Employment Law
Assignment 3 (Noncompete)

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Legal Standard

In most jurisdictions (including NC), an employee noncompete agreement must satisfy two criteria:

1) It must protect a legitimate employer interest, and
2) It must be reasonable in scope (type of activity, geography, duration)

In a civil action—whether the employer sues a former employee to enforce a noncompete or the former employee seeks a declaratory judgment that the noncompete is unenforceable—the employer has the burden of establishing that the noncompete satisfies these criteria.

If a court determines that a noncompete is unenforceable as written, jurisdictions vary as to whether the court must simply deny enforcement, may strike only the overbroad terms but enforce the remainder if feasible ("blue pencil"), or may modify the terms to make the noncompete enforceable. The approach followed in the relevant jurisdiction might affect clients' interests and lawyers' strategies in drafting or negotiating the terms to begin with. For example, in a jurisdiction that allows judicial revision, employers may draft agreements that are unenforceable as written, hoping that they will deter valued employees from leaving, since there is less risk of a court denying enforcement altogether. Conversely, in an "all or nothing" jurisdiction, the employer might take a more cautious approach.[1]

Employers' Legitimate Interest

The first requirement is that a noncompete must protect a legitimate employer interest, and is not merely a "naked restraint on competition". The most common interests that will support a noncompete are (a) protecting the employer's trade secrets or other confidential proprietary information, or (b) protecting the employer's established relationships with its customers/clients.

There's nothing to indicate Newtown uses any special techniques or treatments that would qualify for protection as trade secrets. The usual techniques and remedies of Homeopathy are commonly known among practitioners.[2] There's also no mention of any confidential business information.

Newtown may have a legitimate interest in its relationship with its patients. An employer may generally protect that interest where it has invested effort in building and sustaining a clientele. Since Williams is new to the field and locale, it's unlikely that he is bringing his own patients into the practice.

Jurisdictions are divided on whether an employer's investment (effort and/or expense) in employee training is a legitimate interest that may support a noncompete. Usually, "general" training (i.e. in the sort of knowledge or skills common to the field) will not support a noncompete. But, at least in some jurisdictions, "special" training (i.e. in employer-specific knowledge or skills) may.

There's nothing to suggest that Newtown would provide any "special" training. Whatever Williams may learn there, it's most likely nothing he wouldn't learn in any other homeopathy practice.

[1] Inclusion of a choice of law provision is often another strategic choice in drafting or negotiating noncompetes.

[2] They are also of dubious efficacy. See Steve Lubet, Can a Non-Existent Amount of Duck Liver Extract Cure the Flu? Part 1; Part 2; Part 3.

Scope & Judicial Modification

If the employer can show a legitimate interest, it must further show that the terms of the restriction are reasonably tailored to protect that interest, without unduly burdening the employee's interest in being able to engage in their occupation or the public's interest in labor market mobility and consumer choice. Courts analyze the terms of the restriction along three dimensions: the type of activity restricted, the geographic area within which the restriction applies, and the duration of the restriction. Note that the nature of the employer interest is the touchstone for assessing the reasonableness of the restriction (along each individual dimension and overall). Some interests may support broader or narrower restrictions, and courts may allow broader restrictions along one dimension if the restrictions are narrower along the other dimensions.

Type of Activity

In assessing the type of activity dimension, courts will typically consider the nature of the employer's business (i.e. the types of products/services the employer offers) and the employee's work (i.e. whether the employee a "general practitioner" or "specialist" within their occupation).

The noncompete in this problem restricts Williams from practicing any type of medicine. This is almost certainly too broad, since Newtown's practice is limited to homeopathy. This might depend on whether regular medicine and homeopathy compete within the same market (i.e. they attract the same patients) or constitute distinct market segments (i.e. they attract different patients with little or no overlap). Williams might argue for an even narrower restriction, limited to his particular specialty, pediatrics, within the field of homeopathy.

Geography

On this dimension, courts take into account the geographic territory/market within which the employer operates. Courts may also consider the existence of other competing businesses serving the territory subject to the restriction. Particularly for something like medical services, there is a concern for ensuring that a noncompete does not unduly limit patient's choice of and access to providers.[3]

Assuming Newtown serves patients throughout the city, a city-wide restriction is probably reasonable. A court might consider whether Newtown is the only homeopathy practice in the city.[4]

Duration

In assessing the duration of a noncompete, courts will consider the "shelf life" of the employer's interest. Where the employer seeks to protect trade secrets or other confidential information, this may include the general pace of innovation within the field. Where the employer seeks to protect relationships with customers/clients, this may include the typical frequency with which customers/clients avail themselves of the employer's business.

A three year duration is almost certainly too long. Some jurisdictions treat a duration of more than a year or two as presumptively unreasonable, absent special justification. Assuming patients typically visit Newtown at least once a year, a one year duration should suffice to protect Newtown's interest.[5]

[3] Cf. Model Rules of Prof'l Conduct, R. 5.6 (prohibiting attorney noncompetes).

[4] A sensible person might question whether a court should be concerned about protecting patients' choice of quack. But that's probably not an argument Newtown is likely to raise either in negotiation or any ensuing litigation.

[5] See Hopper v. All-Pet, 861 P.2d 531 (WY 1993) (finding three year duration unreasonable, where, "Based on figures of client visits, a replacement veterinarian at All Pet and Alpine would be able to effectively demonstrate his or her own professionalism to virtually all of the clinics' clients within a one year durational limit.").