Are Noncompete Contracts Between Physicians Bad Medicine? Advocating in the Affirmative by Drawing a Public Policy Parallel to the Legal Profession

Alina Klimkina

University of Kentucky
NOTES

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INTRODUCTION

In August of 2008, the California Supreme Court broadly held noncompete contracts per se invalid, even if narrowly tailored, unless necessary to protect trade secrets.⁴ The restrictive agreement, signed by a CPA several years prior to the suit, was found unlawful as against public policy.³ The court stated that the value of an employee’s mobility, the opportunity for employment, and free and fair competition substantially outweighed the value of enforcing the agreement between an employee and an employer.⁴

This California decision is a bold statement upholding “the values of free competition and employee mobility.”⁵ The case recognizes noncompete contracts under only a narrow exception, ultimately making it much more difficult to create such restrictions on competition and trade.⁶ Most significantly, in rejecting a long precedent of Ninth Circuit

¹ Bachelor of Arts in English and Philosophy, 2007, Centre College; Juris Doctor expected 2010, University of Kentucky College of Law. The author wishes to thank Professor Gaetke, whose invaluable insight inspired this Note. Also, the author wishes to thank her husband and family for their support.


³ Arthur Andersen, LLP, 189 P.3d at 291.


⁶ Id.; see also Hogarth, supra note 4.
cases, California places itself among a very few states to advocate against restrictive covenants in employment without differentiating as to the reasonableness of an agreement.7

"Historically, covenants not to compete were viewed as restraints of trade and were invalid at common law."8 In time, "ancillary restraints," such as noncompetes signed incident to employment, were enforced under "the rule of reason."9 The "war" between the employee's interests in professional mobility and the employer's desire to protect his business interests represents the "modern world of employee non-compete agreements."10 Even more striking is the steady approval of, and judicial assent to, restrictive covenants in some professions as opposed to the traditional disapproval of such contracts in the legal profession. The medical profession, where noncompetes have been upheld by most courts, if found reasonable, provides the best example.11

Against this backdrop, and in light of recent decisions, this Note discusses the background and policy of traditional noncompete agreements, the current trend of restrictive covenants, and most importantly, provides a public policy comparison between the professional fields of medicine and law in which the enforcement of noncompetes is strikingly different. Specifically, this Note presents an evaluation of the public policy arguments underlying the application and validity of restrictive covenants in these fields. In conclusion, this Note aims to draw a direct parallel between the two professions, and advocates for an approach that holds noncompete contracts in the field of medicine unethical.

I. Background

A. The Traditional Approach

Traditionally, courts placed a "heavy burden on employers to justify the need for [noncompete contracts] and the reasonableness

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9 Valley Med. Specialists, 982 P.2d at 1281 (emphasis added); see also RESTATEMENT (SECOND) OF CONTRACTS § 188 (1979).
of any postemployment restraint."  Thus, under the common law "reasonableness" test, courts favored the interests of the employee to those of their employers. Although noncompete contracts were permissible, the courts at common law imposed significant limitations on such covenants. In order to ensure that they were "not overly burdensome to employees and harmful to the marketplace," courts weighed the legitimate interests of the employer in protecting the nature and success of his business against the interests in the employee's ability to obtain employment. Additionally, courts valued the interests of society in maintaining the advantages of a free economy even with such agreements in place.

Under the traditional approach, in order to survive an attack on the validity of a noncompete contract, the employer was required to show a legitimate business or profit reason for any such covenant. The test ensured that the agreement was "not a naked attempt to restrict free competition." The purpose of any such agreement could not be merely to contract against competition or to prevent a former employee from using the skill or knowledge gained while working for a former employer.

Historically, courts recognized two legitimate business interests: protecting (1) the goodwill and (2) the trade secrets of an employer. In recognizing goodwill as an important asset of an employer's business, courts generally held noncompete contracts that focused on preventing a former employee from taking advantage of the employer's good name and reputation to be fair and reasonable. Although originally deemed a justification for enforcing noncompetes, the duty not to disclose the employer's confidential information and trade secrets is actually quite different in scope. Protecting trade secrets of a former employer imposes an obligation that is continuous, reaching far beyond the boundaries imposed by a restrictive covenant. When such a duty is imposed, an employee

12 See Garrison, supra note 10, at 111.
13 Id. at 110-11.
14 Id. at 115.
15 Id.
16 See Harlan Blake, Employee Agreements Not to Compete, 73 Harv. L. Rev. 625, 650 (1960). Professor Blake states that "[a]nything that impedes an employee's freedom of access to a job in which his productivity (and wages) would be higher, involves a cost in terms of the economy's welfare." Id. As such, these are "important" economic considerations. Id.
17 See Garrison, supra note 10, at 115.
18 Id.
20 See Garrison, supra note 10, at 116; see also Handler, supra note 19, at 729.
21 Garrison, supra note 10, at 116.
22 See, e.g., Omega Optical, Inc. v. Chroma Tech. Corp., 800 A.2d 1064, 1066 (Vt. 2002) (citing Restatement (Second) of Agency § 396(b) (1958) (noting the continuing duty of former employees not to disclose confidential information of the employer)).
may not disclose the protected information even when the restraint of a noncompete contract is lifted.23

Eventually, common law standards were altered to create a more relaxed approach to noncompetes.24 The major development was to allow courts to reform or partly rewrite such agreements as opposed to simply striking the agreement in its entirety.25 Thus, instead of punishing zealous employers for writing overly broad employment contracts, courts developed the “blue pencil” test to relieve them of the heavy burden they had previously been forced to carry.26 While the doctrine allowed courts to enforce separate lawful portions within a contract or to alter language where a change was grammatically possible,27 a court could not create a new contract between the parties.28 As such, an agreement could be altered only if its material provisions remained unaffected after the revision.29 While the blue pencil test endured for several decades, reformation was considered a significant

