

Representing Physicians with Non-Competition Agreements: Is the Law Changing?  
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Most plaintiff attorneys find it challenging to represent physicians who have signed non-competition agreements and other types of restrictive covenants before or during employment. Whether the physician is in a partnership or a group medical practice, the restrictive covenant may severely limit where she can practice, who she can treat, how she can solicit patients, and in many cases, what hospital she will have privileges in, when her affiliation with the group ends. The case law, which has evolved in this area, has been unsympathetic to the plight of the departing physician subjected to restrictions.<sup>1</sup> Until recently, the courts' recognition of public policy considerations and the American Medical Association's (the "AMA") guidelines<sup>2</sup> in regard to competition have been absent. However, some progress seems to be taking place as recent decisions are citing these guidelines as well as voicing strong public policy concerns for a patients' right to choose their physician.<sup>3</sup>

In April 1977, the AMA's Council on Ethical and Judicial Affairs issued an ethical rule similar to New York's Disciplinary Rule for attorneys DR-108 (A). It states, in part that the AMA "discourages any agreement between physicians which restricts the right of a physician to practice medicine for a specified period of time or in a specified area upon termination of employment or a partnership or a corporate agreement". It further states that "covenants not to compete restrict competition, disrupt continuity of care, and potentially deprive the public of medical services." While New York courts have long recognized disciplinary rule DR 2-108 (A)<sup>4</sup> for attorneys as despositive in deciding not to enforce a restrictive covenant against an individual attorney<sup>5</sup>, it has refused to recognize the AMA's ethical guideline as anything other than informative.<sup>6</sup>

Unlike the deference that New York courts have awarded attorneys by recognizing a client's right to choose counsel, it will generally enforce restrictive covenants against other professionals, including physicians and dentists, if such covenants are reasonably limited in time and geography, are not harmful to the Public or unduly burdensome to the employee and serve the purpose of protecting the former employer and or associate from

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<sup>1</sup> See generally *Karpinski v. Ingrassi*, 28 N.Y.2d 45 (1971); *Gelder Medical Group v. Webber*, 41 N.Y.2d 680 (1977).

<sup>2</sup> AMA guideline Opinions of the Council of Ethical and Judicial Affairs E-9.02 ("Restrictive Covenants and the Practice of Medicine") (Issued prior to April 1977; Updated June 1997).

<sup>3</sup> See *NYSARC Inc. v. Syed*, 747 N.Y.S.2d 327, 329; *Oak Orchard Community Health Center v. Blasco*, M.D., 2005 NY Slip Op 25221, 25221(May 31, 2005).

<sup>4</sup> DR New York Lawyer's Code of Professional Responsibility, DR 2 -108 (A)), 22 NYCRR § 1200.13(a), values a client's choice of legal representation over a firm's legitimate interest to protect itself from unfair competition. It states:

"A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits."

<sup>5</sup> See *Cohen v Lord, Day, etc. & Lord*, 75 N.Y. 2d 95, 98-99 (1989).

<sup>6</sup> See *Oak Orchard Community Health Center*, 2005 NY Slip Op 25221, 25221.

unfair competition.<sup>7</sup> The standard applied to physicians has been only slightly less stringent than “the strict scrutiny” articulated for accountants and other professionals excluding attorneys, as confirmed in the court’s decision in *BDO Seidman*.<sup>8</sup>

In *BDO Seidman*, a case involving a non-compete provision enforced against an accountant, the court, although only in a footnote, stated that because accountants had no comparable ethical rule as do attorneys, there was no public policy consideration that would necessitate invalidating the restrictions in that case. Given that the AMA has such a rule, courts may have to apply the same standard to physicians as they have to attorneys.

