

IP 06-0439-C H/K Hope Foundation v Edwards  
Judge David F. Hamilton

Signed on 4/12/06

**NOT INTENDED FOR PUBLICATION IN PRINT**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

HOPE FOUNDATION, INC.,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:06-cv-00439-DFH-TAB
	)	
STEVEN EDWARDS,	)	
EDWARDS EDUCATIONAL SERVICES,	)	
INC.,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

HOPE FOUNDATION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 1:06-cv-0439-DFH-TAB
	)	
STEVEN EDWARDS and EDWARDS	)	
EDUCATIONAL SERVICES, INC.,	)	
	)	
Defendants.	)	

ENTRY ON MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Hope Foundation, Inc. is a not-for-profit corporation in the business of offering training to educators to improve schools and student achievement. Hope Foundation seeks injunctive relief to prevent defendants Steven Edwards, Ph.D., and Edwards Educational Services, Inc. from competing with it for one year anywhere in the United States and Canada. A state court issued a temporary restraining order without hearing from defendants. The case was removed to this court based on diversity jurisdiction. This court held a hearing on the motion for preliminary injunction on Friday, March 24, 2006. At the end of that hearing, the court allowed the temporary restraining order to expire and took the motion for preliminary injunction under advisement. As explained below, plaintiff's motion for a preliminary injunction is hereby denied. The court now states its findings of fact and conclusions of law pursuant to Rules 52 and 65 of the Federal Rules

of Civil Procedure. Because these findings and conclusions are based on an expedited hearing after only limited discovery, they are preliminary and subject to revision at later stages of this case.

### *Standard for Preliminary Injunction*

A party seeking a preliminary injunction must demonstrate (1) that it has some likelihood of succeeding on the merits, and (2) that it has no adequate remedy at law and will suffer irreparable harm if preliminary relief is denied. *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992). If the moving party clears both of those thresholds, the court must then consider: (3) the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest, meaning the consequences to non-parties of granting or denying the injunction. *Id.* at 11-12.

### *Findings of Fact*

#### I. *The Parties*

Plaintiff Hope Foundation was founded as a not-for-profit corporation in approximately 1989 or 1990. Hope is an Indiana corporation with its principal place of business in Indiana. It has about 30 employees.

Hope's purpose is to educate educators in strategies for improving schools. It offers a variety of products and services. The lowest priced are training videotapes and books, especially a book entitled "Failure is Not an Option" authored by Hope founder and president Alan Blankstein. Hope also offers training conferences ("summits" or institutes) for educators that typically run two or three days. Its most intensive and expensive services are on-site professional development programs for which Hope sends consultants to visit a school or school district for a day or more, or for a series of visits, sometimes over a period of several years. Most of its on-site services are provided through consultants who are independent contractors. The consultants must have experience with long-term school improvement at the school or school district level. They must understand problem-solving, funding issues, and bureaucratic problems in the education context.

Defendant Steven Edwards began teaching in 1978. He progressed quickly through teaching and administrative ranks to become the principal of East Hartford High School in Connecticut in 1992, which was a challenging school to administer. Dr. Edwards achieved considerable success there measured in terms of higher student achievement levels, lower dropout rates, and lower levels of violence. His success attracted some attention within the education profession. He also has a doctoral degree in educational leadership and has taught in that field at the university level.

Dr. Edwards began speaking to other educators about his work at East Hartford High School. Beginning in 1993, he began to be paid for some of those appearances, in which he would describe a program built on small learning communities focused on student achievement and using techniques proven to succeed. In 2002, Dr. Edwards left East Hartford High School to join the National Crime Prevention Council as its vice president for children, youth, and communities. He worked there for two years. In 2004 he began doing full-time consulting work. He has established Edwards Educational Services, Inc., a Virginia corporation with its principal place of business in Virginia. Dr. Edwards is also a citizen of Virginia. Diversity of citizenship is complete, and the court has subject matter jurisdiction under 28 U.S.C. § 1332.

## II. *Dr. Edwards' Work with Hope*

### A. *Origins and the 2001 Management Agreement*

Hope's relationship with Dr. Edwards began in 2001. Hope's founder Alan Blankstein and its executive director Nancy Shin met with Dr. Edwards at a Hope event and talked about having him speak on behalf of Hope. In June 2001, Hope and Dr. Edwards signed a management agreement in the form set forth in Exhibit 15. (No one has yet located a signed copy, but both sides agree that the agreement was signed.) Under the 2001 Management Agreement, Dr. Edwards agreed that any paid speaking he did (outside his home school district) would be arranged through Hope and that Hope would receive 30 percent of gross revenues

from such speaking engagements. The 2001 Management Agreement had a term of three years and expired by its terms in June 2004. It did not contain any covenant not to compete after its expiration, nor did it include provisions addressing confidentiality of information.