23 See Garrison, supra note 10, at 113.
24 Id. at 114.
25 Id. at 118–19.
26 Id. at 111; see, e.g., Dicen v. New Sesco, Inc., 839 N.E.2d 684, 687 (Ind. 2005) (stating that Indiana courts have “historically enforced reasonable restrictions, but struck unreasonable restrictions, granted they are divisible”). This principle later became known as the blue pencil test. Id.; see also Karlin v. Weinberg, 390 A.2d 1161, 1168 n.4 (N.J. 1978) (stating that under New Jersey law, a court may modify the terms of a noncompete to make the terms of the contract reasonable). But see Blake, supra note 16, at 681–82 (stating that although this test is “still occasionally advanced as a reason for not enforcing a restraint drafted too broadly, most courts either issue an injunction . . . or refuse enforcement altogether”) (internal citations omitted); Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 545 (Wyo. 1993) (noting that the blue pencil test has been criticized and rejected by many courts).
27 See, e.g., Compass Bank v. Hartley, 430 F. Supp. 2d 973, 981 (D. Ariz. 2006) (finding that “under limited circumstances,” the application of the doctrine is acceptable if it “permit[s] a Court to cross-out some unreasonable sections in favor of more reasonable ones without rewriting them”); Varsity Gold, Inc. v. Porzio, 45 P.3d 352, 358–59 (Ariz. Ct. App. 2002) (acknowledging that Arizona courts may use a “blue pencil” to eliminate unreasonable and grammatically severable provisions in a noncompete contract in order to preserve the valid portions of the agreement (internal citations omitted); see also Licocci v. Cardinal Assocs., Inc., 445 N.E.2d 556, 561 (Ind. 1983) (stating that “if the covenant is clearly separated into parts and some parts are reasonable and others are not, the contract may be held divisible. The reasonable restrictions may then be enforced”).
28 See, e.g., E. Bus. Forms, Inc. v. Kistler, 189 S.E.2d 22, 24 (S.C. 1972) (“We cannot make a new agreement for the parties into which they did not voluntarily enter.”).
29 See Rockford Mfg., Ltd. v. Bennet, 296 F. Supp. 2d 681, 687 (D. S.C. 2003) (“The severability of the contract must be determined from its language and subject matter; and where the severable character of the agreement is not determinable from the contract itself, the court, in order to uphold the contract, cannot create a new agreement for the parties, for example, so as to make the restraint a partial restraint within a lesser area than that specified in the covenant or for a lesser period of time.”) (internal citations omitted). Such a change would be material and, thus, is impermissible. Id.
change in the nature of noncompetes and is still applicable today.  

B. The Modern Survey

In effect, "the modern approach shifts the balance toward the employer's interests in protecting its property and forestalling competition by former employees."31 In many states, noncompetes are "considered valid so long as they are 'reasonably' imposed in terms of duration, geography and other factors."32 At one time, "some agreements contained lifetime bans."33 Today, periods of six months to two years are common in terms of the time limitation.34

Currently, "many courts employ a balancing-of-interests test that is more deferential to employers despite [the courts'] stated adherence to the common law."35 Many states that initially followed a strict common law reasonableness test have moved to allow for a more permissive approach for

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31 See Garrison, supra note 10, at 135.

32 See Armstrong, supra note 5.


34 Id.; see, e.g., Rogers v. Runfola & Assocs., Inc., 565 N.E.2d 540, 544 (Ohio 1991) (holding that a duration of one year was reasonable); Raimonde v. Van Vlerah, 325 N.E.2d 544, 548 (Ohio 1975) (holding that a duration of three years was reasonable).

35 Garrison, supra note 10, at 123; see, e.g., Dobbins, DeGuire & Tucker, P.C. v. Rutherford, 708 P.2d 577, 580 (Mont. 1985) (holding that "the covenant should afford reasonable protection for and not impose an unreasonable burden upon the employer, the employee or the public"); Vt. Elec. Supply Co. v. Andrus, 315 A.2d 456, 458 (Vt. 1974) (mandating enforcement unless the agreement is contrary to public policy, unnecessary for protection of the employer, or unnecessarily restrictive of the employees). Some states permit restrictive covenants of up to five years. See, e.g., Med. Educ. Assistance Corp. v. State, 19 S.W.3d 803, 816 (Tenn. Ct. App. 2000) (enforcing a five-year noncompete agreement between a medical school and a faculty physician, making special note of the important public interest in maintaining a viable medical school in upper east Tennessee).
employee noncompete agreements. In fact, several states have broadened the scope of legitimate interests that can be protected by a noncompete. For instance, protecting "highly specialized, current information not generally known in the industry, created and stimulated by the research environment furnished by the employer, to which the employee has been 'exposed' and 'enriched' solely due to his employment" is an interest that has gained substantial recognition.

Furthermore, in recent years more emphasis has been placed on employee education and training. Courts have begun to recognize a legitimate interest in the extraordinary costs of employee education and specialized training in order to validate the enforcement of restrictive covenants. Decisions that broaden the scope of legitimate noncompete contracts may, however, "significantly expand the circumstances under which an employer can conceivably justify an employee noncompete agreement." Nevertheless, the majority of courts still turn to factors analogous to the common law reasonableness approach. This test balances the

36 Compare Crowell v. Woodruff, 245 S.W.2d 447, 449 (Ky. 1951) (stating that noncompete contracts must be upheld if "the restraint is no greater than reasonably necessary to secure the protection" of the employer's legitimate business interests), with Hammons v. Big Sandy Claims Serv., Inc., 567 S.W.2d 313, 315 (Ky. Ct. App. 1978) (adopting the enforceability standard where a noncompete agreement is enforceable if "the restriction is such only as to afford fair protection to the interests of the covenantor and is not so large as to interfere with the public interests or impose undue hardship on the party restricted") (citing Ceremia v. Mitchell, 242 S.W.2d 359, 364 (Ky. 1951)); see also Briggs v. Butler, 45 N.E.2d 757, 763 (Ohio 1942) (Ohio announced a three-part test to evaluate the enforceability of employee noncompete agreements declaring postemployment restraints enforceable only when: (1) the restriction was not "beyond that reasonably required for the protection of the employer in his business," (2) "the provisions [were] not unreasonably restrictive upon the rights of the employee," and (3) the covenant did "not contravene public policy."); cf Raimonde v. Van Vlerah, 325 N.E.2d 544, 546-47 (Ohio 1975) (reformation reflected a pro-employer trend in noncompete agreements and rejected the blue pencil test).

37 See Garrison, supra note 10, at 127.
39 See Garrison, supra note 10, at 128; see, e.g., Robbins v. Finlay, 645 P.2d 623, 627 (Utah 1982) (court held that "an extraordinary investment in the training or education of the employee" is an interest that deserved legitimate protection); Hapney v. Cent. Garage, Inc., 579 So.2d 127, 132 (Fla. Dist. Ct. App. 1991) (court stated that an employer who "dedicates time and money to the extraordinary training and education of an employee, whereby the employee attains a unique skill or an enhanced degree of sophistication in an existing skill," can be warranted protection as means of a restrictive covenant); see also Borg–Warner Protective Servs., Corp. v. Guardsmark, Inc., 946 F. Supp. 495, 501 (E.D. Ky. 1996) (the court enforced an agreement not to compete, reasoning that the employer's investment in the employee clearly had bearing on the balancing of the hardship to the employee and the public interest).
40 See Reinfeld supra note 33; Garrison, supra note 10, at 128-29.
41 See Garrison, supra note 10, at 128.
42 Id. at 117-20.
reasonableness of the duration of the agreement, the geographic area covered, and the business activities restricted by the covenant. Under the current test, the scope of a restrictive covenant between an employer and his employee "cannot be broader than reasonably necessary to protect the legitimate interests of the employer ...." This concern is exactly why courts are disinclined to uphold noncompete contracts that preclude an employee from engaging in a similar business or that inhibit an employee's ability to work for a competitor in any capacity. Such a rule forces a closer reading of the contract by the court, as well as much more precise drafting by most employers.

