Noncompetition Agreements Collide with Virginia's Corporate Practice of Medicine Doctrine

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The Supreme Court of Virginia's March 2, 2007, decision in *Nipun Parikh v. Family Care Center Inc.*[1] has raised concerns regarding the enforceability of noncompetition agreements between physicians and the practice entities that employ them. The case has caused considerable concern in the health-care industry in Virginia, where practitioners and providers have relied for almost two decades on significant authority that supports the ability of nonprofessional entities to employ physicians to provide medical services and to enforce the provisions of those agreements.[2]

In its narrowest interpretation, the case simply says that a nonprofessional corporation cannot enforce a noncompetition provision in an employment agreement with its former physician employee when the drafter describes the interest that the corporation intends to protect as its right to "engage in the practice of medicine." That is because by statute in Virginia it is unlawful to "engage" in the practice of medicine "without holding a valid license as required by statute or regulation."[3]

On the other hand, the broadest reading of *Parikh* suggests that no entity, even a professional corporation, could enforce noncompetition agreements to preclude its licensed physician employees from providing competing professional services, because no entity can obtain a license to provide such professional services.[4] Based on the Court's holding, it could be argued that such a nonlicensed entity would not have a legitimate interest in precluding its licensed physician employees from performing services that only licensed individuals may perform.[5]

Either interpretation seems inconsistent with two Virginia statutes enacted in 2003 that expressly provide that professional medical services may be "rendered" by an unlicensed entity through the use of licensed practitioners.[6]

This article provides an overview of the Virginia corporate practice of medicine doctrine and the Virginia law of noncompetition agreements, discusses the implications of the *Parikh* decision, and suggests a legislative change.

The Parikh Decision

In *Parikh*, a Virginia professional corporation, Family Care Center Inc. (FCC), entered into an employment contract with Dr. Parikh, a licensed physician. The contract contained a noncompetition clause that provided that:

> upon termination of employment for any reason and for a period of three years thereafter, [Dr. Parikh] agrees to pay [FCC] ten thousand dollars each month employee is *engaged in a competing practice* of General Practice, Family Medicine Ambulatory Care or General Internal Medicine within a radius of twenty miles measured from the offices of [FCC].[7]

Upon the death of the physician owner of FCC, the deceased's widow became its owner. This caused FCC to be converted from a professional corporation to a non-

professional corporation by operation of law.[8] Shortly after the physician owner's death, and almost a decade after Dr. Parikh began his employment with FCC, Dr. Parikh resigned from FCC and began working for a competing medical practice within one mile of FCC's office.[9]

The Court in *Parikh* identified as the "dispositive question" whether FCC has a legitimate business interest in enforcing the covenant not to compete under the terms of the employment agreement. The Court concluded that FCC could not engage in the practice of medicine, as the employment agreement recited, "because it does not have a license to practice medicine . . . as required by Virginia Code §§ 54.1-2902 and 2929."[10] Therefore, because FCC "cannot engage in a competing practice of medicine with Dr. Parikh . . . , it has no legitimate business interest in enforcing the covenant not to compete with Dr. Parikh."[11]

Overview of Virginia Corporate Practice of Medicine Doctrine[12]

The theoretical basis for the corporate practice of medicine doctrine is that only individuals who have received the requisite training and licensure should be permitted to arrange or deliver medical care or to own an entity that provides physician services. The public is protected if unlicensed persons are not allowed to commercially exploit the practice of medicine or to interfere unduly with the independent professional judgment that the physician is ethically and legally required to exercise in the delivery of patient care. The doctrine also evolves from the concept that professionals should not be permitted to share profits or split fees with nonprofessionals.