Until recently<sup>9</sup>, prior physician cases such as *Karpinski*, *Gelder Medical Group*<sup>10</sup>, *Novendstern v. Mt. Kisco Med. Group*<sup>11</sup> ignored a patient’s right to choose her own doctors.<sup>12</sup> In these cases the courts enforced harsh restrictions against the defendants. The decisions turned on the courts’ balancing the substantial investment made by the employer’s practice against the former employee’s ability to move and practice elsewhere. They found that the defendants would have been in direct competition with the practice and directly competing for referrals in a narrow geographic area.

The court in *Novendstern*, found the prohibition on a doctor practicing for three years in a limited area described in the covenant to be “reasonable” although the appellant’s brief to the court cited the AMA rules and pleaded that the restriction on the plaintiff would create public harm to long time patients who dependent on him for fertility treatments.<sup>13</sup> The court in *NYSARC Inc. v. Syed*<sup>14</sup> raised the issue of patient choice, noting that “patients have a strong interest in choosing what physician will provide their medical

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<sup>7</sup> “A covenant not to compete ‘will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer’s legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee.’” *NYSARC Inc.*, 747 N.Y.S.2d at 328, quoting, *Arnold R. Leiboff, M.D., PC*, 249 A.D.2d at 497-498.

<sup>8</sup> See *BDO Seidman v. Hirshberg*, 93 N.Y. 2d 382, 389 (1999).

<sup>9</sup> See *NYSARC Inc.*, 747 N.Y.S.2d 327 and *Oak Orchard Community Health Center*, 2005 NY Slip Op 25221.

<sup>10</sup> See *Karpinski*, 28 N.Y.2d 45; *Gelder Medical Group*, 41 N.Y.2d 680. In *Karpinski*, the court upheld an oral surgeon’s restrictive covenant unlimited in time and encompassing an area consisting of five small rural counties because of the substantial investment that plaintiff dental practice made to the areas in the non-compete and how long plaintiff’s dental practice has served those areas. In *Gelder Medical Group*, a case involving a partner in a medical group, the court upheld a 35-mile, five year covenant not to compete due to the specific factual circumstances in the case. The doctor violating the non-compete frequently moved around the continental US and Canada before joining plaintiff’s practice, while the plaintiff’s medical practice has been in one place and serving the area for a long time. The court in *Gelder Medical Group* assumed that the change of geographical location would not prevent the defendant from practicing medicine since he had done so in a number of different locations, while his violation of the non-competes geographical restriction would harm the development and business of plaintiff’s practice.

<sup>11</sup> See *Novendstern v. Mt. Kisco Med. Group*, 576 N.Y.S. 2d 329 (1991).

<sup>12</sup> *Karpinski* and *Gelder* were decided before the AMA guidelines were introduced in 1977 and affirmed in 1989, while *Novendstern* was decided after the AMA guidelines were introduced. See *Karpinski*, 28 N.Y.2d 45; *Gelder Medical Group*, 41 N.Y.2d 680 and *Novendstern*, 576 N.Y.S. 2d 329.

<sup>13</sup> See *Novendstern* at 331; see also *Novendstern v. Mt. Kisco Med. Group*, Docket No. 91-02519, Brief for Plaintiff-Appellant at 13-14.

<sup>14</sup> See *NYSARC Inc.*, 747 N.Y.S.2d at 328.

care”. While the court granted an injunction against the defendant physician, it permitted him to see patients who contacted him (but whom he did not solicit) through the date of the court order.

Recently, in *Oak Orchard Community Health Center*,<sup>15</sup> the court, again in a footnote recognized the AMA’s Opinion as relevant to any discussion of physicians in the context of restrictions. While it conducted a fact based analysis and applied a strict scrutiny standard to the defendant’s actions as articulated in *BDO Seidman*, it nonetheless denied the TRO and found for the defendant. It concluded that the plaintiff had not demonstrated that the defendant would use any means of unfair competition, or trade secrets to procure patients and that the plaintiff (as distinguished from the plaintiffs in prior cases such as *Karpinski* and *Gelder Medical Group*<sup>16</sup>) did not have a legitimate interest in preserving its client base against the competition of the former employee.