B. *The Alton Project and the 2002 Agreement*

In August 2002, Dr. Edwards and Shin began talking about a new long-term project with schools in Alton, Illinois. Hope had a contract to work with the entire school district to train teachers and administrators. Shin wanted Dr. Edwards to act as the project director. In the discussions, Shin said that Hope would need to have Dr. Edwards sign a contract with a non-competition agreement. The testimony from both Shin and Dr. Edwards indicates that Hope was particularly concerned about the access Dr. Edwards would gain to Hope's development of a new curriculum for training educators. On September 15, 2002, Shin sent Dr. Edwards a draft contract as part of a broader e-mail exchange on the scope of the project and strategies for making it most effective. Ex. 39.

In October 2002, the parties signed the "Confidentiality and Non-Compete Agreement" that is the basis of Hope's suit. See Ex. 17 ("the 2002 Agreement"). It provides in relevant part:

B. Consultant [Edwards] has been or will be hired by the Foundation [Hope] to perform certain consulting services for the Foundation (the "*Consulting Services*") and both the Foundation and Consultant desire that the Consulting Services commence or continue.

- C. In the course of its performance of the Consulting Services for the Foundation, Consultant acknowledges that Consultant has learned or will learn of certain confidential information of the Foundation or may develop products, concepts, methods or formulations and the like relevant to the Foundation's business and both Consultant and the Foundation wish to set forth their understanding with respect to same as set forth below.
- D. As part of the Consulting Services provided to the Foundation, Consultant will provide specific services related to the "Professional Learning Communities" model for producing sustainable improvements in school achievement and school climate at the elementary, middle school and high school levels by providing training in data-driven school improvement, curriculum mapping, and facilitative skills (the "*PLC Services*").

\* \* \*

2. *Restrictive Covenants.* In connection with Consultant's performance of the Consulting Services for the Foundation, Consultant will become acquainted with the affairs of the Foundation, its officers and employees, its services, business practices, the needs and requirements of its customers and prospective customers, principals and or prospective principals, trade secrets and other Confidential Information that the Foundation has or will acquire at its cost and expense and will develop business relationships and goodwill with the Foundation's customers or potential customers, principals and or prospective principals. Therefore, as an essential ingredient and consideration of this Agreement and Consultant's continued performance of the Consulting Services, Consultant hereby agrees, in addition to any other obligations or duties Consultant owes to the Foundation, that during the term of Consultant's performance of the Consulting Services for the Foundation and for a period of one (1) year thereafter, Consultant shall not, without the express written consent of the Foundation, directly or indirectly, as an individual, employee, sole proprietor, owner, partner, officer, director, manager, agent, consultant, formal or informal adviser, or by or through the lending of money or other form of assistance, do any of the following:

- (a) Provide any PLC Services to any client or customer of the Foundation other than in the capacity as a Consultant of the Foundation;
- (b) Compete with the Foundation by providing or soliciting, directly or indirectly, any PLC Services to any person or entity within the following geographic regions: (i) in any state of the United States; (ii) in any province of Canada; or (iii) in any foreign country or jurisdiction in which the Foundation, its employees, officers, agents

or consultants have provided any PLC Services during the twelve (12) months prior to the termination of the agreement;

(c) Hire, employ or attempt to hire or employ any person who is then an employee of the Foundation, or who was within the then most recent twelve (12) months an employee of the Foundation, or in any way (i) cause or assist to attempt to cause or assist any employee to leave the Foundation or (ii) directly or indirectly seek to solicit, induce, bring about, influence, promote, facilitate, or encourage any current employee of the Foundation to leave the Foundation to join a competitor or otherwise;

(d) Solicit, sell or provide PLC Services to any existing or potential client or customer of the Foundation with whom the Consultant had contact, or of whom Consultant became aware as a result of his or her association with the Foundation or directly or indirectly divert or influence or attempt to divert or influence any PLC Services business of the Foundation to a competitor of the Foundation;

(e) Act in any capacity or accept any employment in which disclosure or use of the Foundation's Confidential Information would facilitate or support the performance of Consultant's duties; or

(f) Otherwise directly or indirectly interfere in any fashion with the PLC Services business or operations then being conducted by Foundation or assist others in any endeavor that is competitive with the PLC Services business of the Foundation as it is then being conducted.

Consultant and the Foundation further agree that due to the nature of the Foundation's business, and in order to protect the Foundation's Confidential Information and goodwill, the covenants and restrictions set forth in this *Section 2*, including but not limited to the restrictions on Consultant's ability to engage in activity competitive with the Foundation, are required to be broad in scope.

\* \* \*

11. *Entire Agreement, Modifications, No Strict Construction, Counterparts.* The foregoing terms and conditions of this Agreement constitute the entire agreement by and between the Foundation and Consultant with respect to the subject matter hereof and shall be deemed to supersede all prior and contemporaneous agreements, representations, and understandings, with respect to the subject matter hereof, whether written or oral, and the same shall be deemed to have been merged into this Agreement. No amendment to or modification of this Agreement shall be effective unless the

amendment or modification is in writing and signed by the President of the Foundation and Consultant. The parties also agree that the language of all parts of the Agreement shall be in all cases construed as a whole, according to its fair meaning, and not strictly for or against the drafter. Further, the parties agree that this Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which shall constitute one and the same Agreement.

