Non-Compete Agreements in the World of Community Association Management
Take'em or Leave'em?

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Non-compete agreements increasingly have become the topic *du jour* among both CEOs of community association management companies and community managers. CEOs feel that such agreements are essential to protect their respective company's client base, financial viability, intellectual property and confidential information from predatory practices of former employees. At the same time, CEOs and associations want to be able to hire the most qualified managers who best fit the company's or community's culture, without hiring restrictions imposed by non-compete agreements. Managers feel that non-compete agreements limit their options to earn a living. Is this a black-and-white issue, or is there a middle ground that protects both manager and management company? This article will explore the genesis of this type of contract and offer alternatives that may satisfy the interests and concerns of all parties.

Definitions

First, though, is the need to clarify the differences among non-compete, non-solicitation and confidentiality agreements.

In the broader sphere of business, non-compete agreements were originally intended to protect a company from the upper echelons of management who, with knowledge of the inner workings, strategies, operations and finances of the company, could accept a position at a competitor and disclose the original employer's trade secrets. The new employer could capitalize on that knowledge and good will and gain a competitive advantage. A non-compete agreement would prohibit an employee from competing with his or her former employer, either as an individual or as an employee of a competitor, for a specific period of time, within a limited, specific geographic area and for protection of specific intellectual property or trade secrets. Over the past decade, however, employers have extended the requirement to sign a non-compete agreement to all employees, not just on the C-suites and above. Alternatively, employers have focused the requirement specifically on employees who have value to the company and whom the employer is reluctant to release to competitors because the employee would increase the value of that competitor. A few of these evolved agreements prevent employees from working in any industry and in any capacity in which the former company may provide services, including telecommunications, Internet-related services, education and contract services, far beyond the normal scope of work of an onsite or portfolio manager.

The conundrum in the community association business is the definition of "trade secret". According to attorney Scott Carpenter of Carpenter, Hazlewood, Delgado & Bolen, PLC in Phoenix, Arizona,

> The theory of restrictive covenants is that the employer has either (1) trade secrets, or (2) invested in bringing the employee up to the professional level. The problem is that great management companies understand that great managers understand people, problem solving and client service. The "trade secrets", if there are any, are on the process or technology side.

Non-solicitation agreements are less onerous than non-compete agreements. Non-solicitation agreements prohibit an employee from soliciting a former employer's clients and employees for a specific period of time, usually one to two years. In my own non-scientific survey of eight current and former community association management company CEOs from around the country for this article, six of them require potential employees to sign a non-solicitation agreement; only two imposed the more stringent requirement of executing a non-compete agreement. In the words of Kara Cermak, CMCA, AMS, PCAM, President/Principal of Rowell Management in Elgin, Illinois,

> I have my employees sign non-solicitation agreements which are specific as to their ability to communicate with Rowell's clients, upon departure, for a period of two years. My non-solicitation agreement does NOT prevent them from working for another firm, within the industry, in any way.

Confidentiality agreements, also known as non-disclosure agreements, prohibit the employee from disclosing to third parties (such as a new employer who competes with the former employer) trade secrets, proprietary information or knowledge of the company's operations.

State laws regarding non-compete agreements

Boston attorney Russell Beck of the law firm Beck Reed Riden LLP occasionally publishes a survey of the status of non-compete agreements in all fifty states. Last updated in August 2015, the survey can be accessed at http://www.beckreedriden.com/wp-content/uploads/2015/08/Noncompetes-50-State-Survey-Chart-20150809.pdf. Included in the chart is 1) whether continued employment is sufficient consideration to support a noncompete (31 states say yes), and 2) whether non-compete agreements are enforceable against at-will employees whose employment was terminated without cause (28 states say yes).

What do state statutes and case law consider when determining the enforceability of non-compete agreements?

- Is severance provided during the non-compete agreement?
- Does the non-compete agreement create an undue hardship on the employee?
- Is the duration of the time period reasonable?
- Is the geographic location in which competition is restricted reasonable?
- Is the agreement enforceable whether the employee or the employer terminates employment?
- What happens if the employee or the employer breaches the employment agreement in which the non-compete provision in included?
- Is the public detrimentally affected if the non-compete agreement is enforced?
- Can trade secrets and intellectual property be specifically identified?

Most states require employers to offer some kind of consideration in return for the existing employee executing the agreement, such as a bonus, promotion or salary increase. Offering continuation of employment is not a legitimate consideration in this circumstance.