In some states, statutes permitting restrictive covenants have begun to lose their force. For instance, in California, the operative code section provides that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." That section has been interpreted to prohibit "any agreement that restricts an employee from working for a competitor of his former employer or imposing a penalty for doing so." Trade secrets are the only consistently recognized exception, because they protect a company's confidential customer lists and proprietary information. Most courts limit such contracts to a duration of six (6) months to two (2) years. See, e.g., Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 544-45 (Wyo. 1993) (holding that the three year restriction provided by the noncompete contract would be in violation of public policy, but stating that one year would be both reasonable and "sufficient to moderate the risk" to the employer). Some courts, however, have also upheld noncompete contracts that provide for an even longer duration. See, e.g., Blue Ridge Anesthesia & Critical Care, Inc. v. Gidick, 389 S.E.2d 467, 470 (Va. 1990) (stating that an agreement which provides for a three (3) year restriction is reasonable); Roanoke Eng'g Sales Co. v. Rosenbaum, 290 S.E.2d 882, 887 (Va. 1982) (holding the same).

43 Most courts limit such contracts to a duration of six (6) months to two (2) years. See, e.g., Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 544-45 (Wyo. 1993) (holding that the three year restriction provided by the noncompete contract would be in violation of public policy, but stating that one year would be both reasonable and "sufficient to moderate the risk" to the employer). Some courts, however, have also upheld noncompete contracts that provide for an even longer duration. See, e.g., Blue Ridge Anesthesia & Critical Care, Inc. v. Gidick, 389 S.E.2d 467, 470 (Va. 1990) (stating that an agreement which provides for a three (3) year restriction is reasonable); Roanoke Eng'g Sales Co. v. Rosenbaum, 290 S.E.2d 882, 887 (Va. 1982) (holding the same).

44 See Standard Register Co. v. Kerrigan, 119 S.E.2d 533, 539-40 (S.C. 1961) (stating that to be reasonable, the noncompete "must not be unduly harsh and oppressive on the employee"). Thus, as to the geographic area, the limitation is unreasonable, unduly harsh, and oppressive "when the contract tends to deprive the employee the opportunity of supporting himself and his family." Id.

45 See, e.g., Bridgestone/Firestone, Inc. v. Lockhart, 5 F. Supp.2d 667, 683-84 (S.D. Ind. 1998) (the type of activities that the noncompete agreement prohibits an employee from engaging in must be tied to the legitimate interests an employer is seeking to protect).

46 See Garrison, supra note 10, at 118.

47 Id.; see, e.g., Star Direct, Inc. v. Dal Pra, 767 N.W.2d 898, 911 (Wis. 2009) (holding invalid a business clause which prohibited the former employee from engaging "in any business which is substantially similar to or in competition with the business" of the employer) (emphasis added).

48 See Star Direct, Inc., 767 N.W.2d at 911; see also CAL. BUS. & PROF. CODE § 16600 (West 2004).

49 § 16600.

50 See Garrison, supra note 10, at 120; see also Edwards v. Arthur Anderson, LLP, 189 P.3d 285, 288 (Ca. 2008).

51 See Garrison, supra note 10, at 120.
California is unique in that it has both statutorily and judicially declared void any contract by which a former employee is barred from engaging in any similar lawful business or trade.\footnote{Compare Mont. Code Ann. § 28-2-703 (2005); Okla. Stat. Ann. tit. 15, § 217 (West 2007), with Cal. Bus. & Prof. Code § 16600 (West 2004); N.D. Cent. Code § 9-08-06 (1987).} By contrast, several states have read their codes to allow a more permissive approach.\footnote{Mont. Code Ann. § 28-2-703 (2005); Okla. Stat. tit. 15, § 217 (1993); see also Garrison, supra note 10, at 121 ("Regulatory statutes in other states limit the enforceability of employee noncompete agreements to a lesser extent than in California.").} Generally, contracts not to compete are "disfavored" in Tennessee\footnote{Murfreesboro Med. Clinic, P.A. v. Udom, 166 S.W.3d 674, 678 (Tenn. 2005) (citing Hasty v. Rent-A-Driver, Inc., 671 S.W.2d 471, 472 (Tenn. 1984)). Note that the Tennessee legislature has since acted to permit physician noncompete agreements. See Cent. Ind. Podiatry, P.C. v. Krueger, 882 N.E.2d 723, 728 (Ind. 2008) (citing Act of June 21, 2007, 2007 Tenn. Pub. Acts 487 (codified at Tenn. Code Ann. § 63-1-148, effective Jan. 1, 2008) (permitting physician noncompete agreements if they are in writing, last two years or less, and keep within certain geographical limitations)).} and Virginia;\footnote{See, e.g., Simmons v. Miller, 544 S.E.2d 666, 678 (Va. 2001) (invalidating a noncompete contract which provided that the employee could not "directly or indirectly, own, manage, control, be employed by, participate in, or be connected in any manner with ownership, management, operation, or control of any business similar to the type of business conducted by the [employer] for a period of three years). According to the Supreme Court of Virginia, such an agreement is an "unnecessary and unreasonable restraint of trade" that is unduly harsh, oppressive, and "offensive to the public policy of the Commonwealth." Id.; see also Omniplex World Servs. Corp. v. U.S. Investigations Servs., Inc., 618 S.E.2d 340, 342-43 (Va. 2005) (stating that "restrictive covenants are disfavored restraints on trade" and holding that the covenant was "overbroad and unenforceable").} only covenants that "implicate important public policy issues" are reviewed under a stricter analysis.\footnote{Murfreesboro Med. Clinic, 166 S.W.3d at 679.} Similarly, several other courts have proclaimed that "employment noncompete agreements are looked upon with disfavor." Increasingly, courts are "looking at the noncompete agreements with more skepticism, finding that such contracts frequently go too far in restraining employees, especially salespeople."\footnote{See Reinfeld, supra note 33.}
C. The Emerging Trend

Taken together, these changes in the law “have substantially altered the legal landscape for employees bound by covenants not to compete.” Some argue that the new trend in the law of noncompete is an “assault on the modern approach.” Others claim that the emerging trend “suggests that courts are generally more inclined to invalidate employee noncompete agreements,” emphasizing the importance of protecting employees’ interests in mobility and the ability to make a living in their own trade. More stringent scrutiny of such contractual clauses reflects changes in our economy and in the modern workplace.

The newest approach retreats from modern decisions, focusing instead on limiting what is considered a legitimate business interest under restrictive covenants, as well as limiting the courts’ powers of reformation. Recently, the Virginia Supreme Court produced a string of surprising opinions that depart from the modern approach by requiring a closer connection between the language of the noncompete agreement and the asserted interests of the employer. Other states have followed this example. In sum, these recent opinions that delineate a trend in favor of employee mobility and competition have made both drafting and enforcement of noncompetes a challenge for employers.

