

REPORT OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS*

CEJA Report 3-A-14

Subject: Restrictive Covenants
(Resolution 9-A-13)

Presented by: Susan Dorr Goold, MD, Chair

Referred to: Reference Committee on Amendments to Constitution and Bylaws
(Lynn Parry, MD, Chair)

1 Resolution 9-A-13, “Restrictive Covenants,” introduced by the Minnesota Delegation and referred
2 by the House of Delegates, asks that “our American Medical Association conduct an in-depth
3 review of and update” Opinion [E-9.02](#) on restrictive covenants in physician contracts. This report
4 by the Council on Ethical and Judicial Affairs (CEJA) summarizes key ethical and legal issues
5 relating to the use of restrictive covenants in medicine and reviews relevant AMA ethics policy in
6 this area.

7 8 INTRODUCTION 9

10 In the context of medical services, a restrictive covenant—commonly referred to as a noncompete
11 agreement or a covenant not to compete—is a contractual provision between a physician and his or
12 her employer that limits or prevents a physician’s practice of medicine. Generally, the restriction
13 applies to a specific geographic area for a defined period of time following the termination or
14 conclusion of the physician’s employment or the sale of the physician’s medical practice.[1]
15 Restrictive covenants are often implemented to prohibit a new physician from leaving his or her
16 employer and then establishing a competing practice in that particular vicinity while using
17 information, skills, training, or patient contacts provided by the employer.[2] Likewise, they may
18 be implemented to restrict competition against the purchaser of a physician practice.

19
20 The *Code of Medical Ethics* includes several opinions relevant to covenants not to compete.
21 Opinion [E-9.02](#), “Restrictive Covenants and the Practice of Medicine,” holds that the restrictive
22 covenants have the potential to restrict competition, disrupt continuity of care, and deprive the
23 public of medical services.[7] Covenants-not-to-compete may be unethical if they are “excessive in
24 geographic scope or duration” or fail to make “reasonable accommodation” of patients’ choice of
25 physician. Opinion [E-9.021](#), “Covenants-Not-to-Compete for Physicians in Training,” addresses
26 the use of restrictive covenants in the context of medical residency and fellowship programs, and
27 prohibits training institutions from seeking noncompete guarantees in return for fulfilling their
28 education obligations.[8] Finally, Opinion [E-6.11](#), “Competition,” encourages competition among
29 physicians and other health care practitioners and identifies key criteria for ethically justifiable
30 competition.[9]

* Reports of the Council on Ethical and Judicial Affairs are assigned to the Reference Committee on Amendments to Constitution and Bylaws. They may be adopted, not adopted, or referred. A report may not be amended, except to clarify the meaning of the report and only with the concurrence of the Council.

1 TREATMENT OF RESTRICTIVE COVENANTS BY STATE COURTS

2
3 Restrictive covenants are strictly a matter of state law. State courts generally view restrictive
4 covenants in employment contracts with considerable skepticism given that these agreements are
5 seen as a potential restraint on trade.[1] Therefore, courts often decline to enforce restrictive
6 covenants against employees unless the employer can demonstrate that the noncompete agreement
7 falls within the parameters established by state law.[2] In assessing whether a restrictive covenant
8 is legally enforceable, courts look at whether the employer has a protectable business interest
9 beyond simply avoiding competition that justifies the use of a restrictive covenant, whether the
10 covenant is reasonable in terms of the time and geographic restrictions it establishes, and whether
11 enforcing the agreement would be otherwise contrary to public policy.[2,6] Even if a restrictive
12 covenant is determined to be legally valid, a court may be hesitant to see this portion of the
13 employment contract implemented for fear the restrictions may impede an employee’s ability to
14 work and deprive the public of that employee’s skills, all the while providing little if any economic
15 benefit to the employer’s economic interests.[6,7] Depending on the law in a particular jurisdiction,
16 some courts may apply a “blue pencil” rule whereby the court may narrow the terms of the
17 covenant to keep the contract in line with applicable state law.[2] Under this type of rule, a judge
18 may use his hypothetical blue pencil to cross out or limit the unreasonable elements of a covenant
19 while leaving the enforceable provisions of the covenant intact.[2]

20
21 RESTRICTIVE COVENANTS IN PHYSICIAN EMPLOYMENT CONTRACTS

22
23 The use of restrictive covenants in medicine has become more commonplace in recent years
24 because doctors are more likely to change employers than in years past.[10] Prior to 1990, it was
25 estimated that less than two percent of physicians changed jobs during their lifetime.[10] More
26 recent estimates show that approximately ten percent of physicians change their jobs annually.[11]
27 Further, doctors are increasingly seeking employment with large hospitals and health care systems
28 instead of pursuing careers in solo practice.[12] Given the movement toward bigger health care
29 systems where physicians enter into contractual relationships for employment, restrictive covenants
30 have become a ubiquitous component of employment agreements where employers seek to protect
31 their investments in the training and employing of physicians.[13]