The following administrative and legislative actions have been relied on to conclude that the corporate practice of medicine doctrine should not apply in Virginia to preclude a hospital's or medical school's employment of a physician, at least where the agreement specifically provides that the entity will not interfere with the physician's exercise of independent professional judgment.[13]

First, Virginia has never had an express prohibition on nonprofessional corporations practicing medicine; however, from 1948 until its repeal by the General Assembly in 1986, Virginia Code § 54-278.1 did create a limited prohibition on the corporate practice of medicine by providing:

> [i]t shall be unlawful for any physician to practice his profession as a lessee of any commercial or mercantile establishment, or to advertise, either in person or through any commercial or mercantile establishment, that he is a duly registered practitioner and is practicing or will practice medicine, as a lessee of any such commercial or mercantile establishment. But nothing herein shall be construed to prohibit or prevent the rendering of professional services to the officers and employees of any person, firm or corporation by a physician, whether or not the compensation for such service is paid by the officers and employees, or by the employer, or jointly by all or any of them . . .[14]

The repeal of that statute in 1986 arguably confirms the legislative intent that the practice of medicine not be limited to professional entities in Virginia.[15]

Second, in opinions issued in 1989, 1992, and 1995, three Virginia attorneys general consistently confirmed that it is permissible for the practice of medicine to be conducted by unlicensed corporations and foundations owned by hospitals and medical schools.[16]

Third, the General Assembly presumably put the issue to rest in 2003 when it passed Virginia Code § 13.1-542.1 ("Practice of certain professions by corporations") and § 13.1-1101.1 ("Practice of certain professions by limited liability companies"). Virginia Code § 13.1-542.1 states that "professional services . . . may be rendered . . . by a corporation." Virginia Code § 13.1-1101.1 does the same for limited liability companies.[17] "Professional services" are defined in Virginia Code §§ 13.1-543(A)(3) and 1102(A) as "any type of personal service . . . that requires as a condition precedent to the rendering of such service . . . the obtaining of a license," including "practitioners of the healing arts."

Overview of the Law of Noncompetition Agreements in Virginia[18]

Virginia courts have repeatedly acknowledged the enforceability of noncompetition agreements that are "narrowly drawn to protect the employer's legitimate business interest, [are] not unduly burdensome on the employee's ability to earn a living, and [are] not against public policy."[19] In analyzing the factors relevant to the validity of a noncompete agreement, the Court considers the nature of the activity restricted, the existence of a legitimate business interest protected by restricting the activity, the geographic scope of the restriction, and the duration of the restriction.[20]

Virginia law "favors the enforcement of contracts intended to protect legitimate business interests[,as i]t is as much a matter of public concern to see that valid agreements are observed as it is to frustrate oppressive ones."[21] However, the restraint must not be any greater than is necessary to protect the employee's legitimate business interest.

Finally, the Court has consistently held that noncompetition agreements will be narrowly construed as disfavored restraints on trade, and any ambiguity in the language in the restrictive covenant will be construed strictly against the employer.[22]

The Collision

The Supreme Court's decision in *Parikh* was unanimous and was written by its chief justice. As such, its holding and dicta can be expected to be cited frequently in litigation between employers and employees in health-care settings.

To fairly evaluate the potential impact of this decision on Virginia's corporate practice of medicine doctrine and on the law of restrictive covenants, a review of some of the pronouncements included in the case is instructive.

The Court rests its holding that FCC "has no legitimate business interest in enforcing the covenant not to compete with Dr. Parikh" on three specific findings.[23] First, the Court states that "the assertions in the employment agreement . . . that [FCC] is presently 'engaged in the practice of medicine'"[24] are incorrect. FCC "could not and cannot do so because it does not have a license to practice medicine from the Board of Medicine as required by Code §§ 54.1-2902 and 2929."[25] Second, the Court states that because FCC "cannot practice medicine,"[26] it "cannot engage in a competing practice of medicine with Dr. Parikh, who is a physician licensed to practice medicine . . ."[27] Third, the Court reasons that because FCC "cannot lawfully engage in the practice of medicine, it has no legitimate business interest in enforcing the covenant not to compete with Dr. Parikh."[28]

The Court also acknowledges that Virginia Code § 13.1-542.1 expressly "permits a corporation which is not a professional corporation *to render* professional services unless otherwise prohibited by law or regulation."[29] However, the Court concludes that it need not decide (i) "the scope of medical services, if any, that a corporation may 'render,'" (ii) "the meaning of the word 'render' contained in Virginia Code § 13.1-542.1," or (iii) "whether a nonprofessional corporation 'rendering' professional services can enforce a covenant not to compete . . ."[30]