What does an expert in human resources think about the enforceability of non-compete agreements? According to Dawn M. Lively, MBA, PHR, Director of Client Services, Tilson HR, in Greenwood, Indiana,

> I would think, depending on the demographic dynamics of the region, it would still be considered enforceable for an agreement to range, say, 15-25 miles. However, much beyond that, keeping people from getting a job in their industry and profession, is the perfect example of non-compete agreements that are being challenged and are having some success at being deemed "too restrictive", and therefore, unenforceable.

Ransom Daly, CMCA, AMS, PCAM, President of Houston, Texas' ACMP, Inc. AAMC, has been in the community association management business since 1985 and has attended the CEOMC Retreat for almost two decades. He polled 11 CEO colleagues around the country and reports,

> Several CEOs I know have actually had good success with chasing the company who was trying to hire an employee in violation of the non-compete. Especially if they made them aware of the non-compete and they continued to pursue the employee, they were guilty of tortious interference of the contract.

On the other hand, Daly agrees that suing under the non-compete detrimentally affects the reputation of the company in the community as well as morale and loyalty of its employees. Among those same eleven fellow CEOs Daly polled, there was consensus that the non-compete agreements were unenforceable with regard to the individual manager, and that it was not worth the effort, time, money and reputation to fight - and probably not win.

Impact of non-compete agreements on community associations

Associations that have an onsite staff naturally want to hire the most qualified personnel they can find. If the pool of talented, skilled managers is reduced by the number of managers restricted by a non-compete agreement, associations may have to settle for second- or third-best. Additionally, when the number of available managers decreases, competition among employers for the remaining available managers increases, potentially resulting in a bidding war and higher salaries – good for managers, bad for employers. Associations may also be forced to settle on second- or third-tier management companies because one manager in their employ may be encumbered by a non-compete agreement.

Impact of non-compete agreements on management companies

While some management companies require employees to execute non-compete agreements as a condition of employment, there are also disadvantages to wide-spread use of such agreements. Similar to the impact of non-compete agreements on self-managed associations, management companies are limited to hiring managers unencumbered by non-compete agreements. Consequently, management companies have a smaller base of potential managers from which to choose.

In a perpetually-diminishing cycle of benefits of non-compete agreements, the more management companies require employees to sign non-compete agreements, the fewer

managers will be available to hire in order to grow the company or improve its reputation.

Management companies hesitate to hire a manager under a non-compete agreement even though the CEO has no intention of pursuing or accepting contracts from associations formerly managed by the manager for the duration of the agreement. Why? Certain management companies with deep pockets have reputations for filing lawsuits against both managers and management companies to enforce non-compete agreements whether or not a violation occurred. They want to make it perfectly clear that they have the resources to challenge any real or potential threat to their client base and proprietary information. Most CEOs and managers don't want to spend time or money on such litigation and consequently hire someone who may not be quite as qualified but certainly poses no threat of legal action.

Impact of non-compete agreements on managers

Managers bear the brunt of the negative effects of non-compete agreements. If the agreement clearly prohibits a manager from working for a competitor or starting a new management company for two years and within a defined radius of existing management company offices, the manager has few options. Especially with national management companies, there may not be a major city in the nation in which the company does not have a presence. If it's a regional management company, the manager may be forced to leave family and friends in order to work in the community association management business. Faced with such daunting and limited alternatives, many managers leave the profession and work for association service providers and contractors. However, there's still another caveat – some non-compete agreements even prohibit managers from entering another profession that competes with the management company, such as general contracting, engineering, websites and bulk purchasing.

Other factors affecting a manager encumbered by a non-compete agreement include:

- Fear of employment termination and subsequent inability to earn a living. Even if the manager has worked for the employer for only a few months before separation either voluntarily or involuntarily, the manager is still restricted by the non-compete agreement for the specified period of time.
- Inability to change jobs despite ethical, financial or advancement disagreements with the employer
- No increase in salary because the manager refuses to sign the agreement which is a condition of future salary considerations
- Inability to be gainfully employed by another management company that fears retribution by the former employer
- Inability to further develop a career in community association management
- Fear of litigation, and its related cost and aggravation, from aggressive management companies even if the manager complies with the terms of the agreement

Recommendations for management companies

Many management company CEOs and other community association professionals are in agreement that non-solicitation/non-disclosure agreements are more fair and reasonable than encumbering managers with non-compete agreements. CEOs understandably want to protect their client base, and these two options are more palatable to both employees and customers. How does the management company CEO want his or her company to be perceived by existing and potential employees and clients and by fellow management company CEOs – respected as a fair, reasonable, gracious and staff-supporting organization or as a draconian bully who cares

only about ensuring that no employee dare leave without suffering monetary damage in the perchance that clients will follow?

