"DO NO HARM"

Physician Non-Compete Agreements and Public Policy

By D. Wesley Newhouse and Amy E. Kuhlman,

Non-compete provisions are common features in employment agreements for physicians. Typically, they recite that all the patients of a practice group belong to the group, and that the physician employed by the group cannot serve them or contact them for a year after they leave the group. Some agreements also require that the physician not practice medicine generally, or a certain specialty of medicine, within a certain geographic area. These are typical features of non-compete agreements, found in agreements from the salesmen of widgets to the developers of high tech electronic gadgets.

Doctors, however, don't sell widgets or invent new electronic games. They treat illness and comfort suffering. Doctors, or at least the good ones, develop unique personal relationships with their patients. Relationships of trust and reliance.

And so it is strange that physicians, who are the owners of practice groups, use so prolifically the device of a non-compete clause in an employment agreement to restrict employee physicians from serving patients and the community. Given how often the owners of physician practice groups include these clauses in their contracts, it seems unlikely that physicians as a group will adopt a prohibition on non-compete clauses any time soon.

Yet, it would seem that public policy should favor, at the least, closer scrutiny of such clauses when in physician employment agreements, as opposed to agreements to employ the sellers of punch presses.[1]

Courts have balanced the potential harm to the employer versus the harm to the physician and his patients. The primary remedy for violation of a non-compete is injunctive relief. The employer seeks first a temporary restraining order, then a preliminary injunction to prevent the physician from serving the employer's patients, or from setting up a practice in a given geographic area. These are equitable remedies. The rules require that the court balance the interests of the affected parties. It is inevitable that the physician who seeks to avoid the non-compete will argue that public policy favors allowing access to medical care generally, and to allowing specific patients to have the physician of their choice.

The current state of the law requires that courts engage in what is surely a difficult, and often a subjective, balancing of the equities. The outcomes can vary, depending on the disposition of the judge and the circumstances of the case. Take the example of a family practice physician. There are hundreds, maybe thousands of these physicians in any major metropolitan area, and restricting a patient from seeing one such doctor over another one in the same practice group may not be so burdensome as to violate public policy.[2] Certainly, those insurers who make lists of approved providers and who refuse to pay for services of physicians outside of their "networks" have contributed to the perception that one doctor is as good as another, and we should simply take what we get and be satisfied.

But there are important exceptions. Those exceptions might, eventually, define the rule. Elderly residents of nursing homes have nearly an absolute right to the physician of their choice pursuant to state regulations governing the licensing of nursing homes.[3] One court found this right so compelling that it ruled that an elderly and infirm patient should have the right to see her chosen physician on the nursing home's premises even when there was a significant dispute regarding the physician's compliance with the nursing home's standards.[4] The right of the patient to see the physician of her choice prevailed over that of the nursing home that sought to enforce its standards. One would expect that the right of the patient would also trump that of a practice group seeking to prevent access to the physician to protect its financial well-being.

Another exception is when a physician offers a rare service of extraordinary value. Specialists whose services are in high demand may escape the restrictions of a non-compete, based on the public policy that a community would not have access to such services if the contract were enforced.[5]

Another exception may come from the lack of physicians available to serve certain communities. Put the family practice physician we considered before in a remote village that is the county seat of a sparsely populated rural community in southeastern Ohio. Suppose there are three doctors in the county, and one of the doctors is semi-retired. The other two practice together, and the younger of the two is employed by the more senior doctor under a non-compete agreement. While a judge in an urban common pleas court might balance the equities in favor of the employer, a judge in a rural county would likely see the situation very differently.[6]

What is distressing is the lack of standards to judge these situations. There is no code provision, ethical standard for physicians,[7] or compelling and conclusive precedent from our Supreme Court. We must argue the equities with each new situation, and take our chances on the viewpoints of the judges we draw. Ohio's physicians and their patients deserve more certainty than this.

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1. "this measure of disfavor [of restrictive covenants] is especially acute concerning restrictive covenants among physicians, which affect the public interest to a much greater degree." *Busch v. Premier Integrated Medical Assoc.,Ltd.*, Montgomery App. No. 19364, 2003-Ohio-4709, para. 24, quoting and citing *Ohio Urology, Inc., v. Poll* (1991), 72 Ohio App. 3d 446, 452-453, 594 N.E.2d 1027.
2. *Wall v. Firelands Radiology, Inc.* (1995), 106 Ohio App. 3d 313, 666 N.E.2d 235; *General Medicine, P.C. v. Manolache*, Cuyahoga App. No. 88809, 2007-Ohio-4169, unreported.
3. OAC 3701-17-09 (D)
4. *Bittner v. Ohio Presbyterian Retirement Services, Inc.*, (Franklin County C.P., 1/25/2005), No. CVH01-722, unreported.
5. See *Ohio Urology, Inc. v. Poll., infra,; Lewis v. Surgery & Gynecology, Inc.,* (March 12, 1991), Franklin App. No. 90AP-300, unreported; *Williams v. Hobbs* (1983), 9 Ohio App. 3d 331, 460 N.E.2d 287; *Darrow v. Kolczun* (March 6, 1991), Lorain App. No. C.A. 90CA004759, unreported.
6. See *Ohio Urology, supra*; *Clark v. Mt. Carmel Health* (1997), 124 Ohio App. 3d 308; 706 N.E.2d 336; and *Harris v. University Hospitals of Cleveland*, Cuyahoga App. Nos. 76724 and 76785, 2002-Ohio-983, unreported.
7. Claiming no moral superiority, we do note that lawyers are barred by their code of conduct from signing non-compete agreements because of the public policy favoring access to legal services. See *Ohio Rules of Professional Conduct*, Rule 5.6.

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