Instead, the Court held that, by statute, only "licensed" persons can "engage in the practice of medicine" (even though a nonlicensed entity may "render professional services"). A corporation cannot be licensed (only an individual can), so the Court concluded that FCC may not lawfully "engage in the practice of medicine" and had "no legitimate business interest in enforcing the covenant not to compete . . ."[31]

In *Parikh*, the Court's analysis makes a distinction between an unlicensed entity "engaging in the practice of medicine" (which the Court says is not permitted) and the entity "rendering" professional services (which is permitted).[32] This distinction seems inconsistent with the legislative history and purpose of Virginia Code §§ 13.1-542.1 and 1101.1 and with three attorney general opinions that for almost two decades have consistently been relied on to permit hospitals and medical schools to employ and enforce their agreements with physicians.[33] Further, the Virginia Code does not appear to provide for any functional distinction between "rendering medical services" and "engaging in the practice of medicine." Indeed, the Virginia Code appears to use the terms "practice," "render," "furnish," "perform," and "engage in" interchangeably in describing permissible ways to deliver medical services.

For example, Virginia Code § 13.1-542.1 is specifically titled the "*Practice* of certain professions by corporations" and subsequently states that "professional services . . . may be *rendered* in this Commonwealth by" professional and nonprofessional corporations (emphasis added). Virginia Code § 13.1–1101 has a similar title.

The Virginia Code thereafter defines "professional services" of the type that may be "rendered" by nonlicensed entities as:

> any type of personal service to the public that requires as a condition precedent to the rendering of such service . . . *the obtaining of a license*, certification, or other legal authorization and shall be limited to the personal services rendered by . . . [p]ractitioners of the healing arts.[34]

Elsewhere, Virginia Code § 54.1-2903 uses the terms interchangeably in defining what constitutes "practice," stating that:

> signing any statement certifying that the person so signing has *rendered professional service* to the sick or injured . . . shall be prima facie evidence that the person signing or issuing such writing is *practicing* the healing arts within the meaning of this chapter. . . . (emphasis added)

Similarly, Virginia Code § 8.01-581.1 defines the term "health care provider" for purposes of coverage under the Medical Malpractice Act as including:

> a corporation, partnership, limited liability company or any other entity, except a state-operated facility, which employs or *engages* a licensed health care provider and which primarily *renders* health care services. (emphasis added).

The Medical Malpractice Act also defines "health care" to mean "any act, or treatment *performed or furnished* . . . by any health care provider, for to, or on behalf of a patient . . .[35]

When courts construe the meaning of statutes, the will of the legislature trumps all other rules of construction. "[T]he true intent and meaning of the statute is to be gathered by giving to all the words used their plain meaning, and construing all statutes in *pari materia* in such manner as to reconcile, if possible, any discordant feature which may exist, and make the body of the laws harmonious and just in their operation."[36] The reason for considering statutes in *pari materia* is that this permits "any apparent inconsistencies [to] be ironed out whenever that is possible."[37] Additionally, whenever a given controversy involves a number of related statutes, they should be read and construed together and in harmony to give full meaning, force, and effect to each.[38]

It is also noteworthy that Virginia Code §§ 13.1-542.1 and 1101.1 read, in part, "[u]nless otherwise prohibited by law or regulation, the professional services defined in subsection A of § 13.1-543 may be rendered in this Commonwealth by . . ." a corporation or limited liability company. The General Assembly's caveat "unless otherwise provided by law or regulation" presumably was designed to preserve the right of the General Assembly to limit the entity form from which certain professional services may be provided. For example, Virginia Code §§ 54.1-3205 and 2716, et seq., expressly prohibit the

employment of optometrists and dentists, respectively, in certain settings.[39]

The Virginia Code imposes no such specific restrictions against physicians. Indeed, the 1992 attorney general opinion concluded that "if the General Assembly had intended to impose a similar prohibition on corporate employment of physicians, it could have done so in the same express manner."[40]