Finally, the changing nature of the typical employment relationship, particularly the extinction of the traditional long-term, life-loyal employee, must be considered when analyzing restrictive covenants today. Well suited for the old employer-employee relationship, noncompete agreements presently seem outdated, stifling modern employees who yearn for a greater breadth of experience. Unlike the traditional model

59 Garrison, supra note 10, at 135.
60 Id. at 111.
61 Id. at 112.
62 Id.
63 Id. at 135-39; see, e.g., Nat’l Employment Serv. Corp. v. Olsten Staff. Serv., Inc., 761 A.2d 401, 405 (N.H. 2000) (stating that the costs associated with employee recruitment are not legitimate business interests of an employer).
66 Garrison, supra note 10, at 148.
67 Id. at 165; see also Rachel S. Arnow-Richman, Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes, 80 OR. L. REV. 1163, 1167 (2001); Katherine V. W. Stone, Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace, 34 CONN. L. REV. 721, 731 (2002).
68 See Garrison, supra note 10, at 166.
which emphasized employee loyalty and promotion within the workplace, the primary characteristics of the new relationship are “mobility, a lack of job security, and limited loyalty by either employees or employers.”

Competition forces new strategies in the structure of most organizations.

II. Discussion: Analyzing and Comparing Noncompete Agreements in the Medical and Legal Professions

A. Restrictive Covenants in the Legal Profession

Restrictive covenants have been consistently held unethical in the practice of law. Since the adoption of its first code of professional conduct, the American Bar Association (ABA) has plainly “prohibited restrictive covenants between attorneys.” While some law firms have inevitably resorted to using restrictive covenants, such agreements have been consistently invalidated on public policy grounds. The only outward limit on this conduct are the bounds of the law itself, which emphasizes that all actions of the lawyer must be “solely for the benefit of the client and free of compromising influences and loyalties.” Under the rules, nothing at all “should be permitted to dilute” this relationship and the duty owed by an attorney to his client.

The Model Rules of Professional Conduct promulgated by the ABA dictate 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.” The rule provides two exceptions: an agreement concerning benefits upon retirement or “an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.” Thus, the provisions specifically assert that an attorney may not enter into an agreement under any circumstances that restricts his right to practice law. Furthermore, the comments to the Model Rules explain that an agreement restricting an attorney's right to practice upon leaving a firm not only limits

69 Id.


71 See Sfikas, supra, note 11, at 1310; see, e.g., Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W. 2d 528, 529–30 (Tenn. 1991). A law firm sought to enforce a deferred compensation agreement – essentially a noncompete in disguise – against a former associate. The court determined that the covenant was contrary to public interest. Id.

72 Model Code of Prof'l Responsibility EC 5–1 (1980).

73 Id.

74 Model Rules of Prof'l Conduct R. 5.6(a) (2003) (emphasis added).

75 Model Rules of Prof'l Conduct R. 5.6(a)–(b) (2003).

76 Id.
his or her professional autonomy, but restricts the "freedom of clients to choose a lawyer."\textsuperscript{77} Additionally, the comments elucidate that the purpose of section (b) is to prevent a settlement by an attorney on behalf of a client which potentially places a restriction on a lawyer's ability to represent any other person in connection with that claim.\textsuperscript{78} Settlements that mandate that a lawyer not represent other persons in connection with settling a claim on behalf of a client are prohibited.\textsuperscript{79} In contrast, as the comments explain, this rule does not apply to the terms of the sale of a law practice.\textsuperscript{80} The emphasis of the rule is on protecting the interests of the client, not a firm's pecuniary interests in preventing the former employee from competing.

The Model Code rule is an analogue to the rule found in the Model Rules. The two are nearly identical in that requiring an employed attorney to sign a noncompete under most circumstances is against the ethics of the profession.\textsuperscript{81} Just like the Model Rules, the Model Code of Professional Responsibility provides that "[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."\textsuperscript{82} A general restriction on the right to practice is deemed "unwarranted" and "inconsistent with [an attorney's] professional status."\textsuperscript{83} The Code provides that, "[i]n connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law."\textsuperscript{84}

Comparatively, most jurisdictions have promulgated rules of professional conduct based on the Model Rules.\textsuperscript{85} Texas and Kentucky are two examples. Texas Rule 5.06 is nearly identical to Model Rule 5.6.\textsuperscript{86}

\begin{footnotesize}
\item[77] Id. at cmt. 1.
\item[78] Id. at cmt. 2.
\item[79] Id.
\item[80] Id. at cmt. 3.
\item[81] MODEL CODE OF PROF'L RESPONSIBILITY DR 2–108(A) (1980); MODEL RULES OF PROF'L CONDUCT R. 5.6 (2003).
\item[82] MODEL CODE OF PROF'L RESPONSIBILITY DR 2–108(A) (1980).
\item[83] ABA Comm. on Prof'l Ethics, Formal Op. 300 (1961); MODEL RULES OF PROF'L CONDUCT R. 5.6(a)–(b) (2003).
\item[84] MODEL CODE OF PROF'L RESPONSIBILITY, DR 2–108(B) (1980).
\item[85] See MODEL RULES OF PROF'L CONDUCT R. 5.6 (2003); see also AM. LEGAL ETHICS LIBRARY, TOPICAL OVERVIEW, http://www.law.cornell.edu/ethics/ (follow "Listing by topic" hyperlink; then scroll down to 5.6:100 Comparative Analysis) (last visited Oct. 8, 2009) (the following states have adopted rules of professional conduct that are directly based on the Model Rules: Arizona, Arkansas, Colorado, Connecticut, D.C., Florida, Illinois, Kentucky, Louisiana, Maryland, Minnesota, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas).
\item[86] TEX. DISCIP. RULES OF PROF'L CONDUCT R. 5.06 (2009); MODEL RULES OF PROF'L
\end{footnotesize}
The only difference is the additional clause in the Texas rule at the end of subsection (b), stating that an agreement restricting a lawyer's right to practice can be made "as part of the settlement of a disciplinary proceeding against a lawyer."\(^7\) Enacted by its Supreme Court, the Kentucky rule tracks the language of Model Rule 5.6(a).\(^8\) However, unlike Model Rule 5.6(b),\(^9\) which refers to a "client controversy," the Kentucky rule refers to a "controversy between private parties."\(^10\) Lastly, because Kentucky has not yet adopted Model Rule 1.17 dealing with the sale of a law practice, comment 3 does not appear in the commentary to its Rules of Professional Conduct.\(^11\)

As mandated by the Model Rules, the Kentucky rule also states that a lawyer may not procure a settlement which restricts his right to practice in the future.\(^12\) The Kentucky Bar Association has held that it is a violation of the Kentucky Rules of Professional Conduct to condition the receipt of certain payments due to a withdrawing partner on an agreement restricting him from practicing in Kentucky for two years.\(^13\) Similarly, under the Kentucky rules an attorney may not include in the firm's employment agreement a restrictive covenant prohibiting the associate from practicing law within a stated distance of the attorney's office upon termination.\(^14\) Such holdings carry out precisely the same purpose as the Model Rules and comments.

Unlike the rules in most jurisdictions, New York's Rules of Professional Conduct are based on DR 2-108(A) of the Model Code.\(^15\) In substance, the New York rule is identical to Model Rule 5.6 as well.\(^16\) New York DR

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\(^7\) Tex. Disciplinary Rules Prof'L Conduct R. 5.06(b) (2003).

