Teacher's Manual
Developing Professional Skills: Workplace Law
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Chapter 5: Covenants Not to Compete

Problem: Physician considering a job offer seeks advice regarding prospective employer's proposed noncompete agreement.
Legal Rule(s): The law of covenants not-to-compete
Skill(s): Drafting
Assignment: Redraft the client's noncompete agreement and prepare to explain your revision to the opposing party/counsel.
Practice Norm(s): Negotiating terms of hire
Professionalism Concept(s): R. 1.7: Conflict of Interest: Current Clients; R. 1.9: Duties to Former Clients
Optional Extension Assignment: Draft a letter to opposing counsel proposing revisions.

Legal Rules

Noncompete Enforcement & Employers' Legitimate Interests

In most jurisdictions, agreements limiting employees' ability to compete post-employment are enforceable if reasonable. Courts consider the relationship between the limitations imposed by the agreement and the employer's legitimate business interests, taking account of the hardship imposed on the employee and any negative consequences to the public. In a few jurisdictions, notably California, noncompete agreements are unenforceable. The problem involves a client who is relocating to a new job, enabling professors in non-enforcement jurisdictions to situate the target employer in a neighboring state with a different enforcement regime (e.g., an employee moving from California to Washington).

Because noncompetes are disfavored, the burden will be on the employer to demonstrate the enforceability of the agreement in any future litigation. Its first step will be to show a legitimate interest justifying the restraint on competition. The two most widely recognized justifications for noncompetes are the protection of trade secret or confidential information and the protection of the employer's client or customer base. It is highly unlikely that the potential employer in the problem, a homeopathic medical practice, uses any trade secret or confidential information. Although homeopathy is a specific (even insular) specialty, presumably the employer applies the same established techniques that other homeopathic practices employ. The more legitimate interest is in the employer's "customers," i.e., patients. This interest is particularly acute in situations like this one where the employee is being introduced to a new field or a new locale and has no independent contacts.

A related question is the legal significance of any formal or informal training the employer plans to provide to the new hire. An employer who incurs costs in bringing a worker up to speed wants some guarantee that it will receive the benefit of its investment. In this case, Newtown Family is likely concerned that Williams will join a competitor or open a competing practice once Williams gains sufficient knowledge and experience from his/her employment at Newtown. Most jurisdictions, however, do not recognize "general" training, (i.e., training that imparts no proprietary information and can be acquired and/or marketed elsewhere), as an independent justification for a noncompete. Among the many policy concerns posed by noncompetes is the risk that they will create a form of indentured

servitude. For this reason, the law views the employee as the owner of his or her human capital. Newtown Family's investment in training Williams is therefore unlikely to provide legal support for its noncompete; however Newtown Family's investment could provide a motivating rationale for enforcement in future litigation.

Scope & Judicial Modification

Once an employer demonstrates a legitimate interest, the next question is whether the agreement is reasonable in scope. It is the employer's burden to show that the restraint is limited to what is necessary to protect to protect its legitimate interests. Courts consider three factors: the duration of the restraint, its geographic range, and the definition of competition.

The noncompete proposed in the problem is potentially overbroad with respect to each of these factors. On scope of competition, the agreement purports to restrain the client from practicing any form of medicine. This is clearly unreasonable given the focus of the practice. At most, the definition of competition should cover homeopathic medicine; it could perhaps be further limited to homeopathic pediatrics given the nature of client's specialty.

A three-year duration is also questionable on its face. For many jurisdictions, a year (maybe two) is the presumptive limit. Facts and outcomes in particular cases vary significantly. The key is to compare the duration of the restraint to the underlying interest. A good example is Hopper v. All-Pet, 861 P.2d 531 (WY 1993), included in several casebooks, a case involving a noncompete between a veterinarian and her former practice. The Wyoming Supreme Court found that patients typically visited the practice at least once a year; therefore a year was enough time for the former employer to have the opportunity to introduce a new vet to its patients and encourage them to remain with the practice.

On geographic range, assessment requires more factual information about the size of the county and the availability of other service providers. The latter is particularly important in this factual context in which the employer and the client are physicians (more on this below). The professor can either provide fictitious information to the student or set the problem in a known county and ask the students to research real-life facts.

