To compete or not to compete? That is the question.

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When forming a professional relationship, one question for both the physician and practice group to carefully consider is whether to enter into a restrictive covenant agreement. The term "restrictive covenant" is often used interchangeably with the term "non-compete," but they have distinct meanings. Restrictive covenant is a broad term encompassing an individual's continuing obligations to a business following the end of an employment or contract relationship. Those obligations may include a commitment not to: compete; solicit customers or employees of the business; interfere with the business' relationship with its customers or employees; disclose confidential business information; or disparage the business and its employees. In Arizona, restrictive covenants are generally disfavored, but particularly so when it comes to non-competes — a specific type of covenant that restricts an individual from working in his/her chosen profession. Arizona courts apply an even more exacting standard when reviewing the enforceability of non-compete covenants against physicians.

In the 1999 seminal restrictive covenant case, Valley Medical Specialists v. Farber, the Arizona Supreme Court did not go so far as to prohibit all non-competes as applied to physicians, but it came close. In Farber, a pulmonologist, whose practice included treating HIV patients with brachytherapy, entered into a non-compete that prohibited him from practicing medicine for three years within a five-mile radius of any of the practice's medical offices. The Court emphasized the unique nature of the physician-patient relationship and the right of patients to freely choose their doctor. The Court struck down the non-compete, finding that the duration and geographic scope were unreasonably broad and, further, that the employer's business interest in limiting competition was far outweighed by the public's interest in protecting the sanctity of the physician-patient relationship.

The ramifications of Farber are unclear since there have been virtually no published decisions interpreting the breadth of the decision as applied to physicians. But there is no question that post-Farber physician non-compete covenants will be subjected to a higher level of scrutiny as compared to other types of employment relationships.

Arizona's dim view of restrictive covenants in general became even more apparent with the recent Arizona Court of Appeals decision in Orca Communications Unlimited v. Node. Orca, a public relations firm, sought to constrain the President's post-employment pursuits with several different types of restrictive covenants. Adopting a rigorous standard of review, the Court struck down the restrictive covenant provisions in the President's employment agreement as overly broad. Reading Farber and Orca in conjunction will make the task of enforcing restrictive covenants against any employee an uphill battle, but particularly so against physicians.

So what does this mean if you are hiring physicians for your practice or you are a physician being asked to sign a restrictive covenant agreement as a condition of employment? Given the less than hospitable environment around restrictive covenants, medical practices should consider

whether to forgo non-competes altogether, and instead put in place a narrowly drafted non-solicitation, confidentiality and/or non-disparagement covenant to which the courts are more receptive. A non-solicitation covenant, for example, could prevent a former physician-employee from affirmatively soliciting the practice's patients, referral sources, and medical staff. The best chance for any of these covenants to survive a challenge will be to reasonably tailor the terms to the particular circumstances of the practice, specialty, and geographic area, to name a few.

A physician who is required to enter into a restrictive covenant agreement should consider whether to enter into such an agreement or whether to negotiate its terms. For example, if you plan to bring patients, staff, or referral sources with you when you join the practice, you may want to request that such pre-existing relationships be carved out of the non-solicitation clause. If you are being asked to sign a non-compete, you may want to negotiate a more limited duration and geographic scope. Also, the prospect of being bound by a restrictive covenant may impact the compensation terms. You may be justified negotiating a higher salary or bonus, severance upon termination, and/or an equity interest in the practice in exchange for entering into an agreement that restricts your ability to practice medicine or see your patients for a period of time after you leave the practice. If you already are bound by a restrictive covenant agreement with a medical practice, you should carefully review the terms to ensure you don't commit a violation if/when you move on to your next position.

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Regardless of whether you are seeking to bind someone to a restrictive covenant or being asked to sign one, you should consult with legal counsel to make sure you fully understand the terms and ramifications and avoid a legal dispute. While the outcome of these disputes is hard to predict, it is certain the litigation process will be extremely costly and highly disruptive to both sides.

In sum, the answer to the question: "To compete or not to compete" is not straightforward; keep in mind that the Arizona courts have adopted a hostile view of restrictive covenants, particularly those governing physicians. As such, physician restrictive covenants will be subjected to a high standard of scrutiny and must be narrowly tailored to have any chance of enforcement. ru

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