The court’s recognition of the AMA’s guidelines in *Oak Orchard Community Health Center* serves to distinguish a physician’s circumstances from that of an accountant (in *BDO Seidman*) and, at the same time aligns the ethical considerations of physicians with attorneys. The court stated that the AMA’s opinion of such covenants “is only one step away from the proscription of DR 2-108 (A).”<sup>17</sup> While the court’s denial of the TRO in question was itself important, the weighing of public policy concerns against the reasonableness of the restriction, was a significant departure from prior case law.

In all the decisions concerning the learned professions, the court’s contention that professionals are “unique and extraordinary” and not easily replaceable had, in the past moved the court to apply “strict scrutiny” in reviewing the facts and circumstances of the potential competition.<sup>18</sup> However, the court in *BDO Seidman* began a trend away from this analysis by looking at the “means” of the competition and determining whether it was fair or unfair, rather than viewing all competition as unfair and therefore a legitimate business interest of the employer worthy of protection. In *BDO Seidman* and *Oak Orchard Community Health Center*, the court found no unfair competition or misappropriation that would serve a legitimate employer interest in its protecting.

The common thread running through these physician cases, past and present, is the degree of factual detail involved in the court’s analysis. Accordingly, when attorneys are representing physicians it is essential to fully understand the scope of their clients’ practice, where their patients are located, where their hospital affiliations are and how patients are referred to their practice. If you represent the former employee, it is also important to know how they intend to compete with their prior employer and what specific referral mechanisms they will rely on in order to build a new practice.

Attorneys representing individuals in these cases, either in negotiations or when injunctive relief is sought to prevent the competition, must fully understand both the legal

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<sup>15</sup> See *Oak Orchard Community Health Center*, 2005 NY Slip Op at 25221.

<sup>16</sup> See *Karpinski*, 28 N.Y.2d 45; *Gelder Medical Group*, 41 N.Y.2d 680.

<sup>17</sup> See *Oak Orchard Community Health Center*, 2005 NY Slip Op at 25224.

<sup>18</sup> See *Reed, Roberts Assoc. v. Strauman*, 40 N.Y.2d 303, 307 (1976).

and ethical issues confronting their client as well. Whether to advise your client to take an assertive business action (i.e. leaving the practice and treating patients despite the restraints) or an assertive legal position (i.e. claiming breach and trying to negotiate out of the restrictions) must be explored early, particularly if the former employer has a litigious history.

Taking an assertive position can also be helpful to your client if the employer medical group or practice has materially breached her employment agreement. Documenting the practice's failure to pay compensation and bonuses, a lack of on-call support in the office, and inferior patient care may be enough to defend a TRO and even avoid your client's becoming a defendant at trial. Making both the employer and the court aware of other potential contract claims that she may have, such as the "clean hands" doctrine,<sup>19</sup> may also cause the court to dismiss a TRO and possibly invalidate the restriction.

However, once the court has issued an injunction, your physician client could be enjoined from treating her patients for an extended period of time and in a particular locale. She can also be limited in advertising and promoting her new practice and even in what medical procedures she will be able to perform. These limitations present serious financial concerns for the physician but as concerning is the ethical question of a patient's right to choose her own physician, not one mandated by the court.

While many physicians may still find it challenging to overcome the burdens of their restrictive covenants, with recent changes in the courts' attitude towards enforcement a knowledgeable attorney can persuade the court to consider factual information and public policy concerns. Employing an assertive strategy may also force negotiations or may even defeat a TRO. It may also allow a physician client to continue to serve her patients and remain a vital part of the medical community in which she works and resides.

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<sup>19</sup> "The clean hands doctrine bars equitable relief for the willful misconduct of a plaintiff which is fraudulent, illegal or unconscionable even though not of such a nature as to constitute a crime or a basis of legal action." *See* *Horne v. Radiological Health Services, P.C.*, 83 Misc. 2d 446, 456.