32
33 Courts usually recognize two primary business interests with respect to restrictive covenants
34 involving physicians: the employer’s investment in specialized training provided to the physician,
35 and protecting a practice’s patient base.[2] Where the employer has been able to demonstrate it has
36 provided valuable medical training that was key to physician’s current marketability and earning
37 potential restrictive covenants have been upheld.[14,15] In like manner, courts in several states
38 have recognized that access to a practice’s “customer” contacts is a protectable interest under a
39 noncompete agreement.[16,17,18]

40
41 Courts have determined what qualify as “reasonable” geographic and time limitations on a case-by-
42 case basis. For example, the Supreme Court of New Jersey found that restricting a physician’s
43 practice within a thirty-mile radius of his former employer to be excessive, but changing the radius
44 to thirteen miles would be a reasonable geographic limitation.[14] And in Florida, the state statute
45 on employment noncompete restrictions holds that any restrictive covenant that imposes
46 restrictions of less than six months is reasonable, but a limitation of more than two years is
47 unreasonable.[19]

1 While many state courts have held physician restrictive covenants to be ethically justifiable when
2 found to not be injurious to the public,[20] and that they can even have a positive impact on patient
3 care,[21] other states do not enforce noncompete agreements for physicians. Delaware and
4 Massachusetts—two states that allow noncompete agreements in employment contracts—do not
5 enforce them against physicians.[2] States such as Virginia, Tennessee, and Texas, however, are
6 simply more critical of physician restrictive covenants than they are of other employment
7 noncompete agreements.[2]

8 9 ETHICAL CONSIDERATIONS

10
11 A chief concern in the use of restrictive covenants in physician contracts is their impact on patient-
12 physician relationships. Patients have the right to choose their physician (within certain
13 constraints).[22] They are also entitled to continuity of care,[23] and to the extent that restrictive
14 covenants may disrupt continuity, such agreements can be ethically problematic.[24] While a
15 patient may be able to secure care from a different physician in the area or even within the same
16 practice, the trust and confidence established between the patient and his or her original physician
17 may no longer be present.[25] If a noncompete agreement restricts the ability of a physician to
18 enter or leave a market and restricts the scope of the physician’s practice, this can erode the number
19 of physicians in a particular region, causing physician shortages and undermining a patient’s choice
20 in care.[25] This type of outcome may adversely affect the quality of care in a region or limit
21 access to health care to populations that are already underserved.[24] In terms of employment,
22 restrictive covenants may not adequately recognize the contributions a departing physician has
23 made to a medical practice with regard to his or her professional skills, reputation, and patient
24 relationships, and may overestimate the employer’s investment in education and training of that
25 physician.[25] Finally, a noncompete agreement could delay a physician’s exit from the
26 physician’s current employer, keeping the physician in an unhealthy employment relationship that
27 will have ramifications that reverberate across the practice.[25]

28
29 To be ethically justifiable, restrictive covenants must carefully balance the medical needs of
30 individual patients and communities and the business interests of health care organizations. While
31 covenants not-to-compete may seem counterproductive in the medical realm, such agreements can
32 help protect a practice’s relationships with its patients, as well as protect monetary and other
33 investments health care organizations and practices make in physician training and mentoring.[26]

34 35 RECOMMENDATION

36
37 Given these considerations, the Council on Ethical and Judicial Affairs recommends that Opinions
38 E-9.02, “Restrictive Covenants in the Practice of Medicine,” E-9.021, “Covenants-Not-to-Compete
39 for Physicians in Training,” and E-6.11, “Competition” be amended by substitution as follows in
40 lieu of Resolution 9-A-13 and the remainder of this report be filed:

41
42 Competition among physicians is ethically justifiable when it is based on such factors as
43 quality of services, skill, experience, conveniences offered to patients, fees, or credit terms.

44
45 Covenants-not-to-compete restrict competition, can disrupt continuity of care, and may limit
46 access to care.

47
48 Physicians should not enter into covenants that:

- 1 (a) unreasonably restrict the right of a physician to practice medicine for a specified period
2 of time or in a specified geographic area on termination of a contractual relationship;
3 and
4
5 (b) do not make reasonable accommodation for patients' choice of physician.
6
7 Physicians in training should not be asked to sign covenants not to compete as a condition of entry
8 into any residency or fellowship program.
9
10 (Modify HOD/CEJA Policy)