\(^8\) Model Rules of Prof'L Conduct R. 5.6 (2003); Ky. Rules of Prof'L Conduct 5.6 (2006); see also AM. LEGAL ETHICS LIBRARY, supra note 85. The Kentucky rule differs only slightly from the Model Rule. Unlike the Model rule, the Kentucky rule does not specifically refer to shareholder or other types of agreements; it refers to 'agreements' in general. This difference is immaterial to the content and effect of the rule as a whole. See Model Rules of Prof'L Conduct R. 5.6 (2003); Ky. Rules of Prof'L Conduct 5.6 (2006).

\(^9\) Model Rules of Prof'L Conduct R. 5.6(b) (2003).

\(^10\) Ky. Rules of Prof'L Conduct 5.6(b) (2006).

\(^11\) See Model Rules of Prof'L Conduct R. 1.17 (2003); Model Rules of Prof'L Conduct R. 5.6 cmt. 3 (2003); AM. LEGAL ETHICS LIBRARY, supra note 85.

\(^12\) Model Rules of Prof'L Conduct R. 5.6 (2003); Ky. Rules of Prof'L Conduct 5.6(b) (2006).

\(^13\) Ky. Bar Ass'n, Ethics Opinion, No. E-326 (1987); see also Model Rules of Prof'L Conduct R. 5.6 (2003); AM. LEGAL ETHICS LIBRARY, supra note 85.

\(^14\) Ky. Bar Ass'n, Ethics Opinion, No. E -176 (1977); see also Model Rules of Prof'L Conduct R. 5.6 (2003); AM. LEGAL ETHICS LIBRARY, supra note 85.

\(^15\) N.Y. Code of Prof'L Responsibility DR 2-108 (2003); see also Model Code of Prof'L Responsibility DR 2-108(A) (1980); AM. LEGAL ETHICS LIBRARY, supra note 85.

\(^16\) N.Y. Code of Prof'L Responsibility DR 2-108 (2003); see also Model Code of Prof'L Responsibility DR 2-108(A) (1980); AM. LEGAL ETHICS LIBRARY, supra note 85; see
BAD MEDICINE?

2-108(A) provides that "[a] lawyer shall not be 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." Case law dictates, for instance, that a law firm violates DR 2-108(A) if its partnership agreement provides that partners who withdraw from the firm and, as a result, become direct competitors must forfeit profits already earned before leaving the firm. In contrast, however, arbitration awards which reduce the amount paid to a withdrawing partner according to income derived from other sources are permissible and do not violate DR 2-108 with respect to noncompetes.

Furthermore, in connection with settlements restricting a lawyer's right to future practice, the New York rule provides that "a lawyer shall not enter into an agreement that restricts the right of a lawyer to practice law." New York courts have held, however, that as part of the settlement in a mass tort suit, defendants may, nonetheless, take part in an agreement which would prevent plaintiffs' attorneys from representing any similar clients in the future. Despite this judicial rule, it is still a recognized principle that an attorney's freedom to contract and practice cannot be precluded by a settlement agreement. Public policy is the backbone of this rationale.

On the other hand, California, unlike any other jurisdiction, has enacted its own rules of professional conduct. California's counterpart to Model Rule 5.6 contains both superficial and substantive differences. The California rule, for instance, prohibits agreements made in connection with the settlement of a lawsuit without limitations, while the Model

also infra notes 97 – 100.

100 N.Y. CODE OF PROF'L RESPONSIBILITY DR 2–108(B) (2003).
101 Id. But see Feldman v. Minars, 230 A.D.2d 356, 361 (N.Y. App. Div. 1997) (concluding that while an argument to the contrary could be made under the Rules of Professional Responsibility, “an agreement by counsel not to represent similar plaintiffs in similar actions against a contracting party is not against the public policy of the State of New York”). Notably, the Court also remarked in its opinion that even if such an agreement “is against the public policy of this State, the ‘violation’ can be addressed by the appropriate disciplinary authorities.” Id. (internal quotations omitted.) As such, the court left open the possibility of a future holding that would follow the New York Code of Professional Responsibility. Id. See also Blue Cross & Blue Shield of N.J. v. Philip Morris, Inc., 53 F. Supp. 2d 338, 344 (E.D.N.Y. 1999) (noting that the “rule against restrictive covenants has been criticized as ‘an anachronism, illogical and bad policy,’ particularly in the context of mass torts,” and upholding the agreement that restricted “the right of a single defendant” to counsel by which he was represented in the present lawsuit).
103 CAL. RULES OF PROF'L CONDUCT 1–500 (1992); see also, MODEL RULES OF PROF'L CONDUCT R. 5.6 (2003); Am. Legal Ethics Library, supra note 85.
Rules prohibit only agreements made in connection with the settlement of a private lawsuit.\textsuperscript{104} According to the ABA, the difference is only one of semantics.\textsuperscript{105} Furthermore, both rules allow restrictions on the right to practice with regard to agreements concerning benefits upon retirement.\textsuperscript{106} Additionally, both rules allow restrictions on the right to practice law in employment and partnership agreements so long as the restriction does not extend beyond the termination of the employment or partnership.\textsuperscript{107}

The broader scope of the California rule is the most meaningful difference between the rules. Unlike the Model rule, the California rule dictates that a lawyer may not offer or make any type of "an agreement" that restricts the right of an attorney to practice law.\textsuperscript{108} The latter rule includes agreements that may have an incidental or indirect effect on a lawyer's right to practice, as well as any such collateral agreements (although it is silent regarding its application to the sale of a law practice).\textsuperscript{109} The California rule is also substantially similar to the Model Code rule.

As stated, the purpose of the California rule is to protect the "historical right of the public to counsel of choice," under the belief that restrictive covenants "not only interfere with a member's professional autonomy, but also interfere with the public's right to counsel of choice."\textsuperscript{110} In addressing the scope of its rule, the California Supreme Court has held that "[a]n agreement that assesses a reasonable cost against a partner who chooses to compete with his or her former partners does not restrict" a lawyer from practicing law in the sense intended by the rule.\textsuperscript{111} Rather, a reasonable cost merely "attaches an economic consequence to a departing partner's unrestricted choice to pursue a particular kind of practice."\textsuperscript{112} Any such fee, however, cannot be unconscionable.\textsuperscript{113} Finally, although the scope of the California rule is broad, there is an important exception to the rule

\textsuperscript{104} Compare Cal. Rules of Prof'l Conduct 1–500 (1992), with Model Rules of Prof'l Conduct R. 5.6 (2003).
\textsuperscript{105} ABA Comm. on Prof'l Ethics and Prof'l Responsibility, Formal Op. 95–394 (1995).
\textsuperscript{106} Cal. Rules of Prof'l Conduct 1–500 (1992); Model Rules of Prof'l Conduct R. 5.6 (2003); Am. Legal Ethics Library, supra note 85.
\textsuperscript{108} Cal. Rules of Prof'l Conduct 1–500(A) (1992) (emphasis added); see also Model Code of Prof'l Responsibility DR 2–108(A) (1980).
\textsuperscript{111} Howard v. Babcock, 863 P.2d 150, 156 (Cal. 1993).
\textsuperscript{112} Id.
against settlements which restrict an attorney’s practice of law. Specifically, the rule “exempts agreements in lieu of disciplinary prosecution entered into between attorneys and the State Bar . . . and conditions of probation imposed by the State Bar Court incident to discipline from this rule’s prohibitions.”114 Therefore, an attorney may agree to restrict his or her law practice when such an agreement is made in connection with a state bar disciplinary proceeding.115

Just as the rules of professional conduct promulgated in each jurisdiction, the Restatement of the Law Governing Lawyers also includes a provision prohibiting restrictions on a lawyer’s right to practice.116 The Restatement provides that “[a] lawyer may not offer or enter into a law–firm agreement that restricts the right of the lawyer to practice law after terminating the relationship, except for a restriction incident to the lawyer’s retirement from the practice of law.”117 The Restatement prescribes that “[i]n settling a client claim, a lawyer may not offer or enter into an agreement that restricts the right of the lawyer to practice law, including the right to represent or take particular action on behalf of other clients.”118 Thus, the message and purpose of the Restatement rules are identical to that promulgated by the ABA.

