The Company You Keep

Restrictive covenants for doctors and the need to remain vigilant

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By Steven I. Adler, J.D.

One of the most-often litigated issues involving physicians is restrictive covenants (also known as "non-competition agreements" or "non-competes").

Restrictive covenants usually take two forms and are often included in the same agreement. They usually preclude a physician from competing with their former medical group for a number of years within a restricted geographic area, such as a number of miles' radius from the physician's former group. They also often preclude a physician from soliciting patients of the former practice for a specified number of years. This is often referred to as a "non-solicitation clause."

Newly minted physicians joining a medical group for the first time usually are asked to sign a non-compete and non-solicitation agreement. At my firm, we often get frantic calls from these physicians when they leave their first medical group, informing us that they are going to "hang out their own shingle" or join another group, and their former employer is telling them that they will be sued if they violate their non-compete and/or non-solicitation obligations.

Inevitably, their first comment to us is, "I was told that they aren't enforceable." To the contrary, we tell them, in most states they are if they are reasonable in terms of duration, scope, and geographic area, although there is a slight trend to disallow them. It varies from state to state, but non-competes and non-solicitation clauses are readily enforceable in the context of a sale of a medical practice when the buyer wants to make sure the seller is not going to open a new practice down the street and try to retain their patients. This is important because courts do not like to interfere with patients' ongoing medical treatment or a long-standing patient-doctor relationship.

What You Need to Know

In some states, restrictive covenants are governed by statute, although most rely on case law. This means that the contours of an enforceable restrictive covenant agreement change over time based on previous court decisions, or "stare decisis." For this reason, your medical group must remain vigilant, or you will learn too late—usually when you are seeking to enforce them—that there are problems with your previously enforceable agreements.

Do not just stick them in a file and forget about them after they are executed. Case law and circumstances change. For example, the second-highest court in New Jersey recently decided a matter that highlighted the need for medical practices to update their non-competition and non-solicitation agreements. How often should they be updated? It is hard to say: Each case is fact specific.

Clearly, however, if a doctor with a huge following is under contract with a restrictive covenant, and the doctor could significantly hurt your practice if they leave, that is one contract that your group should review more often than others. Likewise, if your group is expanding, such as by opening new locations, that would be a good time to review your restrictive covenant agreements, especially as they concern those doctors who will be working in the new location.

New Hires

Another key time to have counsel review your standard restrictive covenant is when you are hiring a new doctor. Whoever is preparing the new agreement should consider the current state of the law and recommend whether previously executed agreements should be modified.

In most states, doctors can be bound to reasonable restrictive covenants. This includes those arising out of a sale of a medical practice,

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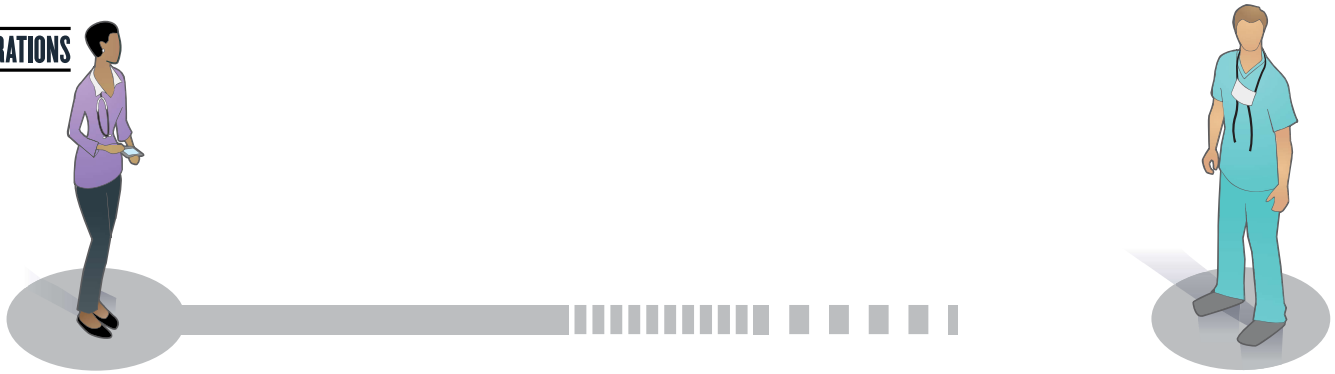

