

Resolution 21-310
Restrictive Covenants
Polk County Medical Association

Whereas, American Bar Association has “prohibited restrictive covenants between attorneys” and the ABA Model Rules of Professional Conduct state that a lawyer shall not participate in making “a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship.” Rule 4-5.6(a) of the Rules of Professional Conduct of the Florida Bar states that “[a] lawyer shall not participate in offering or making...[an] agreement that restricts the right of a lawyer to practice after termination of the relationship.” The Florida Bar Professional Ethics Committee Opinion elaborates: “The ‘special trust and confidence’ inherent in an attorney-client relationship dictates ‘that clients be given greater freedom to change legal representatives than might be tolerated in other employment relationships.’ When lawyers leave firms, they can go where they please and bring their clients with them; and

Whereas, Physicians should enjoy the identical freedom, mobility, and right to continuously care for their patients just as lawyers do for their clients; and

Whereas, If it is unethical for attorneys to have non-compete restrictions in Florida, how is it not unethical for physicians to have non-compete; and

Whereas, The case, Humana Medical Plan, Inc. v. Jacobson, M.D., 614 So. 2d 520 (Fla. 3d DCA 1992), rev. denied, 623 So. 2d 494 (Fla. 1993), The court stressed that “patients are not property or chattel of an HMO” and elaborated on the “doctor/patient relationship [as]...vital to the provision of health care” and as evolving “over time, by a doctor learning a patient’s history and exercising professional judgment in not only evaluating a patient’s complaints, but in developing a specific strategy for treating a patient’s ailments”; and

Whereas, The AMA has stated that restrictive covenants are “not in the public interest”; and

Whereas, Protection of the doctor-patient relationship is a matter of public health and safety. For this reason, in Florida there should be invalidation of physician non-compete agreements; and

Whereas, Covenants not to compete are designed to restrict otherwise lawful competition; and

Whereas, Despite debates by legal practitioners, academics, state legislatures and economist regarding restrictive employment covenants there are very few studies examining these agreements to provide evidence and guidance; and

Whereas, Employers seek to restrict the postemployment activities of their physicians’ regardless of their rank and status. When a physician is still employed by a particular entity, the physician has fiduciary duties that protect against unfair competition with the employer. These fiduciary duties consist of the duty of care and the duty of loyalty; and

Whereas, The duty of loyalty helps ensure that physician employees will serve the firm’s interests and refrain from harmful competition with it during their employment. However, once employment is terminated—for whatever reason—these duties end, and the departing physician employee is should be free to engage in any lawful competition; and

Whereas, The employer's goal for restrictive postemployment covenants is to control the activities of a former employee after the usual employee-employer relationship ends, effectively retaining exclusive use of the information and competitive advantage by contract. In the case of a CEO, there is a far greater risk of harm associated with losing that key employee to a competitor. This is because CEOs typically help create or have knowledge of and have unencumbered access to all of a company's trade secrets, supplier and strategic plans, strengths, and weaknesses. However, physicians have no such valve. The vast majority of physicians that are employed are hired to provide direct medical services to patients; and

Whereas, The CEO is a highly valuable employee and possesses sought-after skills that set him or her apart in a very competitive marketplace for managerial talent. Only the CEO will have unconstrained access to nearly every aspect of the business and its strategic direction. This unique position at the top of the firm's governance structure allows the CEO access to all of the firm's proprietary information, trade secrets, and supplier relationships, product cost structures, research and development information, and strategic plans. As a result, the CEO is the employee who can most harm the company if he or she leaves the firm to work for a competitor. Physician employee's do not have access to this type of information, they do not have unconstrained access to every aspect of the business, nor do physician employees' make decisions that involve the governance, strategic direction of the corporation/hospital; and

Whereas, Covenants not to compete relates to the well-known academic argument that the economic growth of Silicon Valley was made possible in part because of California does not enforced non-compete's. California's longstanding, strong public policy of protecting employee freedom of mobility, and its statutory ban on contractual restrictions on employee mobility and the rise of the tech economy in the state have led to a burst of recent scholarship that attempts to test the effect of non-compete enforcement on various business outcomes—in other words, a so-called "California effect"; and

Whereas, Florida court have aggressively enforced non-compete's (Office of Economic Policy U.S. Department of the Treasury Non-compete Contracts: Economic Effects and Policy Implications March 2016). Although non-compete contracts can have important social benefits, principally related to the protection of trade secrets, a growing body of evidence suggests that they are frequently used in ways that are hostile to the interests of workers and the broader economy. More importantly, Physician employee's, the vast majority of which are exclusively involved in providing medical care, possess no trade secrets, since medical knowledge and medical/surgical skills are not patentable; and

Whereas, There is evidence that non-compete clauses tend to suppress wages and discourage labor market mobility; and

Whereas, Several states have essentially banned non-compete provisions in physician contracts include California, Massachusetts, Delaware and Colorado. A New Mexico statute first enacted in 2015 prohibits provisions in agreements which restrict the right of healthcare practitioners; and

Whereas, The average cost to take a non-compete to court in Florida is at least \$100,000; and

Whereas, Non-compete provisions have a tremendous impact on physicians, resulting in restriction on their future mobility, financial health, and ability to continue practicing medicine. Most non-compete agreements are so prohibitive that it blocks physicians from making a move that might be better for

themselves and their patients. Even if the restraint does not immobilize the doctor, it can force physicians not only to relocate, but abandon their ethical responsibility to the patients; and

Whereas, AMA guidelines and stressed the “sensitive and personal nature of the doctor-patient relationship.” In Farber, the Arizona Supreme Court explained that “the doctor-patient relationship is special and entitled to unique protection” and that “[i]t cannot be easily or accurately compared to relationships in the commercial context”; and

Whereas, In light of non-compete negative impact on the doctor-patient relationship; that fact that the legal profession considers non-compete unethical and that the majority of non-compete provisions in Florida with physicians are between large Hospital and Corporate entities we should significantly limit or ban non-compete clauses for Florida physician’s; and

Whereas, Another reason the law frowns on non-compete agreements for attorneys is because they provide public service, which is to be encouraged. Physicians, who also serve the public and have ethical duties to make their care available, directly trigger that statutory concern with “public health, safety, and welfare”; and

Whereas, Restrictive covenants for doctors are not just ill-advised, but actually injurious to the public. Whereas, such restraints cause a shortage of necessary specialists in a particular community, and also obstruct the continuity of the doctor-patient relationship which fosters quality health care; and

Whereas, Today’s non-compete agreements can likewise block doctors from parting with an ill-suited employer and making a move that could inure to the benefit of patients and society at large
Whereas, Medicine has always adhered to the unremarkable proposition that a patient’s ability to form over time a trusting relationship with a chosen doctor brings lots of health benefits. In contrast, when a restrictive covenant results in the involuntary loss of a physician, it can impose serious physical and psychological damage on the patient; and

Whereas, Physicians blocked from seeing or even contacting former patients under their contracts are, thus, hobbled in their effort to fulfill their obligations to human beings; therefore be it

RESOLVED, That the Florida Medical Association adopts a policy to oppose restrictive covenants and non-complete clauses as it applies to physicians.

Fiscal Note:

Description	Amount	Budget Narrative
10 staff hours	\$400	Can be accomplished with current staff
Total	\$400	\$0 added to the operating budget

Fiscal notes are an estimate of the cost to implement a given Resolution. All Resolutions that are adopted by the House of Delegates will be referred to the FMA Committee on Finance and Appropriations for fiscal consideration.

Reference Committee: III – Legislation & Miscellaneous