The parties disagree about one critical aspect of the 2002 Agreement: the scope of the “Consulting Services” from which the one year covenant not to compete in Section 2 would run. Dr. Edwards contends that the 2002 Agreement was intended to cover only the services he provided for the Alton Project. Hope contends the 2002 Agreement covered any consulting services that Dr. Edwards provided and did not terminate until after this lawsuit was filed in 2006.

The September 15th draft of the 2002 Agreement had contained a further paragraph as part of Section 2. After subsections (a) through (f), the draft had contained the following language:

Consultant and the Foundation agree that for purposes of the restrictions and covenants set forth in this *Section 2*, the “term of the Consultant’s performance of the Consulting Services” *shall include not only the period during which Consultant is providing Consulting Services to the Foundation, but any period thereafter during which Consultant provides services to the Foundation in any manner whatsoever.* Consultant agrees and acknowledges that Consultant shall be bound by the terms of *Section 2 at all times during which Consultant provides services to the Foundation in any manner whatsoever and for the twelve (12) month period after the last date on which Consultant has provided such services.* Consultant’s obligations set forth in this *Section 2* and the Foundation’s rights and remedies with respect thereto shall remain in full force and effect for the period(s) stated herein regardless of any termination or resignation of Consultant or other prior termination of this Agreement for any reason.

Ex. 41 (emphasis added).

On September 24, 2002, Dr. Edwards sent an e-mail to Shin with some specific objections to the draft agreement. The first specific comment addressed the deleted paragraph: “Page 3, section f: the word ‘termination’ in this section, from my perspective, would mean that all bets are off, and the 12 month period would start from the date of termination.” Ex. 40. At this preliminary stage, it is not entirely clear what this objection meant, but it is clear that it was addressed to the paragraph that was eventually deleted. Both Shin and Dr. Edwards testified that the paragraph was deleted at Dr. Edwards’ request.<sup>1</sup>

After signing the 2002 Agreement, Dr. Edwards began to work as project director for Hope on the Alton Project. Soon afterwards, however, Dr. Edwards had to attend to some family matters that interfered with his ability to provide the requested leadership. In approximately December 2002, Dr. Edwards and Hope agreed that he would not act further as project director on the Alton Project. See Ex. 46 (e-mail from Shin to Alton Project team stating (a) that Dr. Edwards was released from obligations in Alton, (b) that he could continue to be a resource for the team, but (c) that he would not have an ongoing role there).

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<sup>1</sup>Dr. Edwards concluded this e-mail with the following: “I do not profess to be an attorney, nor do I have much confidence in or respect for them.” Ex. 40. On October 1, 2002, Laurie Ringquist of Hope sent Edwards a revised version of the agreement. In response to Dr. Edwards’ question about assignability, she wrote: “I am not an attorney, but my understanding of it is . . . .” Ex. 41. Suffice it to say that both parties would have been well advised to spend a little money on legal advice in 2002 that might have avoided this litigation.



C. *The 2003-04 School Year*

In June 2003, Hope and Dr. Edwards signed a new agreement under which he became the national director of Hope's faculty of consultants. Ex. 16. He served part-time in that capacity for one year until June 2004. During that year, Hope paid Dr. Edwards a stipend of \$25,000 that was not tied to specific speaking engagements. Apart from that work for that one year, Hope has paid Dr. Edwards only on a piece-work basis for each speech, appearance, or visit. Members of the faculty were expected to participate in monthly conference calls and to attend training sessions for Hope faculty.

D. *The Last Two Years*

At the end of that contract in June 2004, Hope and Dr. Edwards discussed a possible employment relationship. They were never able to reach an agreement on the terms of such an arrangement. Dr. Edwards made clear that he was looking for contract terms that would allow him to do outside consulting. Ex. 55. A later draft of the agreement prepared by Hope would have limited Dr. Edwards to speaking exclusively through Hope on topics related to public education and Hope's mission. Ex. 56. Hope also proposed a covenant not to compete by providing "professional development services" for one year after termination. *Id.* That proposed covenant was a key sticking point in the negotiations. Dr. Edwards wrote that the provision "in essence could render me unemployable for a year. I don't see how I could agree to that." Ex. 57.

In the absence of an employment agreement, Dr. Edwards continued to speak at Hope events, but he no longer participated in monthly calls and training sessions for Hope faculty consultants. In fact, he was a featured speaker at every Hope summit and institute in 2005 and into early 2006. The evidence indicates that between 2001 and 2006, Dr. Edwards spoke on behalf of Hope in more than 20 states, but there is little evidence about just when and where these engagements were, which is relevant to the extent of any legitimate interest Hope might have in preventing competition by Dr. Edwards. During the 2004-05 and 2005-06 school years, Dr. Edwards has also provided on-site professional training for educators in some schools and districts through Hope.

