

Maximizing Value and Reducing Risk in Your Practice – Session 2

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Refresher from Session 1

- Choice of Entity
- Corporate Practice of Medicine
- Private Equity Concerns
- Succession Planning

Agreements Among Equityholders

- Shareholders Agreement
- Operating Agreement
- Buy-Sell Agreement

How Do These Agreements Help Maintain Value?

- Ensuring continuity in ownership
- Providing mechanisms for resolution of disputes
- Punishing wrongful conduct

Mandatory Transfer or Sale of Equity

- Occurs upon the happening of certain events
 - Death or disability
 - Retirement
 - Voluntary withdrawal
 - Involuntary dissociation
 - “Morals clauses”
- Can be automatic or drafted as an offer to the Company and/or the other partners

Mechanisms for Preserving Value

- Valuation of equity
 - Is there a punitive function?
 - Agreed value vs. Third party valuation
- Life insurance
- Promissory Notes
- Non-competes/restrictive covenants

**USE OF NON-COMPETES AND OTHER
RESTRICTIVE COVENANTS TO
PROTECT YOUR BUSINESS**

What we will cover ...

- I. Introduction to Restrictive Covenants
- II. FTC Non-Compete Ban
- III. New York Rule for Enforceability

I. Introduction to Restrictive Covenants

Types of Restrictive Covenants

1. Non-Compete
2. Non-Solicit
3. Non-Disclosure/Confidentiality



Purpose of Restrictive Covenants

- Protect trade secrets/confidential information
- Protect goodwill of the business
- Protect customer/patient relationships
- Provide means to seek certain types of relief/deterrence:
 - Return of compensation paid
 - Attorneys' fees and costs
 - Injunctive relief
 - Defend Trade Secrets Act remedies

Non-Disclosure Covenant

- Designed to protect confidential and trade secret information by prohibiting the disclosure and use of such information
- Other key terms
 - Return of information and company property at termination of employment
 - Use of personal cloud accounts
 - Defend Trade Secrets Act whistleblower immunity
- Necessary to show a court that you have taken reasonable steps to protect your confidential and trade secret information

Non-Solicitation Covenant

- Customer:
 - Designed to protect your customer relationships and goodwill
 - Prohibits solicitations of customers with whom the employee had business contact or developed relationship with during employment
 - Does not typically extend to customers that employee had a preexisting relationship with prior to taking employment
- Employee: Designed to protect against the solicitation or hire of employees
- Courts routinely enforce narrowly drafted non-solicitation covenants

Non-Compete Covenant

- Designed to protect against the use of confidential and trade secret information and competition from “unique” employees
- Prohibits competition, whether as an employee, contractor or owner, for a certain period of time within a certain geographic region
- Courts will closely scrutinize

Employee Choice Non-Compete

- Applies where an employer conditions receipt of post-employment benefits (e.g., stock options, pension benefits, etc.) upon compliance with broad restrictive covenants.
- Advantage: The general rule governing restrictive covenants does not apply, thus allowing for broader restrictions.
- Disadvantage: (1) Effective deterrent only if the benefit conferred is valuable and (2) the remedy for breach is generally limited to the return of the benefit (i.e., no injunctive relief).

II. FTC NON-COMPETE BAN

FTC's Final Rule Banning Non-Competes

- The final rule declared the vast majority of non-competes against “workers” an unfair method of competition.
- The final rule also prohibited the use of de facto non-competes.
 - Broad non-disclosure provisions;
 - Financial penalty provisions; and
 - Broad non-solicitation/non-interference provisions.
- Effective date was supposed to be September 4, 2024.

Ryan, LLC v. Federal Trade Commission

- Plaintiff brought action to invalidate FTC non-compete ban.
- District Court granted Plaintiff summary judgment on August 20, 2024, and struck down the FTC ban on the grounds that it was done in excess of Congressional authority and was otherwise arbitrary and capricious.
- The Decision means that the FTC ban no longer has any legal effect until a United States Circuit Court or the Supreme Court says otherwise.
- It is likely that the FTC will appeal the decision to the Fifth Circuit Court of Appeals and, depending on that result, to the Supreme Court.