In approaching noncompete agreements, courts give credence to the position of the ABA.119 For instance, the Tennessee Supreme Court has acknowledged that the practice of law is “different from a common business or trade because lawyers deal with clients, not merchandise, and lawyers have a duty to make legal counsel available to the public.”120 The rules promulgated by the ABA Ethics Committee demonstrate the strong view that the practice of law is unlike a common business or trade.121 Lawyers, unlike accountants, merchants, and court reporters, have a duty to make legal counsel available to the public.122 With its emphasis on professional freedom and the client’s freedom to choose, the rules prohibiting restrictions

114 See Am. Legal Ethics Library, supra note 110.
117 Id. at § 13(1).
118 Id. at § 13(2).
119 See Garrison, supra note 10, at 148; see also Sfikas, supra note 11, at 1310.
120 Sfikas, supra note 11, at 1310; see Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528, 529–30 (Tenn. 1991) (noting the position of the American Bar Association’s Ethics Committee); see also Model Code of Prof’l Responsibility EC 2–1 (1980).
on a lawyer's right to practice are often considered the most unique and important in the body of legal ethics.\textsuperscript{123}

While business and commercial standards may be used to evaluate the reasonableness of a covenant not to compete in most any field, the legal profession is unique in that restrictions in this field are largely injurious to the public as a whole.\textsuperscript{124} When it comes to developing a lawyer-client relationship, a client is entitled to representation by the attorney of his choice, notwithstanding traditional considerations.\textsuperscript{125} The "relationship is consensual, highly fiduciary on the part of counsel," and there is no other principle in the practice of law and professional responsibility that is "more deeply rooted."\textsuperscript{126} Due to the importance and the privacy inherent in the lawyer-client relationship, attorneys "are often held to what almost amounts to a per se rule prohibiting non-competition contracts"\textsuperscript{127} because the integrity of the legal profession lies in the client's freedom to choose.

\textbf{B. Restrictive Covenants Between Physicians}

When assessing the reasonableness of a restrictive covenant, the inquiry with respect to agreements between physicians is much the same: fact specific and largely dependent on the totality of the circumstances.\textsuperscript{128} The general rule is that a restriction in a physician's covenant not to compete will be found unreasonable if (1) "the restraint is greater than necessary to protect the employer's legitimate interests"; or (2) if that interest "is

\begin{itemize}
\item \textsuperscript{123} See Valley Med. Specialists v. Faber, D.O., 982 P.2d 1277, 1283 (Ariz. 1999); see also Model Rules of Prof'l Conduct R. 5.6 (2003); see, e.g., Ariz. Rules of Prof'l Conduct 5.6 cmt. 1 (2003).
\item \textsuperscript{124} See Valley Med. Specialists, 982 P.2d at 1283 ("Commercial standards may not be used to evaluate the reasonableness of lawyer restrictive covenants. Strong public policy considerations preclude their applicability. In that sense, lawyer restrictions are injurious to the public interest."); see also Spiegel, 811 S.W.2d at 530 (concluding that the noncompete in question was invalid "as a matter of public policy"); Arena v. Schulman, LeRoy & Bennett, 233 S.W.3d 809, 814 (Tenn. Ct. App. 2006) (holding that "the connection of the financial disincentive to the practice of law constitutes, whether intended or not, an impermissible restraint on the practice of law").
\item \textsuperscript{125} Daylon L. Welliver, Note, When the Walls Come A 'Tumblin' Down: A Look at What Happens When Lawyers Sign Non-Competition Agreements and Break Them, 29 Ind. L. Rev. 729, 729-33 (1996) (traditional considerations include whether or not the employee has acquired certain specialized skills by working for the employer or has become familiar with the employer's privileged information or business secrets); see also Model Rules of Prof'l Conduct R. 5.6 (2003); Model Code of Prof'l Responsibility DR 2-108 (1980).
\item \textsuperscript{126} Dwyer v. Jung, 336 A.2d 498, 500 (N.J. Super Ct. Ch. Div. 1975); see also Valley Med. Specialists, 982 P.2d at 1283.
\item \textsuperscript{127} See Welliver, supra note 125, at 736.
\item \textsuperscript{128} See Restatement (Second) of Contracts § 186 cmt. a (1981); see also id. at §188 cmt. a; Bryceland v. Northev, 772 P.2d 36, 40 (Ariz. Ct. App. 1989) (noting that "[e]ach case hinges on its own particular facts").
\end{itemize}
outweighed by the hardship to the [employee] and the likely injury to the public." The prevailing consideration, much like in the legal profession, is the issue of the "public good" and policy. These considerations, however, seem to be given much more value in theory than in practice.

Typically, courts find some legitimate interest that warrants the validity of a noncompete between physicians. In evaluating such covenants, many courts continue to apply the "reasonableness standard." Under this rule, most agreements between physicians are upheld if reasonable. Courts generally uphold noncompete agreements among physicians concluding that employers' traditional interests in protecting their businesses are reasonable. Ironically, courts have even upheld the employer's interests in protecting their patient relationships. Although the American Medical Association (AMA) has "taken the position that physicians' noncompete agreements have a negative effect on health care and are not in the public interest," decisions in accord with this position are far and few.

