange for signing. If the employee is already employed, then what has the employer given to the employee for signing the contract? While it might be

with her enforcement. The complaint did not name Karen, who'd also left Nancy's employment. In fact, three other employees, all of whom had signed noncompete agreements, had left and gone to work for competitors. Mary was the first one Nancy decided to sue. If you have rights under a contract and you do not enforce those rights, the courts may decide that those rights have been waived. The lesson: Enforce your rights under a contract and enforce

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Similarly, a temporal scope of 10 years might be fine for a firm that has patented a machine that analyzes isotopes in moon rock samples—but it won't work for a salon. You see, the court has to balance the needs of an employee to earn a living against the harm the business owner might suffer. Courts tend to construe noncompete agreements narrowly and against the employer. The best advice is to include only those restrictions absolutely needed to protect your business; don't overreach.

Weak Complaint

But back to Mary and Karen. The noncompete they signed called for a temporal scope of two years and a geographical scope of a 25-block radius—both very reasonable. But remember the circumstances under which Mary and Karen had received the agreement: Nancy had brought it to them after they were already employed. You see, it's fine to inform employees during the interview process that they'll be required to sign a noncompete contract as a condition of employment. It's problematic to suddenly present such a contract to someone who's already an employee.

argued that the employer has granted the employee “continued employment,” many courts have held that “continued employment” is not sufficient consideration to support a noncompete agreement. If a salon owner decides to have existing employees sign a noncompete, it's best to support the agreement with additional consideration, such as a small bonus. But this is just one reason that Nancy's noncompete failed.

Nancy made the mistake of getting her noncompete agreement from the Internet. The document may have been correctly worded, but employers must keep in mind that state laws regarding noncompete agreements vary. For example, in Nancy's state of Nevada, noncompete agreements are wholly illegal—just as they are in Oklahoma, North Dakota and Montana. In other states—such as South Dakota, Oregon, Hawaii, Florida, Louisiana and Wisconsin—agreements may be invalid or strictly limited. “One size fits all” documents from the Internet simply can't be trusted to work in your state.

There was another problem with Nancy's noncompete that wasn't so much with the agreement as it was

them consistently.

Noncompete agreements can be essential to an employer in maintaining the integrity and profitability of her business, but they are minefields for the unwary. Since there's no consistent federal law governing noncompete agreements, each state makes its own rules. Some of those rules are openly hostile to noncompete agreements and may be codified in state statutes. Other rules limiting or restricting noncompete agreements may appear only in published decisions of the courts—of which there are thousands upon thousands. When it comes to noncompetes, don't compete with the lawyers. Get their help.



In Part 2 we'll look at ways to create effective noncompete contracts that include the protection of trade secrets.

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