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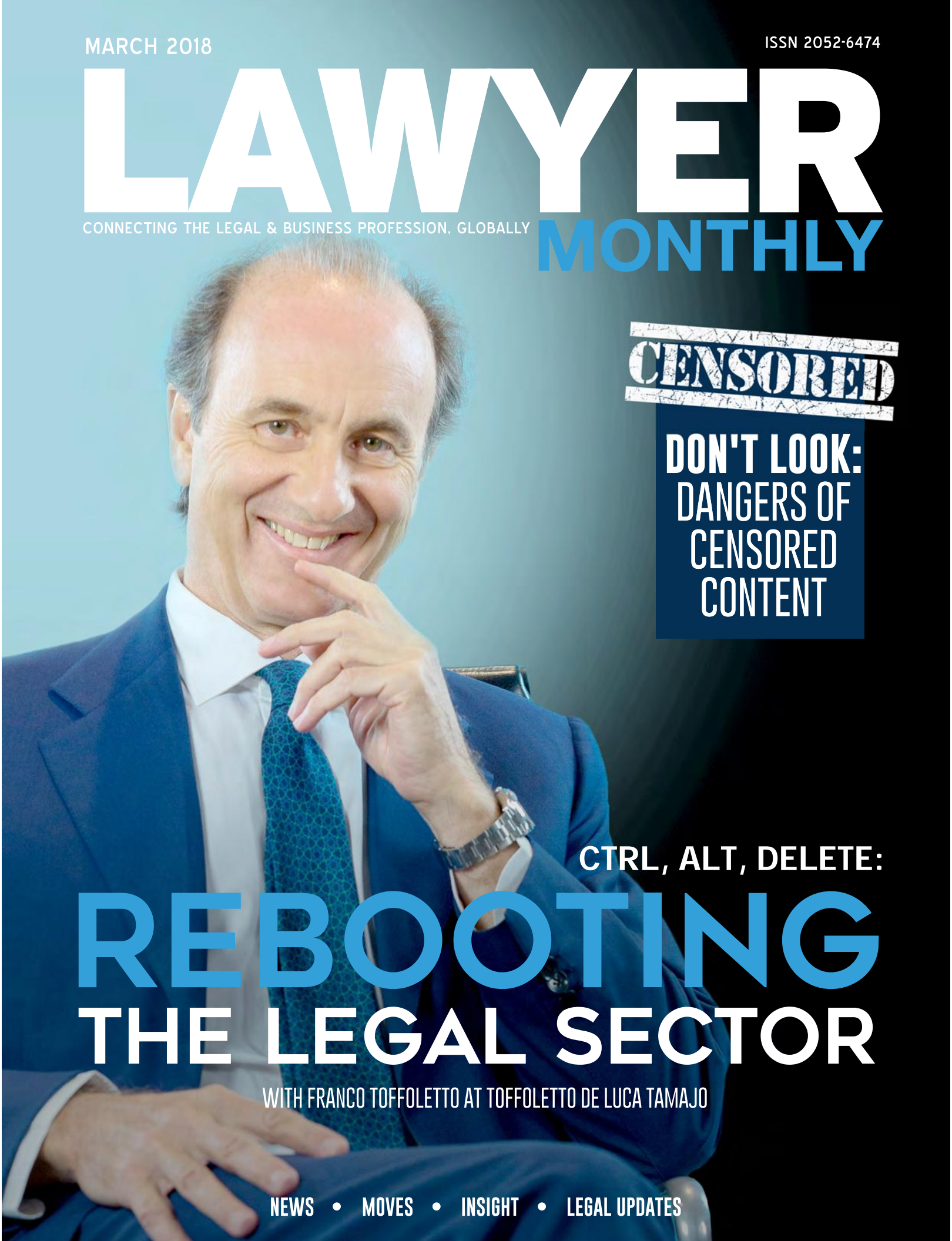

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HEALTHCARE

Are Non-Compete Clauses Fair?

Leaving your current workplace is always a big decision to make, but in the healthcare sector, your change in employer could drastically affect patients' care. Brandon Schwartz speaks on the different contracts, the importance of them and what to do if they are breached.

You specialise in contract law for the healthcare industry, what are common reasons for a non-compete clause to be included in the contract?

The healthcare industry has become extremely competitive in the delivery of high quality and cost-efficient care to patients, in the recruitment of physicians by clinics and hospitals, and the development of referral sources by physicians, clinics, and hospitals. Once on board and for the first couple of years thereafter, the physician is often paid more money than he or she generates for the clinic or hospital while they are becoming familiar with: the hospital/clinic, with the area, the administration of the hospital/clinic, the referral sources (other physicians), and while they are completing any additional specialised training. Put simply, the clinic or hospital is investing in the physician for long-term growth, both in terms of quality patient care and financially.

Thus, for the hospital or clinic, a non-compete, restrictive covenant, or liquidated damage provision in the employment contract with the physician helps protect the investment that the hospital or clinic is making in the physician, the substantial financial risk they take on the physician, the future treatment of patients, and the future revenue stream.

An often overlooked aspect of a non-compete, restrictive covenant, or liquidated damage provision is also the protection that the contractual provision provides to the community and patients as a whole. If such provisions were unenforceable or not implemented, clinics or hospitals would have a hard time recruiting the best available physicians to their area and would be reluctant to invest the time and money into those physicians, due to fear of the physician simply leaving and starting a competing practice.