During the 2004-05 school year, Dr. Edwards also began providing some educational consulting services to school corporations independently of Hope. His clients included the Newport News, Virginia public schools. The school system had been a long-time client of Hope, and Dr. Edwards had first dealt with it as a Hope consultant. Dr. Edwards was “shadowing” principals on school visits and providing feedback on their work. See Ex. 31. Another Edwards client was Southside High School in Greenville, South Carolina, which had been a Hope client in the past. See Ex. 33. Another direct client for Dr. Edwards was Amherst Street Elementary School in Nashua, New Hampshire, which had encountered Dr. Edwards first in a Hope summit or institute and had then contacted him directly. See Ex. 37. Dr. Edwards has also served the Carter County Schools in Kentucky,

which had worked with Hope in the past. The school district found that Hope was too expensive. Dr. Edwards has been willing to provide services at a lower cost.

Some events occurred in 2004 and 2005 that are consistent with Dr. Edwards' view that the 2002 Agreement with the covenant not to compete was limited to the Alton Project. In September 2004, Hope staff (Dan Chappell, the professional development coordinator) contacted Dr. Edwards to suggest that a new exclusive contract should be signed to replace the one that had expired in June 2004. Ex. 91. No such replacement contract was ever signed. In June 2005, Dr. Edwards exchanged e-mails with Hope's Dan Chappell. The e-mail referred to a brochure for a non-Hope engagement by Dr. Edwards in Tennessee. There is no indication that Hope believed the engagement might conflict with any contract with Hope. Ex. 64. In fact, the e-mail referred to the old 2001 Management Agreement that had expired no later than 2004, and did not mention the 2002 Agreement.

In July 2005, the Newport News school district sent a payment to Hope that should have been sent directly to Dr. Edwards for work he was doing independently of Hope. See Ex. 88. Dr. Edwards asked the Newport News school district to contact Hope, to explain the mistake, and to request that Hope forward the payment to Dr. Edwards. Ex. 30. Hope did so, without suggesting that Dr. Edwards' independent work might have conflicted with any existing contract between him and Hope.

In late 2005, Dr. Edwards' wife set up a website for Edwards Educational Services. The website describes educational leadership services that compete directly with those offered by Hope. The website includes testimonials from clients that Dr. Edwards had served through Hope, and it includes information about two other speakers who have also worked for Hope.<sup>2</sup>

A staff member at Hope was doing a search on the internet and found the Edwards site. The date of this event is not clear from the record, but it was probably in late January or early February 2006. Hope's senior management (Blankstein and Shin) raised objections. Shin had learned in December 2005 that there was no operative agreement since the 2001 Management Agreement had expired in 2004. Dr. Edwards told Shin that he needed to make a living and that he could not put all his eggs in one basket, with an exclusive arrangement with Hope. In a later discussion, Hope officials invoked the non-competition covenant in the 2002 Agreement. Dr. Edwards said he had been advised that it was not enforceable. In mid-February 2006, Hope's Shin and Blankstein thought they had resolved the issues with Dr. Edwards. They sent a proposed agreement that would have given Hope the exclusive right to contract with him for purposes of speaking engagements similar to Hope's programs. That proposed agreement did not include a non-competition covenant after its termination. Ex. 76. Nevertheless, Dr. Edwards still had concerns because the draft did not protect

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<sup>2</sup>The evidence before the court does not include any non-competition covenants signed by those two individuals.

him in the event that he was dissatisfied with the volume of work Hope could provide (and thus the amount of income he could earn) as long as the contract was exclusive.<sup>3</sup>

No agreement was reached. Hope filed this action on March 13, 2006. That same day the state court issued a temporary restraining order against Dr. Edwards. Dr. Edwards then removed to this court, and the court set the hearing for March 24, 2006. Additional facts are noted as relevant in the discussion of specific issues below.<sup>4</sup>

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<sup>3</sup>When Hope asked Dr. Edwards to sign a new covenant not to compete in early 2006, he asked for some assurances that Hope would use him enough to make a living. Hope (Blankstein) professed astonishment about that question. But Dr. Edwards paid enough attention to realize that the draft covenant would keep him from making a living as a consultant for a year. Blankstein's patronizing response – in essence, aren't we friends and aren't things going well? – ignores the reality that non-compete agreements are intended to address unhappy situations. They apply only when the relationship that looked so promising at the beginning later goes sour.

<sup>4</sup>Hope's Blankstein is the author of the book "Failure is Not an Option." Dr. Edwards wrote some portions of the book. At the preliminary injunction hearing, Dr. Edwards raised an issue as to whether he is entitled to a share of the royalties from the book. Dr. Edwards claims he had an oral agreement with Blankstein for 1.75 percent of the total royalties. Dr. Edwards did not raise this issue until the lawsuit was filed and had not asked earlier for any share of the royalties. The issue has no bearing on the issue of injunctive relief. The court makes no findings as to the existence or terms of such an agreement.

