MEMO TWO SAMPLE 2 (Excerpts) – with comment boxes

TO: Supervising Attorney
FROM: Your Favorite Student
DATE: October 16, 2008
RE: Angela Singh, covenant not to compete

ISSUE

Will a Maryland court enforce a covenant not to compete, where the employee is a general practice physician at a Baltimore medical group, and where the restraint prohibits the physician from treating any patient she treated as a member of the group for a period of four years anywhere in the United States?

ISSUE: Note how the student incorporates a few determinative facts.

BRIEF ANSWER

A Maryland court will likely hold that the covenant not to compete is enforceable because its restraints are reasonable with respect to a five-part test. The court will find that: (1) the group has a protectable employer interest in preventing Dr. Singh from luring patients to her new practice and thus detracting from the group's patient base; (2) no undue burden is imposed on Dr. Singh because she remains free to practice medicine with minimal limitations; (3) the covenant does not disregard the public interest since there is no threat of monopoly and Maryland courts have not held that restrictive covenants which bind physicians are per se unreasonable; (4) the covenant is reasonable in area and scope because it effectively targets patients of the medical group; and (5) the time limitation is unreasonable given that it is longer than necessary for patients to establish a trusting relationship with a new doctor. While the court will likely find the covenant is unreasonably long in duration, the court will likely modify the duration of the covenant from four years to three and hold that it is enforceable as modified.

BRIEF ANSWER: The first sentence is the overall prediction. Here, there is a five-part test, and the conclusion in each part of the test is given.

FACTS

FACTS: The student includes all determinative facts and any necessary background facts.

Dr. Angela Singh is a physician who practices internal medicine with a group of five other physicians in Baltimore, Maryland. When she joined the group in September 2004, she signed an agreement containing a covenant not to compete. The covenant states:

> Each signatory to this agreement hereby covenants and agrees that upon his/her departure from said group practice, s/he shall not, for a period of four years, at any location in the United States, treat any patient that the signatory has treated while a member of the group.

As with other internal medicine practices, most patients see the same doctor on a regular basis unless dissatisfied. Over the last four years, Dr. Singh has worked hard to build good relationships with patients. Now, she wants to leave the group in order to join another group of doctors in Washington, D.C. Although she has not been dissatisfied with her experience with the Baltimore group, she is interested in working part-time. She also believes that many of her current patients would be disappointed if they could not continue those relationships with her.

DISCUSSION

This is a direct quote of the rule, from which the five-part test is derived. The student broke down this rule into five parts, by parsing the quoted language and reading relevant cases to see how courts have applied the rule in various contexts. In other words, there is no case that says, "there is a five-part test."

In Maryland, the court will uphold a restrictive covenant as reasonable, and thus, enforceable if the "restraint is confined within limits which are no wider as to area and duration than are reasonably necessary for the protection of the business of the employer and do not impose undue hardship on the employee or disregard the interests of the public." *Ruhl v. F.A. Bartlett Tree Expert Co.*, 225 A.2d 288, 291 (Md. 1965). This definition may be evaluated as a five-part test. *See id.*

1) Protectable Employer Interest

Starts with a **Conclusion** on this test.

The court will likely find that the medical group has a protectable interest in prohibiting Dr. Singh from taking their clients away.

To be enforceable, a restrictive covenant must shield a protectable employer interest. *Id.* Specifically, Maryland courts have recognized an employer's interest in protecting customer contacts. *Id.*; *Holloway v. Faw, Casson & Co.*, 572 A.2d 510, 515 (Md. 1990). The extent of personal contact between an employee and the business's customers is especially important in determining whether restraint is reasonably necessary to protect an employer's business. *Ruhl*, 225 A.2d at 291. Restrictive covenants in cases where the relationship between employee and customer is very important to the business will likely be upheld. *Silver v. Goldberger*, 188 A.2d 155, 158 (Md. 1963).

Here is the **Rule** (for first part of test). Can be one sentence or one paragraph. The student briefly explains how courts examine whether there is a protectable employer interest.

For example, in *Ruhl*, the court found that the Bartlett Tree Expert Company had a protectable interest in maintaining its client base. 225 A.2d at 292. At Bartlett, Ruhl had been responsible for contacting potential customers from a database in order to bring in business for the company. *Id.* at 290. In this capacity, Ruhl developed a "direct and continuous relationship with Bartlett's customers." *Id.* at 291. These relationships were vital to Bartlett's economic well-being and competitive edge in the surrounding area. *Id.* at 290. The strength of Ruhl's relationships with Bartlett customers was highlighted by the fact that, after leaving Bartlett and starting his own business, much of Ruhl's work volume was attributable to former Bartlett customers who had followed him to his new venture. *Id.* at 291-92. The court found these facts sufficient to prove that Bartlett had a protectable employer interest. *Id.* at 292.

Explanation. Here's an example of how the rule was applied in one case.

Similarly, the court in *Holloway* found that an accounting firm had a protectable employer interest in maintaining an ongoing relationship with its clients. 527 A.2d at 516. The court pointed to the high degree of personal contact between accountants and their clients as well as the centrality of this relationship to the success of an accounting firm, as evidenced by the fact that 171 of Holloway's customers followed him to his new firm. *Id*. at 511, 516. Thus, the court

Transition to next case, which applies the same rule and comes to a similar conclusion.

found the firm was entitled to protect itself against this vulnerability through the use of a restrictive covenant. *Id.* at 515.

In contrast, the court in *Silver* found no protectable employer interest that would justify a restrictive covenant. *Silver*, 188 A.2d at 159. Silver, who owned and operated an employment agency, claimed that two former employees breached a restrictive covenant when they left his employ and started their own employment agency several blocks away. *Id*. at 156. Silver failed to prove that the defendants had lured, or were likely to lure, some of his clients away from him, and, as a result, the court found that Silver's interest in upholding the non-compete clause was not protectable. *Id.* at 159.