Current State of Non-Compete Law

- Non-Competition agreements are governed by applicable state law.
- New York law provides that a non-compete is enforceable so long as it is reasonable in time and geographic scope and no broader than necessary to protect a legitimate interest recognized under the law.
- Certain states ban the use of non-competes in the employment context.
- Other states significantly limit the use of non-competes in the employment context (e.g., barring non-competes for employees below income threshold).

III. New York Rule for Enforceability

New York Rule for Enforceability

- Sufficient consideration is a must ...
 - Initial employment
 - Continued employment
 - Promotion
 - Severance Benefits
 - Termination “for cause” vs. “without cause”
- More is not better: You cannot “buy” longer or broader covenants with more consideration.

New York Rule for Enforceability

- It must be reasonable in time and area and no broader than necessary to protect legitimate interests.
 - 1-2 years generally enforceable
 - Area depends on geographic footprint of business and employee responsibilities
 - Legitimate interests include
 - Trade secrets
 - Goodwill
 - Customer relationships
 - Key/unique employees

New York Rule for Enforceability

- It cannot be harmful to the general public and/or unreasonably burdensome to the employee.
 - Cannot impose undue hardship on the employee (e.g., cannot prohibit employee from working any job in employee's chosen field).
 - Covenant cannot violate public policy (e.g., certain covenants in the professional context).

Sale of Business Non-Compete Rule

- More deferential standard than the employment context.
- The restrictive covenant must be “reasonably necessary to protect the buyer’s legitimate interest in the purchased asset.”
- Compare with employment context: “no broader than necessary to protect the employer’s legitimate business interest.”
- The result: courts often allow a longer duration and/or geographic scope for restrictive covenants in the sale of business context.

Consequences of Overbreadth

If you are lucky, then the Court will strike only the overbroad portion and enforce the remainder of the agreement.



Consequences of Overbreadth

If unlucky, then the nightmare scenario exists: the Court will strike the entire agreement leaving your trade secrets and customer relationships exposed.



Don't Panic: It Can Still Be Fixed

- Periodic reviews/updates essential
- Covenants can be updated as part of:
 - Continued employment
 - Promotion
 - Other positive change in employment
 - Severance benefits

EMPLOYMENT AGREEMENTS WITH PROVIDERS

Introduction

- **Overview:** Why Employment Agreements Matter
 - Setting clear expectations
 - Protecting the interests of both practice and practitioner
 - Avoiding future disputes
- **Purpose:** Understand key legal elements and terms of the employment relationship

Contractual Terms Overview

- **Essential Clauses in Employment Agreements**
 - Offer of Employment
 - Compensation and Benefits
 - Duties and Responsibilities
 - Work Schedule & Location
 - Term of Employment
 - Termination Provisions

Compensation Structures

- **Fixed Salary vs. Production-Based Pay**
 - Pros and Cons for the practice and practitioner
 - How bonuses and incentives are structured
 - Compliance with Fair Labor Standards Act (FLSA)

Benefits and Perks

- **Typical Benefits in Healthcare Employment**
 - Health insurance, disability, and retirement plans
 - Continuing medical education (CME) allowances
 - Malpractice insurance and tail coverage
- Full descriptions of benefit plans can be set forth elsewhere

Termination Clauses

- **Termination “For Cause” vs. “Without Cause”**
 - Typical grounds for termination
 - Loss of license, certification, approval or accreditation
 - Notice requirements and severance provisions
 - Rights upon termination (e.g., patient handover, medical records)
 - Consequences for noncompliance

Workplace Expectations and Professional Standards

- **Duties and Responsibilities**

- Performance standards and clinical duties
- Professional conduct and compliance with regulations
- Handling patient complaints and peer reviews
 - Oversight of other medical staff

Dispute Resolution Mechanisms

- **Resolution Clauses in Employment Agreements**
 - Mediation and arbitration options
 - Governing law and jurisdiction
 - Importance of clear dispute resolution processes

Confidentiality and Intellectual Property

- **Confidentiality Obligations**
 - Patient information and HIPAA compliance
 - Handling proprietary practice information
 - Ownership of research and inventions

Key Takeaways

- Understanding critical terms before negotiations
- Balancing practitioner and practice interests
- Incorporating existing policies (i.e., handbook)
 - Being clear if deviation is intended
- Importance of legal review before signing

Updates and Trends in Employment Agreements

- **Emerging Trends**

- Value-based compensation models
- Telemedicine and its impact on contracts
- Evolving state laws on non-compete clauses



Thank You

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