There are two avenues available in harmonizing the potentially contradictory provisions of Virginia Code §§ 13.1-542.1 and 1101.1 and Virginia Code §§ 54.1-111, 2902 and 2929. The first is to find a material difference between "rendering medical services" and "engaging in the practice of medicine," as the Court apparently did in *Parikh*. The second is to acknowledge that entities "render" medical services through the services of their licensed professional employees, and that doing so is consistent with Virginia Code §§ 54.1-111, 2902 and 2929. The action of the General Assembly in 2003, when it enacted Virginia Code §§ 13.1-542.1 and 1101.1, appears consistent with the latter interpretation.[41]

It is in reliance on this second interpretation that hospitals and medical schools around Virginia have made significant investments in acquiring and operating physician medical practices. Those entities derive their value from the professional services provided by their licensed employees and therefore would appear to have a legitimate business interest in protecting that investment. The value of such investments is determined by the income that the owner of the entity will receive as a result of the services rendered by the physician employees.[42] Reasonable restrictive covenants are necessary to protect that investment, and it is difficult to understand why an entity that may legitimately employ a physician to "render professional services" would not have a legitimate business interest in the potential revenues generated by those services.[43] To change the system now would be tremendously disruptive.

A Legislative Solution

To clarify the issue raised by *Parikh* and to minimize disruption to the health-care industry inherent in a broad reading of the decision, The Virginia Bar Association requested that Del. John M. O'Bannon III sponsor legislation in 2008 to address the holding in *Parikh*. The version expected to be introduced would create a new Virginia Code § 54.1-111(D) that provides:

> [n]either this section nor § 13.1-543, § 54-1-2902, and § 54.1-2929 shall be construed to prohibit or prevent any corporation of a type listed in § 13.1-542.1 or § 13.1-1101.1 which employs or contracts with an individual licensed by a health regulatory board from (i) practicing or engaging in the practice of a profession or occupation for which such individual is licensed, (ii) providing or rendering professional services related thereto through the licensed individual, or (iii) having a legitimate interest in enforcing the terms of employment or its contract with the licensed individual.

Drafting Suggestions

Unless the Court clarifies its reasoning in *Parikh*, or the General Assembly addresses the issue, it would seem advisable not to include in physician employment agreements recitations that a practice entity is "engaged in the practice of medicine" and to limit the prohibited activities to those that a practice entity is statutorily permitted to pursue. Thus, a recital, if used at all, that the practice is in the business of "rendering professional services through its licensed physician employees" would appear preferable because the language describes verbatim an activity permitted under Virginia Code §§ 13.1-542.1 and 1101.1.

Likewise, the restrictive covenant should only preclude the employee from "rendering professional services" of a type that the professional provided while employed by the practice. Including language that highlights the business interest sought to be protected also is recommended.

Finally, it would be helpful to include provisions (i) reciting that the physician sought the advice of counsel (or was advised to seek the advice of counsel) prior to signing the employment agreement; (ii) stating that during the course of employment, physician will have access to employer's patients and proprietary business information; (iii) addressing severability, nonsolicitation of patients, referral services, injunctive relief, and attorneys fees; and (iv) evidencing physician's continued ability to earn a living upon cessation of employment.

Conclusion

The Court's decision in *Parikh* creates considerable uncertainty as to the enforceability of restrictive covenants between physicians and the entities in which they practice. It is not clear whether the decision hinges on (i) on a poor choice of words by the drafter of the noncompete provision, (ii) an inherent ambiguity between Virginia Code §§ 54.1-111(A), 2902 and 2929, on one hand, and Virginia Code §§ 13.1-542.1 and 1101.1 (and Virginia Code §§ 13.1-543(A) and 1102), on the other, or (iii) broader policy issues relating to the nature of permissible employment arrangements between physicians and the entities in which they practice. While careful drafting may alleviate some of the concerns, the better course is for the General Assembly to reconcile any

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statutory ambiguity and give clear direction to the industry. ⚖

Endnotes:

1 273 Va. 284, 641 S.E.2d 98 (2007).

2 *See e.g.* 1989 Va. Op. Att'y Gen. 283; 1992 Va. Op. Att'y Gen. 147; 1995 Va. Op. Att'y Gen. 235. The repeal of Virginia Code § 54-278.1 also evidences the General Assembly's intent to permit nonprofessional corporations to operate medical practices.

