

Social Media Mavens Beware: Innocent Posts Can Violate Restrictive Covenants

Client Advisories

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It's now official! According to the Superior Court of Pennsylvania--Facebook can be the basis for violation of a non-solicitation agreement. Parties need to be aware that even seemingly innocuous posts about future undefined plans on a Facebook page may violate a non-competition/non-solicitation agreement.

On August 22, 2017, the Superior Court of Pennsylvania issued an Opinion in *Joseph v. O'Laughlin*, No. 1706 WDA 2015. In that case, the parties entered into an asset purchase agreement ("Agreement") related to a veterinary clinic ("Clinic"). Pursuant to that Agreement, for five years after the sale of the Clinic, the defendant was prohibited from "engag[ing] or participat[ing] in any business or practice [within fifty miles of the Clinic] that is in competition in any manner whatsoever with [buyer]. Further, [seller] shall not contact, solicit, or engage in any activity to contact or solicit, indirectly or directly, any client, past, present, or future, during that five (5) year period."

Without opening a competing business, the seller purchased a property, applied for a zoning variance to permit a veterinary clinic, and used a Facebook page to advertise a new veterinary clinic within the restricted area to open at an undisclosed future date. The Appellate Court upheld the injunction issued against seller, despite the fact that no actual competing business had commenced.

The Facebook page specifically was found to have violated the non-solicitation provision of the Agreement. Facebook offers unique problems in this context. There was no evidence that the seller himself actually initiated any contact with any past, present or future clients. Rather, the seller established a new Facebook page indicating that the business would open at some undefined future date and gave the location of that future business. The Court noted that former clients sought out and posted on the Facebook page. The Court stated that "the resounding purpose of the Facebook page, and the attendant communication therein, was to inform the followers of the page, including former clients, that [the seller] intended to open a new clinic and to keep them apprised of his progress."

This Opinion is surprising given the fact that there was not yet a competing veterinary clinic for those former clients to which they could take their business.

If you are the beneficiary of a restrictive covenant, you need to monitor the social media accounts of your counterpart. If you are restricted by such a covenant, you need to be incredibly careful how you use social media. For more information, or if you have any questions regarding restrictive covenants in Pennsylvania, please contact Archer at (215) 963-3300 and ask to speak to **Patrick J. Doran**, Esquire, **Jonathan P. Rardin**, Esquire or one of our other **Trade Secret Protection and Non-Compete** Practice Group members in Haddonfield, N.J., at (856) 795-2121, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, or in Wilmington, Del., at (302) 777-4350.

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Attachments

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