## Conclusions of Law

### I. *Likelihood of Success on Merits*

#### A. *Covenants Not to Compete*

Hope asserts that Section 2 of the 2002 Agreement entitles it to prevent competition by Dr. Edwards for one year throughout the United States and Canada. The 2002 Agreement provides that Indiana law governs, and the parties have not argued otherwise. Covenants not to compete are restraints of trade that are not favored in Indiana law. *Dicen v. New Sesco, Inc.*, 839 N.E.2d 684, 687 (Ind. 2005); *Licocci v. Cardinal Assocs., Inc.*, 445 N.E.2d 556, 561 (Ind. 1983); *Pathfinder Communications Corp. v. Macy*, 795 N.E.2d 1103, 1109 (Ind. App. 2003). Such covenants are normally enforceable only when ancillary to another agreement, such as employment or the sale of a business, and for the purpose of protecting legitimate interests beyond an interest in mere protection from competition. *JAK Productions, Inc. v. Wiza*, 986 F.2d 1080, 1085 (7th Cir. 1993); *Product Action Int'l, Inc. v. Mero*, 277 F. Supp. 2d 919, 923 (S.D. Ind. 2003).

In the employment context, non-competition agreements are construed strictly against the employer and are enforced only if reasonable. *Pathfinder Communications*, 795 N.E.2d at 1109; *Burk v. Heritage Food Serv. Equip., Inc.*, 737 N.E.2d 803, 811 (Ind. App. 2000). When evaluating whether a covenant is reasonable, courts consider whether the covenant is reasonably designed to protect the employer's legitimate interest; whether the restrictions on the former

employee are reasonable in terms of time, geography, and the types of activities prohibited; and the court must also consider the public interest. *Pathfinder Communications*, 795 N.E.2d at 1109; *Burk*, 737 N.E.2d at 811. The employer bears the burden of showing that the covenant is reasonable and necessary in light of the circumstances. *Pathfinder Communications*, 795 N.E.2d at 1109. “The employer must demonstrate, in other words, that ‘the former employee has gained a unique competitive advantage or ability to harm the employer before such employer is entitled to the protection of a noncompetition covenant.’” *Burk*, 737 N.E.2d at 811, quoting *Slisz v. Munzenreider Corp.*, 411 N.E.2d 700, 706 (Ind. App. 1980).

An employer has no legitimate or protectable interest in preventing an employee from using the skills, general knowledge, and information the employee has acquired through the employment unless they are directly related to the good will or value of the employer’s business. *Donahue v. Permacel Tape Corp.*, 127 N.E.2d 235, 240 (Ind. 1955); *McGlothen v. Heritage Environmental Services, LLC*, 705 N.E.2d 1069, 1072 (Ind. App. 1999). In reversing injunctive relief in the *Donahue* case, one of the early and leading cases on the subject, the Indiana Supreme Court explained:

Knowledge, skill and information (except trade secrets and confidential information) become a part of the employee’s personal equipment. They belong to him as an individual for the transaction of any business in which he may engage, just the same as any part of the skill, knowledge, information or education that was received by him before entering the employment. Therefore, on terminating his employment he has a right to

take them with him. These things cannot be taken from him, although he may forget them or abandon them.

127 N.E.2d at 240.

There are two unusual features about this case. First, covenants not to compete are most familiar in the context of employment agreements and agreements to sell businesses. See *Dicen*, 839 N.E.2d at 687 (judicial scrutiny is stricter for covenants in employment agreements than for those that are part of agreement to sell a business); *Product Action Int'l, Inc.*, 277 F. Supp.2d at 923. Dr. Edwards was not an employee. He was only a part-time independent contractor for Hope. Second, covenants not to compete are also most familiar in the context of enterprises that are run for profit. Hope is a not-for-profit corporation whose mission is to spread its ideas for improving schools.

The parties have not cited and the court has not found any Indiana cases dealing with covenants not to compete as applied to individuals who are independent contractors. This federal court's role is to address this question as it believes the Indiana Supreme Court would. *E.g.*, *Klunk v. County of St. Joseph*, 170 F.3d 772, 777 (7th Cir. 1999). There is no reason to predict that the Indiana Supreme Court would adopt an absolute prohibition on covenants where the covenantor is an independent contractor rather than an employee.