Agreements that are overbroad are generally subject to judicial modification. Most states will re-write the terms of the restraint so that they are reasonable under the circumstances. However there are two other approaches: A minority of jurisdictions will void the agreement entirely if any portion of it is overbroad. Another minority will "blue-pencil" the agreement (that is, strike the overbroad language and enforce the rest), provided the agreement is capable of this type of revision. The particular approach followed by courts in the jurisdiction selected for the problem has significant implications for the students' choice of strategy, as discussed below.

Agreements Between Physicians

A final doctrinal consideration is the legal significance of the client's profession. Medicine is an essential service and constraints on a physician's ability to practice may have serious implications for public health. For this reason, some jurisdictions prohibit such agreements by statute. (As discussed above, professors in such jurisdictions can situate the target employer in a neighboring jurisdiction.) Even if the jurisdiction permits physician noncompetes, the risk of adverse consequences to the public

at large will be a factor in any subsequent dispute about its reasonableness. This can potentially provide the client some leverage in negotiating the noncompete's terms.

Practice Norms

Negotiating Terms of Hire

Few noncompetes are negotiated. In the typical situation, the noncompete is unilaterally drafted by the employer and presented to the employee as a take-it-or leave it proposition. The exception is the high-level employee with an individual written contract, who is in the position to dictate some terms of hire. This problem puts students in the role of negotiating on behalf of such an employee. Although the problem focuses on the language of the noncompete, these skills carry over to negotiating other important contract language on behalf of an employee, such as termination, compensation and severance provisions. The same skills involved in analyzing and proposing revisions to the noncompete also apply in an exit situation, where an attorney must advise an employee seeking to join a competitor or defend an employee in an enforcement action.

Choosing a Strategy Informed by Client Interests

An initial point for discussion is whether it is worthwhile for the client to negotiate at all. If the agreement is over-broad, it is unlikely to be enforced, at least in its current form. Indeed, if the problem is set in a minority jurisdiction that voids any overbroad agreement outright, it is arguably to the client's advantage to have a very broad noncompete if there must be one at all. It is far more likely however that a court will modify the agreement in one way or another to make it less onerous. The professor can discuss the pros and cons of signing this agreement as is and simply relying on this legal backstop. An obvious downside is that determining the enforceable scope of an overbroad agreement will require costly litigation that will delay the client's ability to secure another position. The mere existence of the agreement may deter future employers from hiring the client. In addition, the terms of the agreement as drafted will benchmark any future negotiations between the employer and employee about the noncompete's scope at the point of exit. They will also benchmark any modification made by a court.

The degree to which the client attempts to negotiate must be informed by the context. For instance, one possibility would be for the client to propose a drastically reduced restraint or simply refuse to accept a noncompete at all. Student must be mindful, however, that the client is beginning a new relationship; taking a hard line with a future employer may be against the client's professional interests. A new employee typically wishes to convey enthusiasm about the position and begin the relationship on a positive note. Strenuous objections to the noncompete could be perceived by the future employer as a lack of commitment by the employee or simply an argumentative nature. No one wants a "difficult" employee or a "short-timer."

Assuming it is worth it to push back on at least some of the terms, the student must carefully assess the client's interests and priorities. There are many possible changes that would make the covenant more reasonable from a legal perspective and more palatable to the employee. To determine the best changes to make, the lawyer must know more about the client's practice and future plans. How long does the client envision staying with this employer? If the client leaves, is the client likely to continue in homeopathic medicine or return to traditional pediatrics? Would the client envision staying

in Newtown County or returning to the family's former community? The professor can fill in this information in any number of ways, ranging from simply providing additional facts to enlisting a volunteer to role-play the client in a simulated interview.

Reviewing Employment Contracts

Depending on time, the professor may wish to raise questions about other proposed terms of the client's employment. The noncompete is excerpted from a larger written agreement. Students should know that in real life one would never assess just one clause of a contract without looking at the document as a whole. Of particular relevance to this problem is the duration of the agreement and provisions regarding termination. The noncompete provides that it is effective upon termination "for any reason." What if the practice terminates the client? Although the law is not fully developed, many jurisdictions will enforce noncompetes against involuntarily terminated employees provided the termination was made in good faith. Thus an additional proposed change might be that the noncompete apply only upon a "termination initiated by the client," or similar language. In addition, examining the full contract can affect the overall negotiation strategy. One might, for instance, simultaneously propose changes to the duration of the agreement or the termination clause. The client might be willing, for instance, to agree to a longer period of restraint if promised greater job security.