Fiscal Note: less than \$500

REFERENCES

1. Berg P. Judicial enforcement of covenants not to compete between physicians: protecting doctors' interests at patients' expense. *Rutgers Law Rev.* 1992; 45(1): 1–48.
2. Horton RW, Page JA. Restrictive Covenants in Physician Employment Relationships. American Health Lawyers Association Member Briefing. July 2010. <http://www.bassberry.com/files/upload/AHLANonCompeteJuly2010.pdf>. Accessed September 25, 2013.
3. American Medical Association, Code of Medical Ethics. Opinion E-9.02, Restrictive Covenants and the Practice of Medicine. Available <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion902.page>. Accessed October 16, 2013.
4. American Medical Association, Code of Medical Ethics. Opinion E-9.021, Covenants-Not-to-Compete for Physicians in Training. Available <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion9021.page>. Accessed October 16, 2013.
5. American Medical Association, Code of Medical Ethics. Opinion E-6.11, Competition. Available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion611.page?>. Accessed October 16, 2013.
6. Malloy SE. Physicians restrictive covenants: the neglect of the incompetent patients' interests. *Wake Forest Law Rev.* 2006; 41:101–49.
7. Blake HM. Employee agreements not to compete. *Harvard Law Rev.* 1960; 73: 625–691.
8. American Bar Association. ABA Model Rules of Professional Conduct. Rule 5.6: Restrictions on right to practice. Available http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_6_restrictions_on_rights_to_practice.html. Accessed October 23, 2013.
9. Steinbuch R. Why doctors shouldn't practice law: the American Medical Association's misdiagnosis of physician non-compete clauses. *Missouri Law Rev.* 2010; 74(4): 1051–1082.
10. Malloy SE. Physicians restrictive covenants: the neglect of the incompetent patients' interests. *Wake Forest Law Rev.* 2006; 41:101–149.
11. Markel H. Doctors now need well-honed skills in job hunting. *New York Times*. May 22, 2001. <http://www.nytimes.com/2001/05/22/health/doctors-now-need-well-honed-skills-in-job-hunting.html>. Accessed October 16, 2013.
12. Gardiner H. More Doctors Giving Up Private Practices. *New York Times*, March 25, 2010. <http://www.nytimes.com/2010/03/26/health/policy/26docs.html?pagewanted=all>. Accessed October 16, 2013.
13. Cirocco WC. Restrictive covenants in physician contracts: an American Society of Colon and Rectal Surgeons' survey. *Diseases of the Colon & Rectum.* 2004; 54(4): 482–486.
14. *Cnty. Hosp. Group, Inc. v. Moore*, 869 A.2d 884 (N.J. 2005).
15. *Pierson v. Med. Health Centers, PA*, 869 A.2d 901 (N.J. 2005).
16. *Saliterman v. Finney*, 361 N.W.175 (Minn. Ct. App. 1985).
17. *Sharvelle v. Magnante*, 836 N.E.2d 432 (Ind. Ct. App. 2005).
18. *Prairie Eye Ctr., Ltd. v. Butler*, 713 N.E.2d 610 (Ill. Ct. App. 1999).
19. FLA. STAT. § 542.335(1)(d)(1).
20. *Idbeis v. Wichita Surgical Specialists, P.A.*, 112 P.3d 81 (Kan. 2005).
21. *Mohanty v. St. John Heart Clinic*, 886 N.E.2d 85 (Ill. 2006).
22. American Medical Association, Code of Medical Ethics. Opinion E-9.06, Free Choice. Available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion906.page>. Accessed October 16, 2013.

23. American Medical Association, Code of Medical Ethics. Opinion E-10.1, Fundamental Elements of the Patient-Physician Relationship. Available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion1001.page?>. Accessed October 16, 2013.
24. Apple GJ. Physician Covenants Not to Compete: Reasonable Limitations or Overreaching? American Health Lawyers Association. 2009.
25. Beh HG, Ross HR. Non-compete clauses in physician employment contracts are bad for our health. Hawaii Bar J. 2011; 14(13): 79–90.
26. Furlane ME, Del Rossi LJ. Physician restrictive covenants—a delicate balancing act. Lexology. 2011.

APPENDIX

The following opinions are referenced in the report.

E-9.02 Restrictive Covenants and the Practice of Medicine

Covenants-not-to-compete restrict competition, disrupt continuity of care, and potentially deprive the public of medical services. The Council on Ethical and Judicial Affairs discourages any agreement which restricts the right of a physician to practice medicine for a specified period of time or in a specified area upon termination of an employment, partnership, or corporate agreement. Restrictive covenants are unethical if they are excessive in geographic scope or duration in the circumstances presented, or if they fail to make reasonable accommodation of patients' choice of physician. (VI, VII)

Issued prior to April 1977; Updated June 1994 and June 1998.

E-9.021 Covenants-Not-to-Compete for Physicians-in-Training

It is unethical for a teaching institution to seek a non-competition guarantee in return for fulfilling its educational obligations. Physicians-in-training (residents in programs approved by the Accreditation Council for Graduate Medical Education [ACGME], fellows in ACGME-approved fellowship programs, and fellows in programs approved by one of the American Board of Medical Specialties specialty boards) should not be asked to sign covenants-not-to-compete as a condition of their entry into any residency or fellowship program. (III, IV, VI)

Issued December 1997 based on the report "Covenants-Not-to-Compete for Physicians-in-Training," adopted June 1997 (JAMA. 1997; 278: 530).

E-6.11 Competition

Competition between and among physicians and other health care practitioners on the basis of competitive factors such as quality of services, skill, experience, miscellaneous conveniences offered to patients, credit terms, fees charged, etc, is not only ethical but is encouraged. Ethical medical practice thrives best under free market conditions when prospective patients have adequate information and opportunity to choose freely between and among competing physicians and alternate systems of medical care. (VII)

Issued July 1983.