3 Va. Code § 54.1-111(A)(1). *See also* Va. Code §§ 54.1-2902 and 54.1-2929.

4 *See* Va. Code § 54.1-2929. As the Court noted in *Parikh*, the statute regulating "licensure to practice medicine in Virginia, applies to individuals, not corporate entities." 273 Va. at 290, 641 S.E.2d 101, n.3.

5 *See generally Parikh*, 273 Va. 284, 641 S.E.2d 98; s*ee also* Va. Code Ann. §§ 54.1-2902 and 54.1-2929 (1950). It is unclear why the Court focuses on the statutory conversion of Family Care Center Inc. from a professional corporation to a nonprofessional corporation on the death of the licensed owner, as neither entity could hold a license to practice medicine. Va. Code § 13.1-352(B) exists to provide the spouse of a deceased owner of a practice an avenue for continuing the practice by employing another licensed physician or selling the practice to licensed physicians.

6 Va. Code §§ 13.1-542.1 and 13.1-1101.1.

7 *Parikh*, 273 Va. at 287, 641 S.E.2d at 99 (internal quotations omitted) (emphasis added).

8 Va. Code § 13.1-552(B). Va. Code § 13.1-544(A) establishes the eligible organizers and shareholders of a professional medical corporation and limits such ownership to individuals licensed to practice medicine. Va. Code § 13.1-552(B) states that a professional corporation loses its "professional" status automatically upon the occurence of an event resulting in ownership of the entity by a nonlicensed individual.

9 *Parikh*, 273 Va. at 99, 641 S.E.2d at 286, 287.

10 *Id.* at 101, 641 S.E.2d at 291.

11 *Id.*

12 *See* M. Martin, "Corporate Practice of Medicine … Dead or Alive in Virginia?," *VSB Health Law News* (Feb. 1999); P. Devine, "A Checklist for Avoiding Pitfalls in Business Ventures with Physicians in Virginia," *Virginia Lawyer*, 36 (Mar. 1992); P. Devine, "Hospital Acquisitions of Medical Practices," *Virginia Lawyer* at 19 (July 1996). *See also* 1995 Va. Op. Att'y Gen. 235; 1992 Va. Op. Att'y Gen. 147; 1989 Va. Op. Att'y Gen. 283; "Clerk's Office Legislative Proposal for the 2003 Session of the Virginia General Assembly," which accompanied SB 879 (2003 Session); Report for the Departments of Health and Health Professions, "Commercial Walk-In Medical Clinics in the Commonwealth", House Document No. 45 (1990). For a discussion of authority that is not supportive of the absence of a corporate practice prohibition in Virginia, *see Virginia Beach SPCA v. South Hampton Roads Veterinary Association*, 229 Va. 349, 329 S.E.2d 10 (1985) (holding SPCA was unlawfully practicing veterinary medicine without a license because it employed a veterinarian to render services through its not-for-profit animal hospital); *Ritholz v. Commonwealth*, 184 Va. 339, 35 S.E.2d 210 (1945) (holding that an optical company was engaged in the unauthorized practice of optometry because it exercised too much control over its contract optometrists); 1955 Va. Op. Att'y Gen. 146 (holding a hospital cannot practice medicine but may employ a radiologist to assist an attending physician by reading X-rays). It is important to note that states have varying positions on the corporate practice of medicine. For example, the Illinois Supreme Court has held that a not-for-profit corporation cannot enforce an employment agreement with its physician employees because Illinois prohibits the corporate practice of medicine. *Carter-Shields, M.D. v. Alton Health Institute*, 201 Ill.2d 441, 777 N.E.2d 948 (2002) (The court held that a noncompetition agreement could not be enforced because the physician's employment agreement violated the prohibition on the corporate practice of medicine).

13 It is not clear whether the same rule would hold true where the employer was an entity that did not primarily provide health-care services. *See* M. Martin, "Corporate Practices of Medicine . . . Dead or Alive in Virginia?," *Virginia Health Law News* 4 (Feb. 1995); Report for the Departments of Health and Health Professions, "Commercial Walk-In Medical Clinics in the Commonwealth," House Document No. 45 (1990).