This case applies the same rule but comes to opposite result.

Here, the medical group's restrictive covenant addresses a protectable employer interest – specifically, preventing Singh from taking her patients with her to a new practice and thus detracting from the group's patient base. Like the manager in *Ruhl*, who was the main business representative with whom a customer of the tree company interacted, Dr. Singh also has direct and continuous relationships with her patients, as patients typically see the same doctor on each visit. *See* 225 A.2d at 290. Singh herself noted that many of her patients would be disappointed if they were unable to continue their relationships with her. Similar to Ruhl, who had developed close relationships with many of Bartlett's tree customers, Singh's patients likely identify with her and not the medical practice group. *See Ruhl*, 225 A.2d at 292.

Application: How do Dr. Singh's facts compare to the other cases? Start with a **conclusion**.

Moreover, like the accountant-client relationship in *Holloway*, Singh's patients share confidential information with her. *See* 527 A.2d at 516. Compared to an accountant who deals with financial issues, a doctor may have even more opportunities to receive highly confidential information and provide patient services likely to result in the creation of good will that would follow her. *See id.* Dr. Singh's sustained relationship with patients, coupled with the highly

More **Application**.

personal and confidential nature of the doctor-patient relationship, makes it likely that the patients Singh treated while a member of the group would have an interest in keeping her as their doctor even after she moves to a new practice. *See Holloway*, 527 A.2d at 511 (finding protectable employer interest where 171 of Holloway's clients retained his services after he left the accounting firm).

Because of the importance of these personal relationships and the group's resulting vulnerability to losing patients, the court will likely find that the restrictive covenant does serve a protectable employer interest.

Mini **conclusion** on this part of the test.

2) Undue Employee Hardship

Conclusion on this part.

The court will probably find that the restraint will not impose undue hardship on Dr. Singh.

Rule on this part.

Restrictive covenants may not "impose undue hardship on the employee" or be "unduly restrictive of the employee's freedom." *Ruhl*, 225 A.2d at 291, 293. In determining what constitutes undue hardship, courts focus on the employee's inherent right to work in his or her chosen area or profession and take into consideration the employees' skill and education levels as well as their personal circumstances. *Id.* at 293*; Becker v Bailey*, 299 A.2d 836, 838 (Md. 1973).

Explanation. Two cases "explained" together to make the same point. Includes determinate facts and result for each case.

The employees in both *Becker* and *Ruhl* had limited education and skills for working outside their chosen business. The tag-and-title employee, Bailey, was 49 years old, in poor financial condition, and not trained for any other type of work. *Becker*, 299 A.2d at 837. Thus, the court held that the restraint would impose undue hardship on him. *Id.* Similarly, Ruhl had a high school education and never worked outside of the tree business, which he joined at age

fourteen. *Ruhl*, 225 A.2d at 293. Ruhl, however, left his position voluntarily and received training and experience from the employer that might be beneficial to him in the future. Due to these "countervailing considerations," the court held that Ruhl's covenant did not impose undue hardship on him. *Id.*

Similar to *Ruhl*, the court is likely to find that the medical group's restrictive covenant does not impose an undue burden on Dr. Singh. Unlike in *Becker*, where the title courier was prohibited from practicing his trade with anyone in an expansive area, Dr. Singh is not altogether precluded from engaging in her chosen profession; she remains free to practice medicine and treat any number of patients as long as she did not treat them while a member of the group. *See Becker*, 299 A.2d at 836.

Application. Starts with a conclusion.

Like the tree care provider in *Ruhl*, Dr. Singh is leaving the Baltimore practice voluntarily. *See* 225 A.2d at 293. Unlike in *Ruhl*, where the tree care company had trained the employee, here it is unclear whether Dr. Singh has been trained at the Baltimore group. Nonetheless, it is likely that she received training, both in practice and in prior education, so she is well equipped for a future job. *See id.* Further, unlike the unskilled tag-and-title employee in *Becker*, Dr. Singh has undertaken specialized education. *See* 299 A.2d at 837. In a metropolitan area such as Washington, D.C., she will likely be able to find new patients and continue working as a physician. Even if she could not find new patients during the period of restraint, she would likely be able to find a greater range of jobs than would have been available to either Bailey or Ruhl. *See id.*; *Ruhl*, 225 A.2d at 293. The fact that she is considering working part-time also suggests that she is not in as poor a financial condition as Bailey. *See Becker*, 299 A.2d at 837. Therefore, the court will probably find that the covenant will not place undue hardship on Dr. Singh.

Mini-**conclusion**.

3) Public Interest
[omitted]

4) Scope of Area
[omitted]

5) Scope of Duration
[omitted]

CONCLUSION

Of the five issues that the court considers in deciding whether a restrictive covenant is enforceable, the court will likely find that Dr. Singh's covenant not to compete meets the reasonability requirements of four of them. First, the employer has a business interest that is reasonably necessary to protect. Second, the covenant will not impose undue hardship on Dr. Singh. Third, the covenant will not cause substantial harm to the general public. Fourth, the scope of area is not beyond what is reasonably necessary to protect the employer's business interests. On the fifth issue, the court will likely hold that the scope of duration is longer than necessary to protect the employer's business interest. Because the court has the option to modify the scope of duration as it did in reducing the length of the covenant in *Holloway* from five to three years, the court will likely reduce the scope of duration in Dr. Singh's restrictive covenant from four years to three years and hold that the modified non-compete clause is enforceable .

CONCLUSION: The overall Conclusion is a separate section. It is similar to the Brief Answer, but more succinct. Do not add new information; it is a wrap-up section.

THE END

Comment [01]: