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)

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

INTRODUCTION

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

The Code of Medical Ethics includes several opinions relevant to covenants not to compete. Opinion E-9.02.[3] “Restrictive Covenants and the Practice of Medicine,” holds that the restrictive covenants have the potential to restrict competition, disrupt continuity of care, and deprive the public of medical services.[7] Covenants-not-to-compete may be unethical if they are “excessively geographic scope or duration” or fail to make “reasonable accommodation” of patients’ choice of physician. Opinion E-9.021.[4] “Covenants-Not-to-Compete for Physicians in Training,” addresses the use of restrictive covenants in the context of medical residency and fellowship programs, and prohibits training institutions from seeking noncompete guarantees in return for fulfilling their education obligations.[8] Finally, Opinion E-6.11.[5] “Competition,” encourages competition among physicians and other health care practitioners and identifies key criteria for ethically justifiable competition.[9]

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1Reports 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.

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

RESTRICTIVE COVENANTS IN PHYSICIAN EMPLOYMENT CONTRACTS

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

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

Courts have determined what qualify as “reasonable” geographic and time limitations on a case-by-case basis. For example, the Supreme Court of New Jersey found that restricting a physician’s practice within a thirty-mile radius of his former employer to be excessive, but changing the radius to thirteen miles would be a reasonable geographic limitation. And in Florida, the state statute on employment noncompete restrictions holds that any restrictive covenant that imposes restrictions of less than six months is reasonable, but a limitation of more than two years is unreasonable.
While many state courts have held physician restrictive covenants to be ethically justifiable when found to not be injurious to the public,[20] and that they can even have a positive impact on patient care,[21] other states do not enforce noncompete agreements for physicians. Delaware and Massachusetts—two states that allow noncompete agreements in employment contracts—do not enforce them against physicians.[2] States such as Virginia, Tennessee, and Texas, however, are simply more critical of physician restrictive covenants than they are of other employment noncompete agreements.[2]

ETHICAL CONSIDERATIONS

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

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

RECOMMENDATION

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

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

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

Physicians should not enter into covenants that:
(a) unreasonably restrict the right of a physician to practice medicine for a specified period of time or in a specified geographic area on termination of a contractual relationship; and

(b) do not make reasonable accommodation for patients’ choice of physician. Physicians in training should not be asked to sign covenants not to compete as a condition of entry into any residency or fellowship program.

(Modify HOD/CEJA Policy)

Fiscal Note: less than $500
REFERENCES

19. FLA. STAT. § 542.335(1)(d)(1).

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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)


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.