Where an independent contractor was a corporation acting as an agent for another corporation as a principal, the Indiana Supreme Court applied the standards of employer-employee covenants. *Harvest Ins. Agency, Inc. v. Inter-Ocean Ins. Co.*, 492 N.E.2d 686, 688 (Ind. 1986). Courts in other states have not adopted a complete prohibition on covenants by independent contractors. They have treated such covenants as similar to an employee's covenant, subject to close scrutiny. See *Eichmann v. National Hospital and Health Care Services, Inc.*, 719 N.E.2d 1141, 1146 (Ill. App. 1999) (judicial scrutiny of covenant with independent contractor would be as strict as with employee where relationship was similar to employment); *Bristol Window and Door, Inc. v. Hoogenstyn*, 650 N.W.2d 670 (Mich. App. 2002) (finding that covenants not to compete in independent contractor relationships did not violate state antitrust statute and could be enforced if reasonable); *Quaker City Engine Rebuilders, Inc. v. Toscano*, 535 A.2d 1083, 1087-89 (Pa. Super. 1987) (reversing injunction; treating sales representative who was independent contractor as analogous to employee); *Jenkins v. Jenkins Irrigation, Inc.*, 259 S.E.2d 47, 49-50 (Ga. 1979) (explaining that independent contractor's covenant should be treated as employee's covenant), abrogated on other grounds by *Rash v. Toccoa Clinic Medical Assocs.*, 320 S.E.2d 170 (Ga. 1984). Cf. *In re Talmage*, 758 F.2d 162, 165 (6th Cir. 1985) (applying Illinois law and applying sale-of-business standards to covenant that was part of licensing agreement).

Parties may choose to structure a relationship as independent contractors or as employment for a variety of different reasons, sometimes fair to both sides and sometimes not. The situation will not always be inconsistent with a reasonable covenant not to compete. In considering the overall issue of reasonableness, however, a court may still consider the specific context, including the nature of the contractual relationship, when deciding whether the covenant seeks to enforce a legitimate, protectable interest. If a person is an independent contractor, that fact may signal a greater likelihood that he has brought his own strengths and abilities to the joint enterprise, such that the party seeking to enforce a covenant not to compete may have a more limited protectable interest. See *Starkings Court Reporting Services, Inc. v. Collins*, 313 S.E.2d 614, 615 (N.C. App. 1984) (affirming denial of enforcement of covenant not to compete against court reporter who was independent contractor who used her own equipment, paid her own expenses, and was not subject to supervision).

As compared to the sale of a business, in which courts are more generous in enforcing covenants not to compete, Dr. Edwards's relationship with Hope was more like an employee than like a person who has sold a business. His part-time, independent contractor status tends to weaken Hope's interest to some extent. Dr. Edwards gave speeches, made appearances, and visited schools only upon request. Hope was not obligated to provide any minimum level of activity or compensation, and Dr. Edwards was free to reject any particular engagements.

This very limited relationship tends to reduce the extent of any otherwise protectable interest Hope might have had.

The second unusual feature of this case is that Hope is not a traditional for-profit business seeking to protect its profitability. It is a not-for-profit corporation. It was founded to spread its ideas about educational reform as widely and as effectively as possible. The parties have not cited and the court has not found Indiana cases addressing a not-for-profit corporation's ability to enforce a covenant not to compete. Again, this court's role is to predict how the Indiana Supreme Court would approach the issue.

And again, there is no reason to predict the state court would adopt an absolute bar to such cases. Decisions in other states provide some guidance. In a Missouri case that is still pending, former employees of a not-for-profit corporation argued that public policy should prohibit enforcement of covenants not to compete with a not-for-profit corporation. The Missouri Court of Appeals rejected the argument in dicta, *Healthcare Services of Ozarks, Inc. v. Copeland*, — S.W.3d —, 2005 WL 1759942, at \*7 (Mo. App. July 27, 2005) (noting that argument was not supported by authority and that corporate powers are identical for not-for-profit and for-profit corporations). The case is now on review by the Missouri Supreme Court, No. SC87083, 2005 Mo. LEXIS 393 (Mo. Nov. 1, 2005). Not-for-profit hospitals have been able to enforce covenants not to compete in some cases. *E.g., Community Hospital Group, Inc. v. More*, 869 A.2d 884 (N.J.

2005) (partially enforcing an overly broad covenant); see generally *American Baptist Churches of Metropolitan New York v. Galloway*, 710 N.Y.S.2d 12, 15-16 (N.Y. App. Div. 2000) (rejecting theory that a not-for-profit corporation could never recover damages for wrongful loss of corporate opportunity; when fiduciary diverted money that would otherwise be available to promote corporation's objectives, it could suffer compensable loss). In other cases, however, courts have viewed the use of covenants not to compete as a factor that weighs against an entity's right to be treated as a charitable institution for tax purposes or other purposes. See *Wilson Area School Dist. v. Easton Hospital*, 747 A.2d 877, 881-82 (Pa. 2000). Also, not-for-profit corporations can find themselves competing against for-profit corporations, as in this case, where Edwards Educational Services has been set up as a for-profit corporation. In such situations, it would seem unfairly asymmetrical if courts were willing to enforce covenants not to compete in favor of only the for-profit entities. Again, however, in evaluating the protectable interest of Hope and the public interest as it might be affected by a preliminary injunction, the court should consider its not-for-profit status as part of the relevant circumstances.