The AMA has proposed for many years that noncompete agreements among physicians are contrary to public policy. Still, despite its contentions that noncompete agreements disrupt the continuity of care and potentially deprive the public of medical services, "most courts continue to enforce physicians' noncompete agreements." For years, the AMA has

129 RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. a (1981); see also Blake, supra note 16, at 648-49.
130 Sfikas, supra note 11, at 1310; see also Blake, supra note 16, at 691.
131 See, e.g., Idbeis v. Wichita Surgical Specialists, 112 P.3d 81, 89 (Kan. 2005) (referral services deemed a justifiable interest for upholding physician noncompete agreement); Wood v. Acordia of W. Va., Inc., 618 S.E.2d 415, 422 (W. Va. 2005) (a non-solicitation agreement was held legitimate on the basis of lesser restrictions of employees' rights).
133 See, e.g., Cent. Ind. Podiatry, P.C. v. Krueger, 882 N.E.2d 723, 725 (Ind. 2008) (holding that "noncompetition agreements between a physician and a medical practice group are not per se void as against public policy and are enforceable to the extent they are reasonable. To be geographically reasonable, the agreement may restrict only that area in which the physician developed patient relationships using the practice group's resources").
134 See, e.g., Weber v. Tillman, 913 P.2d 84, 95-96 (Kan. 1996) (enforcing a restrictive covenant on the conclusion that its restrictions were reasonable); Cmty. Hosp. Group, Inc. v. More, 869 A.2d 884, 900 (N.J. 2005) (enforcing modified noncompete contract on determination that employer had a legitimate business interest warranting protection).
136 Sfikas, supra note 11, at 1310.
137 See AMA. CODE OF MED. ETHICS, § E-9.02 (1998); see also Berg, supra note 70, at 6.
138 See Sfikas, supra note 11, at 1311; see also Gillespie v. Carbondale & Marion Eye Ctrs., Ltd., 622 N.E.2d 1267, 1270 (Ill. App. Ct. 1993) ("[R]estrictive covenants between medical doctors are not detrimental to the public interest because the restricted doctor can be just as useful to the public in another location outside the restricted area; and the physician can
claimed that such covenants are strongly contrary to the interests of the public,\(^{139}\) and although such covenants are not prohibited, they are strongly discouraged and disfavored by physicians' organizations.\(^{140}\) Repeatedly, the AMA has stated that the right to choose his or her own physician is the right of every patient and a “prerequisite of optimal care and ethical practice.”\(^{141}\) The relationship between a patient and his physician is so private and intimate that the patient's right to choose his own doctor is the cornerstone of any ethical practice.

As a result of this persistence, several courts have begun to recognize and give credit to the AMA's claim that noncompete contracts not only impede and discourage competition, but “disrupt continuity of care, and potentially deprive the public of medical services.”\(^{142}\) Ten years ago, in a landmark decision, the Arizona Supreme Court invalidated a restrictive employment agreement, holding that the contract between a medical practice group and one of the employees was unreasonably overbroad.\(^{143}\) In 2000, a physician's noncompete agreement was also held unenforceable by an Indiana appellate court for failure to show a “protectable” business interest.\(^{144}\) While the courts invalidating restrictive agreements between doctors are in the minority, more jurisdictions seem to have developed a higher awareness and respect for the recommendations of the AMA.\(^{145}\) Today, “more and more courts...are holding these covenants unenforceable for public policy reasons.”\(^{146}\)

In 2005, for instance, a private medical practice filed a complaint against a physician and former employee “seeking to enjoin him from violating the non-compete provision of his employment agreement.”\(^{147}\) The Supreme Court of Tennessee held the covenant unenforceable “[d]ue to the important public policy considerations implicated by physicians' covenants not to compete, along with the ethical problems raised by them.”\(^{148}\) The thrust of the discussion was an evaluation of the AMA's position toward such contracts, as well as a comparison between the practice of medicine and the

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\(^{140}\) Id.; AMA CODE OF MED. ETHICS, § E-9.02 (1998).


\(^{143}\) Valley Med. Specialties, 982 P.2d at 1286.


\(^{145}\) See Sfikas, supra note 11, at 1311.

\(^{146}\) Id.

\(^{147}\) Murfreesboro Med. Clinic, 166 S.W.3d at 677.

\(^{148}\) Id. at 683.
practice of law. Nonetheless, in a majority of states, including Tennessee, statutory provisions still allow for restrictions on the right of an employee or contracted healthcare provider to remain in effect upon termination or conclusion of the employment. Despite the slow movement by courts to invalidate restrictive covenants between physicians, in some states the legislature has taken part in the battle to continue the enforcement of such agreements.

C. Drawing Parallels in Public Policy & Advocating for a Similar Approach

Given the vast number of decisions upholding restrictive covenants among doctors, the implication is that noncompete clauses in physicians’ employment agreements will generally be enforceable. The parallels in public policy concerns between the legal and medical professions, however, make it difficult not to question the differing approaches. Arguably, "having a greater number of physicians practicing in a community benefits the public by providing greater access to health care." Increased competition for patients tends to improve quality of care and keep costs affordable." The same is essentially true for the practice of law. A greater number of attorneys concentrated in an area means that representation is readily available; a greater number of attorneys in the same region results in a greater variety of available services.

Most importantly, the right of every individual to choose his or her physician is directly synonymous with a client’s ability to choose his or her attorney. Over time, these relationships become intimate and personal. After years of being seen by the same doctor, patients hesitate to switch to a different primary care physician just as many clients return to the same attorney for representation time and again. In the medical context, the importance of a patient’s ability to choose is paramount. Contracting around this right with a third party, such as a hospital administrator or a business partner, seems dangerously unethical.

149 Id. at 679-84.
151 Murfreesboro Med. Clinic, 166 S.W.3d at 679.
152 Shikas, supra note 11, at 1310.
153 Id.
154 Id.
155 Id. at 1310-11; see also Mandeville v. Harman, 7 A. 37, 40 (N.J. Ch. 1886).
156 See Mandeville, 7 A. at 40-41. In Mandeville, the court noted that “[p]rofessional skill, experience, and reputation are things which cannot be bought or sold” because they are part of an individual, not a practice. Id. at 40. The patient chooses his physician based on that skill and experience. Thus, because the “practice of a physician is a thing so purely personal, depending so absolutely on the confidence reposed in his personal skill and ability,” noncompete contracts among physicians are impractical due to the difficulty they pose for the patient. Id. at 40-41.
Upon close examination of the likeness of these professional fields, the courts' traditional justification for enforcement of such noncompete covenants does not seem applicable.\textsuperscript{157} Given the public interest in doctor–patient relationships, the validity of restrictive covenants between physicians does not seem justified. Originally, the inquiry was phrased in terms of “whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interest of the public.”\textsuperscript{158} Now, the inquiry seems focused on the public policy that, first and foremost, considers patients’ interests. In cases specifically involving professions such as law and medicine, “public policy concerns may outweigh any protectable interest the remaining firm members may have.”\textsuperscript{159}

While scholars have argued that noncompete agreements are instrumental in protecting employers’ investments in human capital, this model no longer seems to fit. For example, a shortage of physicians in a particular specialty, as well as in the geographic area, has been a concern in several jurisdictions.\textsuperscript{160} For instance, in adopting a more sensible public policy in favor of an employee’s freedom of movement, the Supreme Court of Alabama stated that “a severe shortage of doctors in a medical specialty” was a significant factor in considering the legitimacy of a restrictive covenant.\textsuperscript{161} Restrictive agreements among those practicing medicine “inconvenience patients and interfere with their access to health care” by either interfering with the patient’s ability to see a physician in a convenient location or by minimizing the number of specialists available within a certain area.\textsuperscript{162}

Undeniably “strong public policy considerations preclude” the applicability of noncompetes in the practice of law.\textsuperscript{163} The reasoning behind courts’ refusals to enforce physicians’ noncompetes has less to do with individuals’ freedom of movement, and more to do with people’s freedom of choice.\textsuperscript{164} A doctor’s relationship with the patient is singular, private,
and maintained in order to advance the patient’s best interests, just as the
client’s relationship with his attorney when he seeks legal representation.
Neither relationship is based on principles of commerce. “Prevent[ing]
competitive use, for a time, of information or relationships which pertain
peculiarly to the employer and which the employee acquired in the course
of the employment” should not be a concern given weighty consideration in
light of the patients’ interests at stake.\footnote{Blake, supra note 16, at 647.}
Despite the freedom to contract, contracts among physicians affect the public to a much greater extent than
contracts which deal with an ordinary employer–employee relationship.

