To Compete or Not to Compete . . .

By Michael Jordan

All too often, physicians agree to covenants not to compete in employment agreements without carefully evaluating the ramifications of the covenant. In the eagerness to begin employment, issues that might arise in the future often fall by the wayside. Later, as relationships change and new opportunities arise, the physician will ask, "hey, is this thing enforceable?"

The answer, in classic legalese, is: *maybe.* Ohio courts have upheld and enforced covenants not to compete when such covenants are reasonable on their face and do not constitute a restraint on trade. The Ohio Supreme Court has examined the issue of the reasonableness of such covenants and established the following test:

> A covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if (1) it is no greater than is required for the protection of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.[1]

Attorneys often refer to a rule of thumb that a covenant is more likely to be enforced if it is no greater than five miles in scope and one year in duration. Further, under Ohio law, a court is empowered to "blueline" a covenant to make it enforceable if a court believes that, as written, it is overbroad. A court could determine that a 20-mile prohibition is overbroad and reduce the geographic scope, but find that the covenant is otherwise enforceable.

What might make a covenant enforceable or unenforceable varies with the facts of each particular case. Courts often consider, for example, the effect upon the public if a physician is prohibited from practicing within a certain geographic area. The court will therefore be interested in the particular physician's specialty and how available those services are in the geographic market in dispute. Further, what is the targeted patient base? Nursing home residents have "patient choice" statutes that conflict with the ability of an employer to attempt to stop physicians from treating such patients. The American Medical Association has opined that covenants not to compete may be "unethical."

> 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.[2]

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However, while some courts have found that Opinion persuasive and ruled that such covenants are not enforceable as limiting patient choice, others have found that the AMA opinion does nothing more than advocate that such covenants are to be strictly construed.

Very candidly, the particular judge to whom the case is assigned will have his or her own predilections in terms of whether they are willing to enforce a covenant. Some judges simply do not like covenants not to compete. Others will enforce them if they believe enforcement is warranted by the facts. In making the determination of whether an employer's business interest is protectible, the court will evaluate several factors. These factors include: How much time and effort the employer has invested in establishing patients and other business contacts for the employed physician? Does the employer have an interest it truly can protect, such as an exclusive right to provide services at a hospital or facility? How much training did the physician receive from the employer and how long has the employer provided the business service it seeks to protect? For example, a court might enforce a covenant against a physician who was trained to treat sleep disorders by an employer with an established sleep disorder center if the physician leaves such employment and attempts to compete in violation of a covenant.

Very often, these evidentiary disputes are determined in connection with a motion for temporary restraining order or preliminary injunction, which are typically filed by an employer who wishes to prevent an employed physician from competing. This generally results in a flurry of depositions and a hearing, conducted as a "mini-trial," before the court. These proceedings can become expensive and are likely to lead to the assertion of other claims between the parties and continued litigation.

Practical tips: It is critical to pay attention to the covenant at the time of signing. What is the geographic scope and time duration? If the employer has multiple facilities, is the geographic scope of the covenant limited to the facility where the employed physician operates or does it apply to every facility? Obviously, that will have a dramatic impact upon the geographic scope of the intended covenant. Should the covenant be applicable to all circumstances involving termination of employment, or can the employer be persuaded that a covenant should not be enforceable if the employee is terminated without cause by the employer? The key point is that a covenant not to compete should never be taken lightly and always be viewed as a critical term of an employment agreement.

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[1] *Raimonde v. Van Vlerah, 42 Ohio St.2d 21 (1975).*

[2] *AMA Code of Medical Ethics, Council on Ethical and Judicial Affairs, E-9.02 Restrictive Covenants and the Practice of Medicine.* ■