#### B. *Scope of the 2002 Agreement*

The first issue concerns the scope of the 2002 Agreement between Hope and Dr. Edwards. The covenant not to compete applies "during the term of Consultant's performance of the Consulting Services for the Foundation and for a period of one (1) year thereafter." Ex. 17, ¶ 2. What are or were "the Consulting

Services”? Do they include *any* services that Dr. Edwards provided, as Hope contends, or were they limited to the Alton, Illinois project, as Dr. Edwards contends?

The analysis begins with the contract itself. Recital B attempts to define the term: “Consultant has been or will be hired by the Foundation to perform certain consulting services for the Foundation (the ‘*Consulting Services*’) and both the Foundation and Consultant desire that the Consulting Services commence or continue.” Ex. 17. That provides little guidance. Recital D states: “As part of the Consulting Services provided to the Foundation, Consultant will provide specific services related to the ‘Professional Learning Communities’ model for producing sustainable improvements in school achievement and school climate at the elementary, middle school and high school levels by providing training in data-driven school improvement, curriculum mapping, and facilitative skills (the ‘*PLC Services*’).” *Id.* Recital D refers to “specific services,” but does not shed much additional light on the subject. Training in “data-driven school improvement, curriculum mapping, and facilitative skills” may be part of the “specific services,” but that says little more about the intended scope of the “Consulting Services.”

Other aspects of the 2002 Agreement provide some additional clues to the meaning of “Consulting Services.” The integration clause provides in relevant part: “The foregoing terms and conditions of this Agreement constitute the entire agreement by and between the Foundation and Consultant with respect to the

subject matter hereof and shall be deemed to supersede all prior and contemporaneous agreements, representations, and understandings, with respect to the subject matter hereof, whether written or oral, and the same shall be deemed to have been merged into this Agreement.” *Id.*, § 11. This fairly standard language begins to pose problems when one asks how and how much Dr. Edwards would be paid for the “Consulting Services.” The 2002 Agreement does not say. The reference in Recital B that “Consultant has been or will be hired” to perform certain consulting services clearly indicates that the parties intended to have and did have other agreements concerning at least the issue of compensation for the “Consulting Services.”

Because the scope of the relevant “Consulting Services” covered by the 2002 Agreement cannot be discerned from an examination of only the document itself, the court may consider additional evidence that sheds light on the parties’ intentions. See *University of Southern Indiana Foundation v. Baker*, 843 N.E.2d 528, 534-355 (Ind. 2006) (abandoning distinction between “latent” and “patent” ambiguities for purposes of determining admissibility of parole evidence to interpret ambiguous trust instrument).<sup>5</sup>

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<sup>5</sup>Several Seventh Circuit cases have followed earlier Indiana decisions in adhering to the distinction between latent and patent ambiguities in contracts and wills in determining the admissibility of parole evidence. See, e.g., *Estate of Starkey v. United States*, 223 F.3d 694, 701 n.6 (7th Cir. 2000) (extrinsic evidence may be used to resolve a latent ambiguity but not a patent ambiguity); *American National Fire Ins. Co. v. Rose Acre Farms, Inc.*, 107 F.3d 451, 457-58 (7th Cir. 1997); *Trustees of First Union Real Estate Equity and Mortg. Investments v. Mandell*, 987 F.2d 1286, 1290-91 (7th Cir. 1993) (patent ambiguity could not be  
(continued...)

Looking more broadly at the parties' relationship, the 2001 Management Agreement provided for Hope to keep 30 percent of the gross receipts for Dr. Edwards' public speaking. There was apparently no need for a confidentiality term or a post-termination covenant not to compete in that agreement. See Ex. 15. The occasion for the confidentiality and the non-compete terms was the Alton Project, in which both Hope and Dr. Edwards intended that he would play a much greater and more integral role than he had in previous and subsequent engagements, such as speaking at training institutes and summits. It was important to Hope, according to Shin's testimony, that Dr. Edwards sign the 2002 Agreement with its confidentiality and non-compete provisions, before Hope disclosed certain confidential information relating to design of Hope's training curriculum.

The parties did not act as if the 2002 Agreement superseded the 2001 Management Agreement. They continued to split money 70/30 for speeches and similar engagements. Also, there were separate negotiations for compensation that applied to the Alton Project. See Ex. 39. Those negotiations did not result in a clause in the 2002 Agreement itself. It seems clear that the parties

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<sup>5</sup>(...continued)  
clarified by extrinsic evidence); *Amoco Oil Co. v. Ashcraft*, 791 F.2d 519, 520 (7th Cir. 1986) ("Indiana adheres to the ancient, mysterious, and much-derided distinction between 'patent' and 'latent' ambiguities in contracts and wills"); *Ohio Casualty Group of Ins. Cos. v. Gray*, 746 F.2d 381, 383 (7th Cir. 1984), citing *Graham v. Anderson*, 454 N.E.2d 870, 872 (Ind. App. 1983). The very recent decision in *University of Southern Indiana Foundation* reflects Indiana's abandonment of that "ancient, mysterious, and much-derided distinction."

contemplated that Dr. Edwards would be paid for the Alton Project, and that he would be paid on a basis different from his usual speaking fees with the 70/30 split with Hope. As late as December 2005, Shin testified, she had thought the applicable agreement was the 2001 Agreement and had not realized that it had expired in 2004.

