

MEMO

To: MMA Policy Council

From: MMA Committee on Ethics and Medical-Legal Affairs, Dick Geier, MD, Chair
Teresa Knoedler, MMA Staff

Re: Restrictive Covenants

Date: January 15, 2016

A restrictive covenant is a clause in an employment contract that prevents the employee from practicing his or her profession in some fashion, in the event the employee terminates the employment contract. In Minnesota, restrictive covenants are measured by their “reasonableness”. Minnesota courts closely scrutinize restrictive covenants for fairness, which is generally examined by the geographical scope of the restriction, the length of the restriction, and the scope of the restricted practice. Many restrictive covenants contain a liquidated damages provision that may permit a physician to “buy out” the restrictions; this is usually an enormously large sum of money. The vast majority of Minnesota physicians, in both private and integrated practice settings, have a restrictive covenant in their employment or partnership contract. Restrictive covenants are challenged by many who believe they unfairly restrict the physician-patient relationship, and that they unduly burden physician autonomy.

The MMA has considered restrictive covenants on several occasions over the last five years. A resolution from the 2011 House of Delegates called for legislation prohibiting the use of restrictive covenants in physician contracting. That resolution was considered by the MMA Ethics and Medical-Legal Affairs Committee in 2012 and 2013. The committee was unable to reach consensus or majority vote on the resolution. Some committee members felt that restrictive covenants undermine patient choice and unduly burden physicians; others felt that restrictive covenants are important tools for independent physician practices to manage human capital investments.

Per the Ethics Committee and the MMA Board of Trustees, the MMA Delegation to the AMA House of Delegates brought a resolution to the AMA in 2013, requesting that the AMA Council on Ethical and Judicial Affairs (CEJA) review its policy on restrictive covenants. That policy, last reaffirmed in 1998, “discouraged” the use of restrictive covenants in physician contracting and stated that restrictive covenants “may be unethical” if not reasonable in scope. CEJA review was already undertaking a review of the policy and, in 2014 revised the policy to read in part:

Competition among physicians is ethically justifiable when it is based on such factors as quality of services, skill, experience, conveniences offered to patients, fees, or credit terms.

Covenants-not-to-compete restrict competition, can disrupt continuity of care, and may limit access to care.

Physicians should not enter into covenants that:

- (a) unreasonably restrict the right of a physician to practice medicine for a specified period of time or in a specified geographic area on termination of a contractual relationship; and
- (b) do not make reasonable accommodation for patients' choice of physician.

After this updated policy was issued, in 2014 the Ethics Committee once again discussed restrictive covenants. Once again the committee was unable to reach consensus.

In April 2015, the MMA Policy Council convened a Policy Conference to address various challenges facing the physician-patient relationship. One session focused on restrictive covenants. An attorney familiar with restrictive covenants in physician contracting presented on the issue and fielded questions from the audience. At the end of the session, the audience was polled. 68.8% of respondents indicated that restrictive covenants were a "moderate" or "significant" threat to the physician-patient relationship. 51.5% indicated that geographic location was the most onerous aspect of a restrictive covenant, and 39.4 indicated that time limitations were the most onerous aspect. When asked what action the MMA should take on restrictive covenants, 30.3% responded "strongly oppose", and 60.6% said "do not oppose, but work to define 'reasonable restrictions'".

In light of the prolonged and difficult-to-resolve conversations within the MMA the last 5 years, and the results from the policy forum discussed above, staff and the MMA Ethics Committee worked to offer guidance on what may be a "reasonable" restrictive covenant. "Reasonable" for physicians may be different from "reasonable" for other professions who are regularly subject to restrictive covenants. Possible reasonable terms should address geographical scope, duration, and practice scope. There is very little precedent in other states to define this, specific to physician practice.

Accordingly, the Ethics Committee discussed the issue of restrictive covenants once again in November 2015. The committee felt that it was difficult to define a "one-size-fits all" reasonable restrictive covenant. There was a strong consensus that restrictive covenants are bad for patients and bad for physicians, and should be banned from physician contracts. Yet there were also strong voices that in some settings, restrictive covenants can be very "pro-physician" and may help small independent practices protect themselves against encroaching large systems. The committee considered a number of different metrics to define reasonable geographic limitations, including a population-density metric that would expand the geographic limitation for less-dense areas. In the end, the committee felt that it was simpler to articulate clear

boundaries for reasonableness. The committee offers the following policy proposal for consideration by the Council:

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Covenants not-to-compete are unreasonable if they:

- (a) prohibit practice for longer than one year;
- (b) apply to practice sites which were not the primary practice site of the restricted physician;
- (c) prohibit practice for a distance greater than 5 miles from the primary practice site of the restricted physician;
- (d) apply to services the restricted physician was not contracted with to provide;
- (e) prevent a patient from obtaining information from the employer about the restricted physician's new practice; or
- (f) include a liquidated damages clause in excess of one year of the physician's salary.