14 *See also Stuart Circle Hospital Corp. v. Curry*, 173 Va. 136, 146, 3 S.E.2d 153, 157 (1939) (holding that "while a hospital may not be licensed to practice medicine, within the intent of the broad statutory definition thereof, it may actually engage in so much of said practice as is customary and necessary in the proper conduct of its business, without being required to comply with the regulations provided for an individual"); *P.M. Palumb Jr., M.D., Inc. v. R. Bennett, M.D.*, 242 Va. 248, 409 S.E.2d 152 (1991) (physician employment agreement containing a noncompetition agreement upheld, despite the fact that contract violated the then-statutory prohibition on professional corporations rendering medical services through independent contractors). *But see* 1955 Va. Op. Att'y Gen. 146 (distinguishing *Stuart Circle Hospital* and holding that a statutory change enacted since that court decision means "that today a hospital is prohibited from practicing medicine in Virginia . . . [but] a hospital would not be practicing medicine if it employed a radiologist . . . to furnish diagnostic aids to the attending physician practicing in the hospital").

15 *See also* 1992 Va. Op. Att'y Gen. 147 at 151 (discussing the history of the corporate practice of medicine doctrine in Virginia and the repeal of Virginia Code § 54-278.1); *Godlewski v. Gray*, 221 Va. 1092, 1096, 277 S.E.2d 213, 215-216 (1981) ("when [a statute] is revised, or when . . . portions of the former are omitted, the missing part . . . will be considered as annulled and revoked").

16 *See supra* note 2.

17 Interestingly, Senate Bill 703, as originally introduced by Sen. William C. Wampler Jr., was drafted to provide that there could be no "corporate practice of medicine" in Virginia except through professional corporations and professional limited liability companies. The bill as enacted did just the opposite.

18 *See* Edward L. Isler, Virginia CLE: 25th Annual Business Law Seminar: 2007 Update on Covenants Not to Compete, Duty of Loyalty, and Other Business Torts (written materials on "Covenants Not to Compete in Virginia"); S. Sinclair, "Defending a Physician Against Enforcement of a Covenant Not to Compete", *Virginia Health Law News* 20, 21 (Feb. 1995). The Court has regularly held that well-drafted, reasonable non-competition agreements between physicians and the practices that employ physicians are enforceable.

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19 *Omniplex World Services Corporation v. US Investigations Services Inc.*, 270 Va. 246, 249, 618 S.E.2d 340, 342 (2005); *see Simmons v. Miller*, 261 Va. 561, 580-581, 544 S.E.2d 666, 678 (2001).

20 *Simmons*, 261 Va. at 580, 544 S.E.2d at 678; *Omniplex World Services Corporation*, 270 Va. at 249, 618 S.E.2d at 342; *Modern Environments Inc. v. Stinnett*, 263 Va. 491, 493, 561 S.E.2d 694, 695 (2002).

21 *Meissel v. Finely II, et al*, 198 Va. 577, 584, 95 S.E.2d 186, 191 (1956). The Court has previously held that a legitimate business interest exists when service corporations use restrictive covenants to protect against detrimental competition by a former employee who had access to confidential information or who used client information to the detriment of the former employer. *See Advanced Marine Enterprises Inc. v. PRC Inc.*, 256 Va. 106, 119, 501 S.E.2d 148, 155 (1998).

22 *Simmons*, 261 Va. at 581, 544 S.E.2d at 678; *Clinic Valley Physicians Inc. v. Garcia*, 243 Va. 286, 414 S.E.2d 599 (1992) (The Court held that a noncompetition covenant in a physician employment agreement that the employer drafted to apply on "termination" of employment did not apply on the "nonrenewal" of an employment agreement with a fixed term that had expired).

23 *Parikh*, 273 Va. at 291, 641 S.E.2d 101.

24 *Id.*

25 *Id.*

26 *Id.*

27 *d.*

28 *Id.* Confusingly, the Court says it reaches the first conclusion because "the litigants do not argue" it, reaches the second conclusion because "the litigants do not discuss" it, and reaches the third conclusion because the issue "is not before us in this appeal."