Additionally, there often is a limit as to the number of a particular type of physician a community can support. For instance, a community of 100,000 people may only need one cardio thoracic surgeon to provide the requisite cardio thoracic surgeries for that community. If that cardio thoracic surgeon breaches his or her contractual provision, it will make it very difficult for the clinic or hospital to recruit a replacement. The patients then are left only with the choice of following the breaching physician, costing the non-breaching clinic or hospital revenue and potentially interfering with the continuity of care for that patient. The primary focus in the healthcare industry must be on patient care which is furthered by reasonably tailored contractual obligations, on both the physician and the clinic/hospital to make sure all parties are on the same page and working together towards bettering patient care.

What are common reasons to why this may be breached? Is there any leeway for clients once this has occurred?

Common reasons for non-competes, restrictive covenants or liquidated damage provisions being violated by a physician, include financial incentives for both the physician, as well as the competing clinic or hospital, malcontent with the employing clinic or hospital, and/or bad legal advice to the physician.

With regards to the financial incentive, the delivery of high quality healthcare is often lucrative. The physician sees the revenue that they are generating versus the portion that is paid to administration, overhead, other physicians, etc. and decides to set up a competing practice. Due to the relationships established in the community, the physician would rather stay in the community and pay a liquidated damage provision or fight against a breach of contract claim rather than move to a new community and start over. The physician sees the legal battle as a cost of doing business versus starting over.

Competing hospitals or clinics, particularly in smaller communities, are often aware of the revenue being generated by certain physicians and will offer to pay the physician more money, give bigger bonuses, or some other incentive for the physician to leave their present employment and commence employment with the competing hospital or clinic. In certain instances, the competing hospital or clinic may also agree to fund the defence of any lawsuit or pay the liquidated damages for that physician, because the financial benefit in hiring the physician is that substantial.

Physicians and administration from time-to-time do not see eye-to-eye on certain issues within the practice of medicine. This can cause tension and may give rise to the physician leaving, even if it means violating a non-compete, restrictive covenant or liquidated damage provision.

There also, unfortunately, are simply instances of a physician receiving bad legal advice regarding the enforceability of such a provision. Not every attorney is familiar with the intricacies of this highly fact dependent area of law and may not provide the sagest advice.

With regards to whether there is any leeway if a physician breaches one of these provisions, I would say there certainly is. Any attorney who guarantees that a certain outcome will occur 100% of the time is not being straight. The enforcement of non-competes, restrictive covenants and liquidated damage provisions are highly fact dependent upon the particular situation, thus to state that there is never any leeway would be inaccurate. For instance, perhaps there is only one oncologist within a 100 square mile radius. And the contractual provision prohibits the physician from practicing within 30 miles of his or her clinic for a period of 10 years. There would be a strong argument that 10 years is too long and not reasonably necessary to protect the clinic or hospital. There would also be a public policy argument that the community needs the oncologist to ensure continuity of care for those patients with cancer and that having to drive 100 miles for treatment would be a hardship. Thus, the well-informed practitioner will review these types of facts in any situation involving the enforcement of a non-compete, restrictive covenant or liquidated damage provision.

Do you think anything needs to be changed in regard to liquidated damages in the healthcare industry?

In the healthcare industry, I personally prefer the use of a liquidated damage provision, versus a restrictive covenant or non-compete. With a liquidated damage provision, the physician can still practice medicine within the defined area or during the defined time, but pays a defined amount to their prior employer (six months' salary or some set amount). This allows the physician to keep practicing and treating patients, while at the same time protecting the substantial investment the clinic or hospital made in recruiting and training the physician by receiving reimbursement. Further, it often limits costly and time-consuming litigation as the liquidated damage amount is already defined.

What are common facts in this field which you find your clients are often unaware about?

Generally speaking, in most industries, non-competes, restrictive covenants or liquidated damage provisions are looked at with disfavor by courts as limiting an employee's options, competition, and the free market. Physicians often believe the same is true in healthcare. But courts regularly enforce these provisions in the healthcare industry for a number of reasons:

1) Physicians are highly educated, knowledgeable individuals with substantial bargaining power and less likely to get taken advantage of by an employer during the negotiation of one of these provisions.

2) The protection to the community the provisions provide in recruitment of new or replacement physicians is substantial. As discussed, clinics and hospitals invest substantial funds in recruiting to the area and training the physicians after hiring. Clinics and hospitals may not invest such funds if they knew after taking the time and funds to introduce the physician to the community, referral sources, administration, etc., the physician simply set up a competing clinic without reimbursement from the physician or a contractual provision to prevent such competition.

3) The provisions are usually better drafted and more tailored to the specific situation involving the physician, whereas oftentimes in other industries, the same restrictive covenant was used for a high level manager and a low level employee. Utilising a form contractual provision irrespective of the level of employee provides a good argument that the provision is not reasonably necessary to protect the legitimate business interests of the employee. These circumstances are often not at the front of a physician's mind as they are rightfully focused on patient care concerns. **LM**

About Brandon M. Schwartz, Esq.

Brandon Schwartz is a trial attorney at Schwartz Law Firm working with his father, law partner and mentor, Michael Schwartz. Brandon has been at Schwartz Law Firm for 10-years following his Division 1 college hockey and pro hockey career. Brandon loves being a litigator and helping people and businesses through very difficult times and very complex issues. He is extremely competitive and the pressure of being a trial attorney, with substantial money or life changing outcomes on the line in each case, fuels his competitive nature.

Firm Profile

Schwartz Law Firm represents entrepreneurs and businesses throughout Minnesota, Wisconsin and Iowa in matters of business law and commercial litigation.

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