Communicating with Opposing Party

Upon determining the universe of changes to be proposed, one must decide how to communicate with the future employer. Should it be by letter? Phone? Email? To whom should it be sent? The employer's principal? The employer's attorney? Is there an attorney (and how do you know)? And who should initiate the contact? The client's attorney? Or the client directly? One can discuss the relational implications of shifting from direct negotiation between the client and future employer to involving attorneys.

Ethics & Professionalism

The problem states that Williams comes to this firm because it previously assisted the client's current practice in a matter involving termination of a nurse practitioner. This professional relationship could raise conflict-of-interest issues under MRPC 1.7 (duties to current clients) & 1.9 (duties to former clients) that are not readily observable to students.

To unpack this, students must first understand that in the prior matter the firm was representing the organization (the physician partnership), not Williams or any of the other pediatricians as individuals. Williams and Children's Medical are two different clients, hence the potential conflict. Next students should understand how these two clients might have (or come to have) different interests, now or in the future, with respect to Williams' departure. There are a number of potential issues that might arise in this context, including ongoing or future financial obligations Williams might owe the practice, as well as issues related to Williams' prospective new employment and potential competition (e.g., might Williams have signed a noncompete with Children's Medical?).

To analyze this correctly, one must first determine whether Children's Medical is a current or former client. The problem states that the student "previously" handled the nurse termination situation, but there may be a continuing relationship is between Children's Medical and the law firm.

What other work has the students' firm done for Children's Medical? Does it anticipate any future work? Is it under retainer? If yes, there is likely a current relationship. Ultimately, however, existence of a lawyer/client relationship is determined based on the reasonable expectations of the client. Does Children's Medical consider this firm its lawyer? If an employment dispute were to arise, would it immediately contact this firm and expect to receive counsel? If so, it is probably best to treat the practice as a current client.

Under MRPC 1.7 a lawyer may not represent a client if the representation would (a) be directly adverse to another client or (b) if the representation would be materially limited by the lawyer's responsibilities to another client. Prong (a) would certainly come into play if Children's Medical actively opposed Williams' departure. There could be a conflict under prong (b) if, for instance, the student were to learn in the course of the representation that Williams' departure breached a term of the partnership agreement.

Students should understand that practical and professional concerns might arise even if Children's Medical is classified as a former client. Under MPRC 1.9, a lawyer who had previously represented a client may not take on the representation of another client in the same or substantially matter if the interest of the new client would be materially adverse to the interests of the former client. If the only matter previously handled by the firm on behalf of Children's Medical was the nurse termination matter, then there is a strong argument that the current representation of Williams does not qualify as a "substantially related" matter and Rule 1.9 is not implicated. But what would happen if Williams' departure from Children's Medical were to become contentious and the former practice wished to renew its relationship with the students' firm? Having taken on the representation of Williams in connection with the homeopathic practice, Williams is now a current client of the firm and accepting the new representation from Children's Medical would be directly adverse to Williams under 1.7.

The professor can take this opportunity to raise some of the business realities that accompany the practice of law. If the students can only consistently represent one client, Williams or Children's Medical, who would they rather have? Any firm would be hard-pressed to prioritize what is likely a one-time representation of an individual (who is leaving town, for that matter) over the potentially long-term representation of a local business organization. Indeed, this is one of the reasons why relatively few workplace law attorneys represent both employers and employees on a regular basis.

For all of these reasons, good practice dictates that the students raise these issues with Williams and Children's Medical and obtain the written informed consent of both parties. Assuming Children's Medical and Williams are departing on good terms, there is no reason why both clients would not choose to waive any potential conflict and consent to the firm's representation of the other.

Add-on exercise

An optional add-on exercise is to have the students prepare a written cover letter to the employer/employer's counsel explaining the proposed changes. This is an excellent opportunity for students to practice a persuasive, but conciliatory, style of drafting that adopts a very different tone from what is commonly used in court documents and demand letters.