

The Business of Medicine: *Prohibited Business Activities that Restrict Patient Care*

By **Rosaria A. Suriano of Marcus, Brody, Ford & Kessler**

A patient has the right to seek medical treatment from his or her physician of choice. However, a physician can be restricted from treating a patient, if the treatment violates a restrictive covenant in an employment agreement, service agreement or lease agreement with a hospital.

A restrictive covenant, or covenant not to compete, is typically used to restrict competition, restrict the solicitation of patients, the solicitation of co-employees, and an employer's referral sources. Thus, when a physician leaves his employment or if the practice breaks up, a restrictive covenant will preclude a physician from taking the patients of the practice, from taking staff, such as a nurse, a receptionist or a technician, from soliciting patients and other employees, and from contacting prior referral sources.

Many physicians are focused, not on the business aspects of their practice, or the corporate structure, but on developing the medical practice and employing gifted and talented physicians, who in their zeal to focus on patient care and patient development, pay little attention to a restrictive covenant, the office policies and controls and what happens should there be a death, a break up or departure of a colleague. However, these aspects of a medical practice are as significant as that of patient care.

Restrictive covenants are commonly contained in physician agreements and have

been viewed as intruding on a physician's relationship with a patient. Despite recent challenges to restrictive covenants by members of the medical profession, in the recent case of *The Community Hospital Group, Inc. v. More*, 183 N.J. 36 (2005), the Supreme Court of New Jersey declined to find a restrictive covenant "per se" unreasonable and unenforceable. Rather, the court focused on the physician-employer's legitimate interest in protecting ongoing relationships with patients and applied a "reasonableness test", reviewed on a case by case basis, to determine whether a covenant not to compete is valid. A covenant that also restricts solicitation of other employees and patients, will be enforced if found to be reasonable.

A. The Employer's Legitimate Interest

If the restrictive covenant is used simply to restrict competition, it is not enforceable because a physician, like any other employer, has no legitimate interest in preventing competition. Thus, an employer must meet a legitimate business interest test. Here, the employer will have to prove that the covenant is needed to protect patient lists, patient relationships, referral sources and the investment made to train the departing physician or the acquisition of unique skills possessed by the departing physician. For example, the payment of continuing education courses, medical insurance, medical license fees, travel related fees, and speaking engagements are the types of "investments" which relate to whether a restrictive covenant protects

the employer's legitimate interests. Patient lists and retaining the customer base, patient relationships and referral sources are also valuable business assets that will be protected under a covenant.

B. The Reasonableness of The Covenant

The covenant must also be reasonable in the activities restrained, its geographic scope and in its duration. If a covenant attempts to prevent a physician from practicing in his or her specialization, for any given period of time without a geographic boundary, it is unenforceable. For example, a restrictive covenant that prevents a physician from practicing anywhere in New Jersey is typically void. If the covenant prevents a physician from treating a patient or group of patients without a geographic boundary, it is unenforceable. For example, if the covenant indicates that the departing physician can not treat a former patient at all, the covenant will be void because it must only restrict patient access within a specific geographic location. If the covenant attempts to restrict a physician for an unreasonable period of time, it is unenforceable. A covenant that restricted a dermatologist from practicing within a ten-mile radius for five years was enforceable, because patient access was not completely restricted. Rather, the patient could be treated by the departing dermatologist, so long as it was outside of the ten-mile radius.

Moreover a covenant can be "blue penciled" meaning a court can change it to limit the geographic scope or duration.

C. Undue Hardship On The Departing Physician

A covenant will not be enforced if it will unduly burden the departing physician. New Jersey courts have been reluctant to find undue hardship and to deny enforcement of a covenant that is reasonable in time and geographic location.

D. Public Policy Concerns

A restrictive covenant will not be enforced if a physician can show that it will be injurious to the public. For example, if a physician restrictive covenant will lead to a shortage of a particular specialty in a geographic area, it may be void or modified by a court.

Recently, a neurosurgeon who entered into a series of successive employment agreements containing restrictive covenants

with a hospital, challenged a restrictive covenant and asked the court to adopt a ban on restrictive covenants involving physicians because he believed they restrict a patient's choice of physicians. He argued that the two (2) year, thirty mile radius restriction on his employment caused serious harm to the public interest because of the shortage of neurosurgeons within the 30 mile radius. The Supreme Court upheld the restrictive covenant against the neurosurgeon, finding that the neurosurgeon was not restricted from treating patients, rather he was restricted only from treating patients within the 30 mile radius. In addition, although the

American Medical Association discourages restrictive covenants between physicians, it only declares them unethical if "excessive in geographic scope or duration, or of they

fail to make reasonable accommodation of a patient's choice of physician."

E. Conclusion

In New Jersey, restrictive covenants in the medical profession are common place. So long as the public interest takes precedence over private concerns, a restrictive covenant will be enforced, entitling a former employer to damages such as lost profits, loss of profits, diminution in the value of a practice and possibly even investment damages. The reasonableness of the covenant is key and each covenant will be examined on a case by case basis. Attorney review and negotiation of a restrictive covenant, and other agreements that affect the business aspect of the medical practice, is the key to avoiding costly litigation and potential damages.

ASC Licensure Required for One Room Surgery Centers

By **Mark Manigan - Brach Eichler L.L.C.**

The NJ Department of Health and Senior Services has recently taken the position that one room surgery centers set up as general business corporations (i.e., "Inc.'s") require ASC licensure even if all of the other criteria for licensure exemption are met (that is, even if the facility in question is limited to one operating room, owned only by physicians, and used only by its physician owners or employees). The Department's position is based on NJ Board of Medical Examiner rules which do not include "Inc.'s" as permissible structures for physician practices. The Department argues that if the entity is not a set up as a physician practice it cannot qualify for the exemption.

Upon discovering that a one room is set up as an "Inc.", the Department will send a "cease and desist" letter requiring the facility to close and warn that failure to close could subject the center to civil penalties up to \$1,000 per day.

We have successfully assisted a number of one room ASCs that were set up as "Inc.'s" and received "cease and desist" letters obtain appropriate corporate designation and avoid penalties. We have been able to do it in a manner to that reduces exposure to reimbursement recoupment claims

from insurance companies as much as possible. We have also assisted our clients in changing the corporate designation with CMS.

Please feel free to contact me with any questions.

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