29 *Id.* at 290, 641 S.E.2d at 101 (emphasis in original).

30 *Id.*

31 *Id.* at 291, 641 S.E.2d at 101.

32 *Parikh*, 273 Va. at 290, 641 S.E.2d at 101.

33 *See supra* note 15, 16.

34 Va. Code § 13.1-543(A)(3) (emphasis added). *Accord* Va. Code § 13.1-1102(A).

35 Va. Code § 8.01-581.1 (emphasis added). That provision was added to the Medical Malpractice Act specifically to confirm, among other things, that hospital and medical school affiliated medical practices are "health care providers" that are permitted to enjoy the benefit of the Virginia medical malpractice cap for the services they provide.

36 *Lucy v. County of Albermarle*, 258 Va. 118, 130, 516 S.E.2d 480, 485 (1999) (citing *Tyson v. Scott*, 116 Va. 243, 253, 81 S.E. 57, 61 (1914)).

37 *Lucy,* 258 Va. at 130, 516 S.E.2d at 485 (quoting *Commonwealth v. Sanderson,* 170 Va. 33, 38, 195 S.E. 516, 518 (1938)).

38 *Boynton v. Kilgore*, 271 Va. 220, 229, 623 S.E.2d 922, 927 (2006). When the language of a statute is ambiguous or appears to be inconsistent with other portions of the statute, courts are to harmonize any ambiguity or inconsistency in the statute to give effect to the General Assembly's intent without usurping the "legislature's right to write statutes." *Parker v. Warren*, 273 Va. 20, 24, 639 S.E.2d 179, 181 (2007) (citing *Boynton*, 271 Va. at 229-230, 623 S.E.2d at 927 (2006)).

39 Va. Code § 54.1-3205 provides in part that "[n]o licensed optometrist shall practice optometry as an employee, directly or indirectly, of a commercial or mercantile establishment." Va. Code § 54.1-2716 provides that "[i]t shall be unlawful for any dentist to practice his profession in a commercial or mercantile establishment", while Va. Code § 54.1-2717 states that "[n]o corporation shall be formed or foreign corporation domesticated in the Commonwealth for the purpose of practicing dentistry other than a professional corporation as permitted by Chapter 7 (§ 13.1-542 et seq.) of Title 13.1."

40 1992 Op. Va. Att'y Gen. 147 & 151.

41 *But see Sexton v. Cornett*, 271 Va. 251, 257, 623 S.E.2d 898, 901 (2006). The Court stated that:

> courts assume that a legislative body, when enacting new legislation, was aware of existing laws pertaining to the same subject matter and intended to leave them undisturbed. Otherwise, the older laws would have been amended or expressly repealed. Consequently, when two statutes are in apparent conflict, it is the duty of the court, if reasonably possible, to give them such a construction as will give force and effect to each.

42 The value of a practice when sold is, in part, calculated by determining the practice's "goodwill." The Court has previously recognized quantifying the value of "goodwill" based on the value of the difference between the price a business would sell for and the value of its nongoodwill assets as an acceptable valuation method. *Advanced Marine Enterprises v. PRC, Inc.*, 256 Va. 106, 119-20, 501 S.E.2d 148, 156 (1998) (citing *Russell v. Russell,* 11 Va. App. 411, 416, 399 S.E.2d 166, 169 (1990)) (The Court accepted this formula as a valid way to calculate damages for violation of a noncompete clause).

43 Furthermore, the existence of a nonlicensed employer's legitimate business interest in its patients and records is evidenced by the fact that the patient is a patient of the practice and the medical records are the property of the practice. *See* Va. Code § 54.1-2403.3. Like any other business that generates revenue through the provision of service to customers (patients), FCC would seem to have had a legitimate business interest in protecting itself from competition by a former employee who has had access to its confidential business and patient information and had established contacts with its patients while serving as an employee of the corporation. The Court's decision states that FCC continued to have a licensed physician employee following Dr. Parikh's departure. Thus, the practice could continue to operate. The practice also would continue to have a legitimate business interest in retaining its patient base for the purpose of selling the practice. *See* Va. Code § 13.1-552.