Several courts have emphasized the special “difference between a
profession and a trade or business, characterizing the relationship between
doctor and patient as similar to that between lawyer and client.”\footnote{Kafker, supra note 8, at 39.}
Just like an attorney–client relationship, the doctor–patient relationship is not built
on the exchange or sale of goods, because the patient is not a “customer.”\footnote{Id.; see also Odess v. Taylor, 211 So.2d 805, 811 (Ala. 1968).}
The relationship is one built on “personal confidence.”\footnote{Id. at 39.}
Most doctor–patient relationships are continuous, and when they end abruptly, the
severance of ties tends to negatively impact the patient.\footnote{Id. at 31–32 (citing Ralph B. Freidin & Alan M. Lazerson, Terminating the Physician–Patient Relationship in Primary Care, 241 JAMA 819, 822 (1979) (“The physician–patient relationship is central to the process of primary care.”)).}
Studies have shown that longstanding relationships between patients and physicians

Members of the General Assembly and all officers, before they enter
upon the execution of the duties of their respective offices, and all
members of the bar, before they enter upon the practice of their profes-
"solemnly swear" that they will "support and defend the Constitution of the United States" and "neither take part in deception of the court, nor allow deception to take place."\textsuperscript{172} This vow is later renewed to the bar and to the state.\textsuperscript{173} It is a pledge to "faithfully execute," to the best of their ability, the office "according to law" and a promise to carry out each challenge without any offense.\textsuperscript{174}

In the study and practice of medicine, the Hippocratic Oath dates back to the fourth century BC.\textsuperscript{175} For centuries thereafter, young doctors have entered this “covenant... according to the medical law.”\textsuperscript{176} The words of the original oath state that to fulfill and uphold it is to “enjoy life and art, being honored with fame among all men for all time to come.”\textsuperscript{177} Those taking the modern oath promise to “respect the hard-won scientific gains of those physicians in whose steps [they] walk, and gladly share such knowledge . . . with those who are to follow.”\textsuperscript{178} Moreover, every new physician states his or her understanding that “warmth, sympathy, and understanding may

\begin{footnotes}
\item KY. CONST. § 228. Compare with Ludwig Edelstein, The Hippocratic Oath: Text, Translation, and Interpretation 55 (Johns Hopkins Press, 1943).
\item Id.
\item See Ky. Sup. Ct. R. 2.540; see also KY. CONST. § 228.
\item KY. CONST. § 228.
\item Edelstein, supra note 175, at 3.
\item Id.
\end{footnotes}
outweigh the surgeon’s knife or the chemist’s drug.”

Furthermore, every new doctor pledges to “call in [his] colleagues when the skills of another are needed for a patient’s recovery.” Every physician makes a promise to “respect the privacy of [his] patients, for their problems are not disclosed ... that the world may know.” Aside from caring for the sick, every physician takes on a greater responsibility, one which may force him or her to “tread with care in matters of life and death” and stand by the loved ones of those who are dying. Those who choose to enter this profession take on “special obligations to all ... fellow human beings, those sound of mind and body as well as the infirm.” Thus, to allow restrictions on the practice of those who willingly make this promise to every member of our society is not only contrary to public policy, but to the covenant made by every physician in this country.

CONCLUSION

Given the parallels in the public policy arguments and the considerations that must be taken into account when evaluating restrictive covenants in the legal and medical professions, it becomes difficult to understand what causes such disparate results in the application of such covenants. When dealing with noncompete agreements between professionals who in the course of their employment not only do, but purposefully seek to, develop intimately close relationships, it seems nonsensical to disallow restrictive covenants in one field and not the other. When the primary distinctive feature of the professional relationship reaches or has the potential to reach both the client and the employee on a deeply personal level, the grounds upon which a restrictive covenant may be upheld become shaky.

Moreover, it seems odd that while the landscape of restrictive covenants is changing to allow for greater employee mobility, freedom of movement, and more competition, the view of the majority of courts toward enforcement of restrictive covenants among physicians has not changed. As noted, while some courts have slowly begun to step in the right direction by drawing upon principles and the rationale for holding noncompete agreements unethical in the legal profession, the majority have not yet taken this necessary step. Most courts still treat restrictive covenants among physicians just as restrictive covenants in the commercial setting. Notwithstanding the influence of the AMA on some courts, most still value the interests of the employer over those of the physician employee, and as a result, over those of the patient.

179 See Lasagna - Modern Version, supra note 178; Modern Version, supra note 178.
180 See Lasagna - Modern Version, supra note 178; Modern Version, supra note 178.
182 See Lasagna - Modern Version, supra note 178; Modern Version, supra note 178.
183 See Lasagna - Modern Version, supra note 178; Modern Version, supra note 178.
On the other hand, restrictive covenants among attorneys are still considered unethical in all jurisdictions. Courts still emphasize the client’s freedom of choice and the lawyer’s duty as a fiduciary as the underlying public policy rationale for holding those covenants unethical. The lawyer’s duty remains primarily to the client, and courts still gladly value that policy over protecting the interests of the employer.

Noncompete contracts in medicine must be subject to special scrutiny, given that the relationship affects not only the employer and the employee, but has a direct bearing on the well-being of a third party — the patient. Restrictive covenants between physicians should be construed in favor of employee mobility, focusing on “access to medical care and facilities.” It is ludicrous to advocate against this position in order to prevent competition between physicians. Instead of examining each restrictive covenant between a doctor and a prior employer under the standard of reasonableness, courts should turn to the rule of ethics adopted in the legal profession. The direct parallels in the honor and nature of these two unique professions, and the public considerations they entail must be used to create a directive that reads against covenants not to compete. In turn, a rule that favors freedom of choice by the patient, freedom of movement for the former employee, and competition that will provide better medical services to individuals and communities alike.

When looking at a noncompete agreement, courts must evaluate restrictive covenants between physicians in a similar manner as lawyers’ noncompetes. The nature of the profession and the concerns of public policy must be seen as controlling against the considerations of what has previously been viewed as the legitimate business purpose of the employer. Ultimately, when restrictive covenants are upheld among physicians, the patients take the hardest hit. The best way to deal with this injustice is to carve out an exception for the medical profession, just as one has been created for those practicing law. In judging noncompetes, clients’ interests — exactly that upon which the ethics of the profession are centered — must prevail over all other considerations. To continue allowing restrictive covenants to be enforced in medicine is simply to treat the sick with bad medicine.

185 See Mike J. Wyatt, Comment, Buy Out or Get Out: Why Covenants Not to Compete in Surgeon Employment Contracts are Truly Bad Medicine, 45 Washburn L.J. 715 (2006).