What is the appropriate duration for a non-compete to be considered reasonable? … As to geographic radius, a 10-block radius might be appropriate in a metropolitan area while a 10-mile radius may be appropriate elsewhere.

as well as non-competition clauses contained in employment agreements.[1] In Avhad v. Precision Pain, et al., the plaintiff-doctor was retained by defendant-medical group pursuant to a written agreement.[2] The agreement contained the usual confidentiality, non-solicitation, and non-competition clauses. The non-compete specifically provided that, after she left the practice, plaintiff would not compete for two years and within a 10-mile radius of defendant's two existing offices. The agreement also contained a merger clause confirming that the agreement constituted the complete understanding of the parties and could only be amended by a subsequent written agreement signed by both the medical group and the doctor.

A few years later, the medical group opened a third office in a city elsewhere in the state. Before the group allowed plaintiff to work in that new office, it alleged that she verbally agreed to be bound by that same 10-mile radius from the new office. Thereafter, she worked in the new location for a few years. However, the doctor then left the medical group and opened her own office two miles from the medical group's newest location.

Subsequently, the doctor filed a lawsuit by way of an order to show cause in which she sought a court ruling that the restrictive covenant did not apply to the newest office because the agreement only referenced the other two locations. The trial court agreed, finding that the merger clause required any changes to the non-compete to be in writing. It therefore held, in what the court claimed was a "final order," that the doctor could continue to practice near the medical group's new office and dismissed the lawsuit. On March 14, 2022, the decision was reversed on appeal.

The appellate court held that the trial court should not have granted final relief on the return date of an order to show cause. Moreover, it held that, notwithstanding the merger clause, there was a factual dispute concerning whether the doctor orally agreed not to practice near the third location. The Appellate Division, therefore, remanded the case to the trial court.

Multi-factor Decisions

The takeaway: If your group wants to protect valuable patient relationships, periodically have legal counsel review your non-compete agreements with doctors and physician assistants, especially when opening new locations. Moreover, as noted above, this area of law is usually driven by case law; therefore, you should review non-competition agreements from time to time to ensure they remain enforceable as case law changes. This could mean changing the duration, scope, or radius of the non-compete or making other changes, such as allowing a doctor to work near one of the practice's offices where the doctor had not seen many patients while in your employ.

As indicated above, a court considers many facts when deciding whether to enforce a non-compete. For example, what is the appropriate duration for a non-compete to be considered reasonable? Most courts will enforce a non-compete of one to two years. Often, as part of that analysis, they will consider how long it will take the medical practice to train a replacement. As to geographic radius, a 10-block radius might be appropriate in a metropolitan area while a 10-mile radius may be appropriate elsewhere. Courts will also consider the impact on the public. For example, if the geographic radius interferes with the public's need for a doctor with a particular specialty in that geographic area, the court may choose to enforce a smaller geographic restriction.

Finally, courts often consider why a doctor is leaving a medical practice. If the doctor had been mistreated where they had worked, a court may not allow that practice to saddle the doctor with a restrictive covenant. It is, therefore, extremely important for counsel to know all of the facts and circumstances surrounding the negotiation and execution of the agreement, the employment, and the reasons why the doctor is leaving the practice. GPJ

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References

1. *Karlin v. Weinberg*, 77 N.J. 408 (1978); *Community Hosp. Group, Inc. v. More*, 183 N.J. 36 (2005).
2. *Avhad v. Precision Pain, et al.*, 2261-20 N.J. App. Div. (March 14, 2022)