Mediating Non-Compete Disputes in the Medical Device Industry

Insights
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The medical device industry remains a hotbed for non-compete litigation, and the reason is plain and simple. Economic justification. Sales reps develop close relationships with surgeons who purchase millions of dollars worth of medical devices each year. Top reps at industry leaders commonly have multi-million dollar books of business and are often viewed by physicians as an integral part of the team when it comes to the delivery of care. If and when these reps switch firms, there's a real risk that their clients will follow them. And that's not all. Their colleagues may follow them too.

Consider the recent case filed by Abbott Laboratories against its former sales executive, Samuel Conaway, and his new employer, Boston Scientific. Abbott claims that after Conaway left to join Boston Scientific, he and his new employer began to unlawfully poach Abbott's sales force. Recognizing that sales reps control revenues, it's no wonder that Abbott is willing to spend top dollar on an AmLaw 100 law firm to address its concerns. And make no mistake about it, these types of cases are certainly expensive.

Even modest non-compete cases in the medical device industry easily rack up attorneys' fees in the high six figures. Consider Medtronic v. Hughes and St. Jude Medical (Minnesota 2011) where Medtronic successfully recovered over $615,000 in fees. Imagine how fees can multiply in cases where the parties engage in a race to the courthouse, which is not uncommon when someone finds a

basis to file in California. See, e.g., Advanced Bionics Corp. v. Medtronic, 29 Cal. 4th 697 (2002) (where the California Court held that California courts should not generally enjoin litigants from pursuing similar claims or defenses in foreign courts, even where important and unique California public policies [such as employee mobility] are at stake).

Just as the medical device industry remains a hotbed for non-compete litigation, it also remains a viable candidate for non-compete mediation. Mediating these disputes presents unique challenges because these lawsuits bear all of the hallmarks of ordinary litigation compressed into a short and urgent timeframe. It is expensive, fast paced, driven by emotion, and often embraces issues of tremendous importance. But a mediator with extensive non-compete litigation experience can help craft creative solutions, and that is what is required to resolve disputes of this nature. Courts presiding over these disputes have discretion to fashion equitable remedies. Why wouldn't a mediator be called upon to help the parties work toward a similar mutually acceptable result? But this cannot happen unless the parties cooperate with their mediator, and sometimes obstacles get in the way. "What obstacles?", you might ask. Here are five.

Sunk Costs – As noted above, these cases are expensive, and the fees mount rapidly. Attorneys' fees are viewed by parties as sunk costs – costs that have been incurred that cannot be recovered if they settle. The longer parties wait to mediate, the harder it becomes to settle. This is particularly true in two instances: (1) cases involving startups where resources are scarce; and (2) cases where an attorneys' fee provision or statutory equivalent is present. To address this issue, consider mediating earlier in the lifespan of a case; perhaps at the close of expedited discovery before a preliminary injunction hearing.

Reactive Devaluation – Reactive devaluation is a cognitive bias that occurs when a proposal is devalued if it appears to originate from an antagonist. This phenomenon alone demonstrates the greatest value of mediation. The parties are relying on the mediator to help them find a solution, and not just any solution, but rather, a durable one that is mutually acceptable to the parties. A mediator is uniquely situated to help the parties overcome this obstacle.

Negotiating Conventions – In a classic settlement negotiation, each side begins with a position, and moves a little bit at a time (often a very little bit). It is not uncommon for one side or the other or both to begin with an extreme position and wait for the other side to capitulate so as to gain the upper hand. An effective mediator will assume control of the mediation in an unassuming fashion and steer the parties toward a constructive dialogue. In essence, an effective mediator lets the parties know that resolution is their choice, but the process towards resolution will be shaped by the mediator.

Imbalance of Power – This factor most commonly exists in cases between industry leaders and startups with fewer resources. The role of the mediator is not to ensure equal power among the participants to the mediation; after all, a mediator is an impartial participant in the settlement process. That does not mean, however, that the mediator cannot help the parties overcome the difficulties presented by an imbalance of power. An effective mediator will create ground rules for

the parties' discussion, ensure that each side has a full and fair opportunity to air their views, and determine what topics must be addressed and in what order.

Lack of Information – Notwithstanding all of the money parties spend on discovery, it is amazing how poorly they understand one another's perspective, and at the end of the day it comes down to poor communication and lack of information. A good mediator will spend a lot of time listening to each side in order to ensure a thorough understanding of each side's viewpoint. A party's desire for confidentiality will always be respected, but providing the mediator with a complete understanding of each side's view of the world will enable the mediator to move each side towards a lasting peace that addresses each side's interests.

The bottom line? The market for medical devices is intensely competitive, perhaps second only to the market for top notch medical device sales reps. This is a $100 billion industry that is certain to continue spawning non-compete litigation for years to come. Litigation is expensive, distracting, emotionally draining, and certainly unappreciated by clients. Mediation is an alternative that can save parties precious time and resources. It is imperative that parties choose a mediator who has significant experience in restrictive covenant and trade secret litigation so that the mediator can efficiently and incisively cut through the issues. Using a mediator sufficiently attuned to the factors a court will use to determine the enforceability of a restrictive covenant will get the parties to a settlement faster and cheaper than the courts, and it will do so with less uncertainty, less publicity, less precedent, and more control.

Michael R. Greco is a partner in the Employee Defection & Trade Secrets Practice Group at Fisher Phillips, and he received his mediation training from the Center for Dispute Settlement in Washington, D.C. To receive notice of future blog posts either follow Michael R. Greco on Twitter or on LinkedIn or subscribe to this blog's RSS feed.

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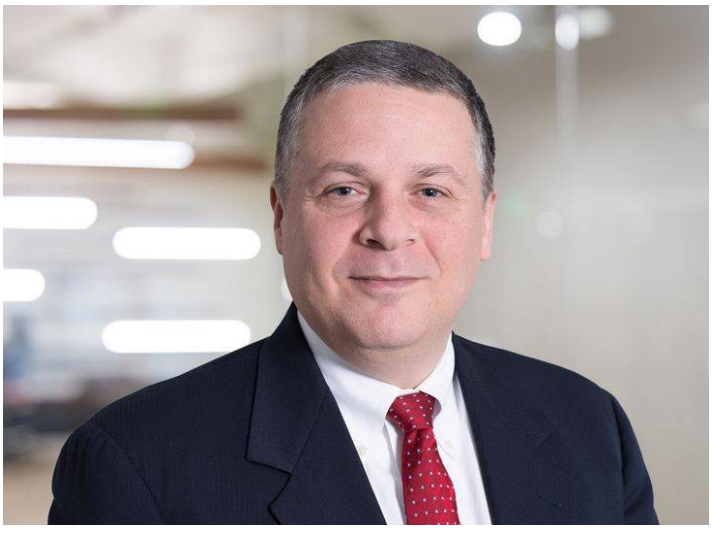

Michael R. Greco
Regional Managing Partner
303.218.3655
Email