

C.I.C

October 27, 2020

TO: MSSNY OFFICERS, COUNCILORS AND TRUSTEES
FROM: MSSNY EMPLOYED PHYSICIANS COMMITTEE
RE: RESOLUTION 54 - END RESTRICTIVE COVENANTS
RESOLUTION 55 – RESTRICTIVE COVENANTS

(FOR COUNCIL APPROVAL)

At the 2020 MSSNY House of Delegates, the following resolutions were considered, and referred to the MSSNY Council. After extensive discussion at the September 17 MSSNY Council meeting, these 2 resolutions were referred to the MSSNY's Employed Physicians Committee.

Resolution 54:

RESOLVED, that the Medical Society of the State of New York seek legislation banning such restrictive covenants for physicians; and be it further

RESOLVED, that the Medical Society of the State of New York advance this issue to the AMA to end such restrictive covenants nationwide.

Resolution 55:

RESOLVED, that MSSNY should seek legislation on restrictive covenants that does not allow non for profit health care systems to create restrictive covenants that prevent physicians for working for one of their competitors.

In consideration for the MSSNY House of Delegates, since both resolutions touched upon the subject of restrictive covenants, the Reference Committee believed it was important to combine the resolutions. In its report to the MSSNY HOD, the reference committee noted that it heard mixed perspectives on Resolution 54 to ban all restrictive covenants but received more positive comments about Resolution 55 which was specific to large health systems' use of restrictive covenants. Moreover, the report to the HOD noted that the reference committee understood the concerns that there are instances where restrictive covenants can help protect physician practices who bring in a younger physician to train. The reference committee, therefore, recommended a substitute resolution that MSSNY be supportive of legislative proposals that restrict large systems' use of restrictive covenants that may disrupt ongoing patient-physician treatment relationships. However, since some believed that policy did not go far enough to limit the use of restrictive covenants, it was referred to the MSSNY Council.

At both the September 17 MSSNY Council meeting at the October 27 meeting of the MSSNY Employed Physicians committee, there was extensive discussion of the positives and negatives of the use of restrictive covenants. Several physicians articulated their personal opposition to the use of restrictive covenants in any health care setting, hospital-employed or private practice, noting that it unfairly limited the ability of a physician to continue to practice in a particular region and gave enormous control to an employer or private equity firm to force the physician to remain in what may be a very challenging professional care delivery setting. They also noted that the most significant concern with restrictive covenants is that it unfairly limits patient choice by

forcing patients to travel enormous distances to see a physician with whom they may have developed a trusted treatment relationship, should the physician leave the setting that used the restrictive covenant.

However, at the same time, some physicians noted that a restrictive covenant was an important mechanism used by physician specialty groups to bring in and train younger physicians to see patients in their practices, so as to help maintain patient continuity, and to protect the economic investment the practice makes in training that physician to treat patients. Moreover, concerns were expressed that, in some cases, many or all of the physicians in a particular specialty practice that uses these restrictive covenants may be MSSNY members.

It also should be noted MSSNY also has adopted Policy 165.856 relating to restrictive covenants that notes that:

- MSSNY policy regarding restrictive covenants is that they are unethical if they are excessive in geographic scope or duration in the circumstances presented, or if they fail to make reasonable accommodation of patients' choice of physician. (HOD 2011-112; Reaffirmed Council 11/29/2012)
- The Medical Society of the State of New York should advocate for legislation to limit restrictive covenants contained within physician employment contracts between hospitals and a physician to employment with other article twenty-eight entities. (HOD 2012-101; referred to, modified by and adopted by Council 2011-2012)

At the October 27 meeting of the MSSNY Employed Physicians committee, several physicians noted the importance of ensuring that restrictive covenants not only be prohibited in employment arrangements, but also in other practice arrangements where outside financial interests can adversely impact physician freedom to provide care in the setting of their choice, such as when a practice contracts with a private equity-backed Management Services Organization. Recognizing that there are differing opinions on use of restrictive covenants in private practice settings, it was also suggested that MSSNY initiate a survey among physicians across the State of New York to obtain a comprehensive perspective on this question. The results of that survey could form the basis for MSSNY to consider a subsequent resolution to support the prohibition on all restrictive covenants, or to maintain a position that sought to prevent them only in certain health care delivery settings.

RECOMMENDATION:

The Committee recommend that MSSNY adopt the following substitute resolution in lieu of Resolutions 54 and 55:

RESOLVED, that the Medical Society of the State of New York support legislation that prohibits a "restrictive covenant" provision in a health system-physician employment contract or in a contract between a Management Services Organization (MSO) and a physician that limits the ability of such physician to deliver care in the same region after the physician leaves employment from such health system or leaves the medical practice that utilizes that MSO; and be it further

RESOLVED, that the Medical Society of the State of New York conduct a survey of physician to assess their support or opposition to legislation to prohibit all restrictive covenants.