INTRODUCTION

The American Academy of Emergency Medicine (AAEM) opposes the use of post-contractual restrictive covenants, or “non-compete clauses,” in physician contracts. Some contract holders and hospital administrators control emergency physicians through exploitative contractual provisions. These provisions include restrictive covenants that control where emergency physicians may work, violating their professional rights and effectively preventing them from advocating for their patients. The threat of termination from a hospital medical staff as well as a restrictive covenant, may prevent physicians from advocating for their patients if the hospital or contract holder opposes such advocacy.

AAEM joins other professional organizations in taking this position. The American Medical Association strongly discourages the use of restrictive covenants in physician contracts, and both the American Academy of Emergency Medicine and the American College of Emergency Physicians prohibit the use of restrictive covenants in emergency physician contracts.

DISCUSSION

Illegitimate use of restrictive covenants. A restrictive covenant provides that upon termination of a professional contract, a physician may not work in a defined geographical location for a specific period of time. In such a circumstance, if a contract-holder terminates a professional contract, the physician may have to sell his home and move his family if he wants to continue practicing his profession.

Many emergency physicians assume that contract holders use restrictive covenants to prevent competition. However, preventing competition is not a legitimate business interest. Legitimate business interests supporting the use of restrictive covenants include the protection of (1) trade secrets, (2) referral sources, and (3) confidential information. Employers sometimes argue that since they expend considerable funds to educate or recruit physicians, the restrictive covenant protects their “investment.”

However, emergency physicians rarely possess trade secrets and do not disrupt referral patterns when they leave an emergency department. Confidentiality laws prevent physicians from divulging personal patient information. Furthermore,
emergency physicians receive their education during residency, not from contract-holders. If a contract-holder expended funds to recruit a physician, a contract may reasonably require the physician to repay those funds if she terminated the contract within a defined period of time.

Finally, the use of post-contractual restrictive covenants violates the professional rights of physicians. Article IV of the U.S. Constitution, as interpreted by the U.S. Supreme Court, guarantees all citizens the freedom of travel. Coincident with that right is the right to practice one’s trade or profession. Three states have laws specifically banning restrictive covenants in physician contracts, four states have near-absolute bans, and one state has a Supreme Court opinion banning restrictive covenants in most physician contracts.

The Rule of Reason. Courts in the remaining states use the “rule of reason” to decide whether to uphold post-contractual restrictive covenants. These courts reason that a party to a contract may compromise its legal rights under certain circumstances. These courts balance the public interest against the parties’ freedom to contract. Thus, even though a physician signs a contract which includes a restrictive covenant, courts may decide to not enforce the restrictive covenant.

In states that use the “rule of reason,” courts enforce restrictive covenants if (1) the employer/contract-holder has legitimate business interests, and (2) the time and territorial restrictions are reasonable, and no greater than required for protection of the employer/contract-holder. How much time is reasonable? A restrictive covenant may apply only long enough to allow the employer a reasonable amount of time to overcome the loss (i.e.: to recruit and train another physician). Therefore, if an employer/contract-holder replaces a physician within two weeks, then the duration of the restrictive covenant cannot reasonably extend beyond that time.

Courts generally disfavor post-contractual restrictive covenants because they exist as a narrow exception to Constitutional rights. Therefore, courts may strike down restrictive covenants for a number of other reasons, including the creation of a monopoly, illegal restraint of trade, and a general violation of the public interest. However, when applying the rule of reason, courts will apply relevant state laws. Depending on the state law involved, courts may uphold the restrictive covenant, requiring the physician to cease the practice of medicine or move to another locality.

Inapplicability of restrictive covenants in emergency medicine. Of all medical specialties, post-contractual restrictive covenants have the least applicability in emergency medicine. Despite their common use, restrictive covenants have no legitimacy in emergency medicine because (1) when emergency physicians move to another hospital, they do not take patients with them, (2) emergency physicians almost never learn “trade secrets” from contract-holders, (3) emergency physicians do not have referral lists to take to another hospital, (4) as hospital-based physicians, emergency physicians learn how to practice during their residencies, and do not learn office-management from employers, (5) in emergency medicine, contract-holders almost always use restrictive covenants for the illegitimate purpose of restricting competition, and (6) contract-holders use restrictive covenants as a means of controlling and exploiting emergency physicians and effectively prevent emergency physicians from advocating for their patients.

Violation of public policy. Courts often decide issues based on “public policy,” or what the court perceives as the common good. In addition to the threat to a physician’s career, and the inhibition of physicians’ ability to advocate for their patients, restrictive covenants violate public policy for a number of other reasons. As the Tennessee Supreme Court stated in Murphreesboro v. Udom, restrictive covenants decrease the number of physicians in a community thereby decreasing the overall quality of care, increase the cost of care, interfere with patients’ rights to choose their
physicians, disrupt doctor-patient relationships, raise antitrust concerns, and violate medical ethics. For all these reasons, the *Udom* court banned restrictive covenants in physician contracts in Tennessee.

**Non-interference clauses.** A reasonable “non-interference with contract” clause does not compromise the practice rights of emergency physicians. AAEM recognizes the right of contract holders to expect the loyalty of physicians working in their emergency departments. Certainly, emergency physicians have the right to file complaints and disagree with emergency department policies. However, emergency physicians should not conspire to control the emergency department management contract while working with other parties to whom they have contractual obligations. Likewise, the emergency physician should not conspire with other parties to assist them in obtaining the emergency department management contract. Therefore, AAEM does not oppose the use of reasonable “non-interference with contract” clauses.

**CONCLUSION**

The use of post-contractual restrictive covenants in physician contracts violates public policy and medical ethics. Of all medical specialties, restrictive covenants have the least applicability in emergency medicine. Often, restrictive covenants violate the law, either because of state laws that ban restrictive covenants in physician contracts, or because the restrictive covenants serve an illegitimate business interest such as the restriction of competition. Finally, restrictive covenants violate a strong standard of emergency medical practice in the United States, as both major emergency medical societies prohibit their use in emergency physician contracts. Therefore, AAEM condemns the use of post-contractual restrictive covenants in physician contracts.

*AAEM thanks Linda Kesselring for reviewing this manuscript.*

*References*

2. AAEM Mission Statement, 1997; AAEM Position Statement on Restrictions on the Right to Practice, 2005, American Academy of Emergency Medicine, Milwaukee
10. Massachusetts G.L.c. 112 §12X.
11. Alabama §8-1-1.
12. California §16602 Bus & Prof.
14. North Dakota 9-08-06.