

## **PHYSICIAN COMPETE WITH THYSELF**

By Harold D. Jones

The ancestral rivalry between lawyers and doctors is never resolved. The battles of tort reform, malpractice fights, and congressional hearings still ongoing, the new front is non-competition law. Pitted against the need to hold onto trained and skilled physicians has always been the importance of freedom and mobility. Part of the joy of being a physician has always been the freedom to move almost anywhere in the world with a marketable skill. However, medical employers are increasingly having counsel draft covenants not to compete into physician employment contracts. The logic for the covenants is clear: the clauses safeguard employers' initial investments in hired physicians and prevent physicians from leaving and becoming competitors too closely, too quickly, or too secretly.

### **HISTORY OF NON-COMPETES**

Covenants not to compete are ancient. As early as the 15<sup>th</sup> century, English courts considered restrictive covenants. The covenants have always been considered a plague, of sorts, and courts as well as legislatures have attempted to characterize the covenants as restraints on trade and employment. Ironically, the antipathy towards these covenants in part stemmed from the actual Black Plague which ravaged Europe during the 14<sup>th</sup> century and created a scarcity among the labor force. With the rise in capitalism came a rise in mobility, as capital flowed to wherever it was most advantageous. Still, the harm of stopping willing labor from working has loomed large in Anglo-American jurisprudence.

The conflict poses as a scale of benefit between the employer requesting enforcement against the societal harm resulting from enforcement. This has manifested itself in America, especially in the doctrine of reasonability. In other words, only restrictive covenants that are reasonable are enforceable. The evaluation of what is reasonable can differ from court to court, county to county, industry to industry, and state to state.

### **FACTORS IN ENFORCEABILITY**

While contract law in the U.S. is nearly a seamless outgrowth of contract law in England, public policy and legislatures have found their own way. For instance, in New Jersey, the test of reasonability is whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given and not so large as to interfere with the interest of the public.

Factors that appear to crop up in almost every jurisdiction include the extent to which the restraint on trade hinders the competition as a whole, and the validity of the underlying

transaction, the scope and time of the territorial restriction, the effect of the covenant on the public availability of the service in question.

The desire to be free from competition in and of itself is not seen as a protectable interest in American jurisprudence.

### **PHYSICIAN NON-COMPETES**

In the medical field, perhaps above almost all other professional contexts, courts are likely to give great weight to public policy concerns or promoting unfettered competition. In almost every jurisdiction, physician non-competition agreements are treated differently than other non-competition covenants. Many courts believe that non-competition clauses hinder the availability of medical services to the public and simply decline to enforce any such restraint. Other courts hold that these types of covenants are unenforceable only if they do not pass the reasonable test.

Medical employers can formulate their business interests in a legitimate manner when they provide physicians with the following:

- A patient base
- Specialized training
- Confidential business information

### **THE PROBLEM WITH SURGEONS**

Surgeons often do not fit neatly into these patterns. In the medical context, referral relationships for surgeons are difficult to classify. Courts struggle to define what constitutes the legitimate business interest in referral relationships. Medical employers invariably claim that their referral sources are legitimate business interests that warrant the protection of covenants not to compete. In proving this point in litigation, medical employers usually argue that the referral relationships result from their efforts in building good will and that those relationships exist only because referring physicians recognize that goodwill.

Under this logic, physicians and surgeons who join medical groups benefit from the groups' reputations by receiving the existing referral stream. The counter to this is that there is no legitimate business interest because referrals are based on a surgeon's reputation and ability, not on a surgeon's affiliation. Surgeons and physicians argue, perhaps persuasively, that the referrals in question are based on their skills and reputations as opposed to the group's pedigree.

For a surgeon, the prestige acquired from their reputation for skill or dependability is uniquely their own.

### **THE UNIQUE ISSUE OF REFERRALS**

This argument is ongoing. Legally, the value of the patient base belongs to the medical employer in a sense that the employer has offered services in exchange for patient relationships. Patient relationships, in terms of a source of revenue at least, are often considered a medical employer's most valuable asset. In that formulation, it seems unfair to permit a physician to use the center's goodwill to take away the center's business.

Referral structures differ, however. Referral structures that capitalize on the surgical group's goodwill often result in minimal contact between physician and surgeon without much of a personal relationship. These intra-group referral systems thus seem to belong more to the group itself. In groups where the referrals capitalize on the surgeon's skills and reputations, the surgeons frequently have strong, deep relationships with referring physicians.

A second type of structure allows groups to generate more business through a benign form of intra-group competition. When groups are permitted to protect their interests in the surgeon's referral relationships by using covenants not to compete, they get to keep their cake and have it, too. The groups reap the benefits of competition within their groups, while hindering outside competition.

However, this appears unfair. Referring physicians usually refer patients to surgical groups because they recognize an operating surgeon's skill and reputation. If the group wishes to demonstrate to have a protectable interest, they must prove that they possess a business interest in the surgeon's skills and reputation. But a surgical group cannot have a legitimate business interest in their surgeon's skills and reputations because a surgeon cannot misappropriate their own skill after resignation. How can a surgeon embezzle his own skills?

Surgeons have a different argument than non-surgeons in these covenants not to compete fights. Non-compete agreements seem inappropriate in surgeon employment contracts because the surgical setting does not have the kind of problem that the covenants not to compete were created to remedy.

Surgeons are rarely provided specialized training by their employers. Instead, surgeons usually begin employment with groups fully ready to perform surgery. They cannot misappropriate training they did not receive, and there are really no trade secrets to speak of in surgery groups.

Finally, there is very limited patient contact for surgeons and no real threat exists that surgeons will take their patients with them when departing. Surgeons generate business primarily from

receiving new patients, so their referral sources are the most hotly litigated issue in surgical non-compete cases.

Surgeons should negotiate harder to avoid signing non-competition agreements. Physicians who are not required to sign non-compete agreements are often much more effective employees. An unconstrained, freely competing, skill seeking surgeon is the wave of the future and should not have her hands tied.

*Board certified in Labor & Employment law in the State of Texas, Mr. Jones advises and counsels on the issue of non-compete law across the nation.*