Experts in the community association industry agree. Julie Adamen of Adamen, Inc., says,

> I find that management companies make their clients vulnerable to departing staff only when there are larger, systemic problems within the company, and/or, the departing manager was the only one with whom the client had a relationship. Clients are much less likely to leave their current company - too much of a hassle - if they feel the company is providing overall good service to them AND they have a relationship with another employee - such as the District Manager, VP or even the owner. Too often a Board feels they have no connection to anyone but the manager, and that's the fault of the management company

Virginia attorney Glenn Silver, of Silver & Brown, P.C. recently successfully represented Community Association Management Professionals (CAMP) and two of its employees against litigation by a Dallas-headquartered community association management company. First, a judge held that the non-compete provision was overly broad and vague and therefore unenforceable against the first manager, so the Dallas company dropped its non-compete lawsuit against the second manager and CAMP. Then, a jury found in favor of the second manager on the remaining claims of breaches of confidentiality and of fiduciary duty.

Silver asserts that narrowly drafted non-compete agreements are fair for top executives who are being paid top dollar. For other employees who deal with marketing, community association management or administrative functions, limited non-solicitation agreements are preferable.

Ed San George, MPA, PCAM, President of Integra Management Corp in Mt. Arlington, NJ believes that non-disclosure agreements relating to confidentiality of company information and non-solicitation of accounts or employees are appropriate. According to George, “You can’t stop an employee from securing employment with a competitor but you can stop the dissemination of confidential information and the non-solicitation of accounts and employees, in this case for two years.”

Sonya Bradley, CMCA, AMS, PCAM, President of Midtown Management Corporation and previously a portfolio manager in Houston, Texas, agrees:

> To make unrealistic demands against someone working for a community or doing business with a community they previously managed is not good. If a company does their job by keeping a client happy and are serving them per their contractual obligations, then they should not be as concerned about losing a client just because a manager leaves and goes to work for another management company. The client will be less likely to follow if they are happy with the overall services the management company offers and will understand that there is turnover in employees but will be confident that another suitable replacement will be found who will serve them well.

Lisa Esposito, former CEO of a California community association management company and currently Marketing and Customer Service Director for A.C. Enterprises in San Francisco, California, concurs:

> I believe that the most successful management company practices are based on good business practices, policies, procedures and above all else good communication. None of which involves trade secrets.
>
> In an industry that requires extraordinary customer service even when there is adversity, it is critical that the management company provide a "safe harbor" for its employees. A company that provides a working environment that is caring, and demonstrates its support of its employees in deed not only in words, will enjoy the greatest success.

Another Houstonian, Carolyn Bonds, PCAM, President of Crest Management Company, AAMC, and Ed Alrutz, CPM, CMCA, AMS, PCAM, President, KPA Management, AAMC, Falls Church, Virginia, recommend a one-year non-solicitation agreement for the manager. Alrutz further includes a provision precluding the employee from working for a KPA client for a year following the employee's departure. Bonds and several other CEOs – John Lawton, former owner of a management company in Raleigh, N.C. and Houston's Ransom Daly, CMCA, AMS, PCAM among others – suggest including a provision in the management contract prohibiting an association from hiring a company's employee for a period of one year following that employee's departure from the management company. According to Bonds, "This may or may not discourage anyone but at least they will have to stop and think about it and decide if it is worth risking a lawsuit to do this. We have not had anyone abuse this and we have only lost one account to a prior manager."

Douglas Kleine, CAE, President, Professional Association Services, Alexandria, Virginia, offers several alternatives to requiring non-compete agreements:

- Include in the employment agreement that the employee will reimburse the company for all expenses relating to training and certification fees if the employee voluntarily leaves within a certain period of time, perhaps two years.
- Include a specific monetary penalty or prohibition against working for an existing client for a period of one year.
- Include in the management agreement a provision imposing a monetary penalty on the association should it hire an employee within a year following his or her departure from the management company.

Silver offers another option – pay the manager for the period in which the non-compete is in effect.

An essential factor in this discussion of non-compete agreements is the Community Associations Institute's Professional Manager Code of Ethics, a tenet of which states that the manager shall:

> Not use the work products of colleagues or competing management firms that are considered proprietary without the expressed written permission of the author or the management firm.

What better encouragement for a management company CEO to protect the company's best interests than to support managers' efforts to attain a CMCA credential or AMS or PCAM designation? Depending on the severity of the violation of the code of ethics, CAI could ultimately impose public censure and revoke both CAI membership and credentials.

Recommendations for Managers

Adamen, Inc.'s Julie Adamen does not believe managers should sign non-compete agreements. She asserts that

> The problem is that the companies - especially the larger ones - have much deeper pockets than the ex-employee, and the mere filing of a suit can cost the respondent thousands of dollars they likely can't afford. Non-compete agreements keeps most departed managers from working in their profession until the agreement is over. So, if you aren't willing to forego two years' in your industry (even if they eliminate your position or fire you) - don't sign a two-year non-compete unless you can afford the lawsuit.

If a potential employer requires execution of an employment agreement prior to employment, consider the following:

- The agreement was prepared by the company's attorney to protect the company, not the employee.
- Don't give notice to your current employer until you have received from your potential employer -- and reviewed -- all the paperwork you will be expected to sign.
- Have a labor lawyer review the paperwork before accepting employment.
- Read the employment agreement in its entirety. Even if there is no specific heading entitled "Non-Compete", similar content may be included under another heading. Don't take the employer's word that there is no non-compete provision.
- What is the duration of the non-compete? If it's two years, try to negotiate to one.
- What is the geographic limitation? If it's within 100 miles of the employer's office in all directions, does that leave you any options to find a similar job in your area? Try to negotiate it to within a more reasonable radius, perhaps 20 miles. Is it within a specified number of miles of any office in any state in which the management company has a presence? Try to negotiate to just the location where you will work.
- What are the work limitations? In addition to not being able to manage community associations based on duration and geography, are you prohibited from going to work for an ancillary service company such as website provider, general contractor or other service provider?
- The employment agreement should say that if an action is brought to enforce restrictive covenants, the substantially-prevailing party is entitled to attorney fees. Most agreements provide for the management company to be awarded attorney fees, but no mention of the employee's rights.
- Is a severance package included in the employment agreement? If not, it's better to negotiate it up front, when the employer wants you, than when you're terminated and have no negotiation power.
- The non-compete agreement should not take effect until six-months after your employment date. That gives both you and your employer time to determine if you're a "fit" with each other. Imagine if you worked for the company for only a few months and are now prohibited from remaining in the community association profession in your area for the next year or two!
- Rather than agreeing to a non-compete restriction, negotiate a non-solicitation/non-disclosure agreement instead.

What happens if an employer asks a current employee to sign a non-compete agreement? Silver says that the request/demand should be followed by a salary increase, signing bonus or other remuneration. Non-compete agreements must benefit both employer and employee; during the hiring process, the employee's consideration is the promise of employment. After the employee is on board and is asked to sign an employment agreement, the employer must offer another consideration. Tilson HR's Dawn Lively says it best – asking an existing employee to sign a non-compete agreement should raise a red flag to any employee.

Summary

Finding a reasonable balance between protecting the best interests of a management company and a manager's ability to earn a living is an achievable challenge if the CEO focuses on what each ultimately wants to accomplish. Well-written non-solicitation agreements prevent former employees from pursuing clients and staff. If the major concern is protecting a company's trade secrets (if any), a non-disclosure agreement would better address that issue. Utilizing these documents instead of the more restrictive non-compete agreements allows a manager to continue in his or her profession, to earn a living, and to contribute to the professionalism and growth of the community association management industry.

According to Adamen, there are thousands of community association manager positions in the United States unfilled because of the dearth of qualified managers. Skilled managers are in high demand. If a non-compete provision is not acceptable, managers have the power to negotiate less restrictive, more palatable terms, or walk away and find another management company that understands the effectiveness of non-solicitation and non-disclosure agreements.

Community association management company CEOs can grow the company only by hiring more managers. Managers are in the driver's seat, with the clout to affect the success or failure of company. Most CEOs recognize and respect the value and integrity of their managers and work with them to craft an employment agreement that is fair and reasonable to both parties.

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