The negotiations leading up to the 2002 Agreement strengthen Dr. Edwards' case for the limited scope of the phrase "Consulting Services." Both Shin and Dr. Edwards acknowledged that the 2002 Agreement was prompted by the Alton Project. Dr. Edwards objected to the paragraph that said the covenants not to compete in Section 2 would apply "at all times during which Consultant provides services to the Foundation in any manner whatsoever and for the twelve (12) month period after the last date on which Consultant has provided such services." Ex. 41. That deleted paragraph clearly signaled that the parties distinguished between the "Consulting Services" that were subject to the 2002 Agreement and a larger category of any other consulting services that Dr. Edwards might provide to Hope.

On the other hand, when Dr. Edwards was the national director of the Hope faculty consultants, Hope used a standard form agreement that included the broader form of the covenant not to compete, with even the paragraph that the parties deleted from the 2002 Agreement with Dr. Edwards. See Ex. 19.

The evidence does not point all in the same direction. However, the weight of the documentary evidence and evidence of the parties' actions is generally consistent with Dr. Edwards' testimony to the effect that he and Shin agreed that the 2002 Agreement was limited to the Alton Project. That project was something new and different for them. It called for a different arrangement that would protect the confidentiality of information and would prevent some forms of competition. Shin did not disagree with Dr. Edwards' testimony on this point. She testified that she does not recall discussions on the subject. The limited scope of the covenant not to compete also makes business sense under the circumstances. Edwards was only a part-time consultant for Hope. Although Hope uses covenants not to compete with many consultants and speakers, it does not do so with all of them. In essence, whether Hope has a covenant is a question of bargaining power. The parties bargained in 2002, and agreed to the more limited scope for the 2002 Agreement. For all these reasons, then, the court finds at this preliminary stage that Hope is not likely to succeed in its effort to show that the 2002 Agreement with Dr. Edwards remained in effect in 2004, 2005, and 2006.

C. *Application of the 2002 Agreement*

Even if the 2002 Agreement were not limited to the Alton Project, Hope would have only limited prospects for success on the merits. The court must consider whether the covenant is reasonably designed to protect the employer's legitimate interest; whether the restrictions on the former employee are reasonable

in terms of time, geography, and the types of activities prohibited; and the court must also consider the public interest. *Pathfinder Communications Corp. v. Macy*, 795 N.E.2d 1103, 1109 (Ind. App. 2003); *Burk v. Heritage Food Serv. Equip., Inc.*, 737 N.E.2d 803, 811 (Ind. App. 2000). The several covenants not to compete in the 2002 Agreement reach well beyond any legitimate, protectable interest that Hope might have.

1. *Protectable Interests*

One protectable interest could be in confidential information. *E.g.*, *McGlothen v. Heritage Environmental Services, LLC*, 705 N.E.2d 1069, 1072 (Ind. App. 1999). When asked for specifics, however, Hope's witnesses were unable to identify any truly confidential information to which Dr. Edwards had access, at least outside the scope of the Alton Project. Shin testified that Dr. Edwards knows how Hope structures its services, how it uses its summits and institutes as gateways for longer-term on-site services, and about the content of its programs and the people Hope uses to provide those programs. None of that information is truly confidential. The contents and staffing of the programs are widely publicized. Thousands of educators have attended those programs. Those who attend are under no obligation to keep the content confidential. Also, there is no evidence here of a confidential customer list. Every school and school district is a potential customer, and the relationships with these entities, most of which are public schools spending public funds, are not confidential.

Hope could have a legitimate and protectable interest in its relationships with its customers. Shin testified that protection of those relationships was the purpose of the covenants not to compete. It is well established that when an employee, acting on behalf of his employer, develops working relationships with customers, the employer has a protectable interest in the good will, trust, and confidence that the customer develops. Reasonable covenants not to compete will be enforced to prevent a departing employee from taking the good will with him. *E.g., Licocci v. Cardinal Assocs., Inc.*, 445 N.E.2d 556, 561-62 (Ind. 1983) (“The Indiana courts have held the advantageous familiarity and personal contact which employees derive from dealing with an employer’s customers are elements of an employer’s ‘good will’ and a protectable interest which may justify a restraint, if limited to a reasonable period and to the geographical area of the employee’s prior operations.”); *McGlothen*, 705 N.E.2d at 1072.

Some of the relationships that Dr. Edwards developed during his consulting work with Hope could fit into that description, at least where the work involved on-site visits and long-term relationships. (The court doubts that Hope would have a protectable interest in a relationship with a potential customer who merely attended a Hope-sponsored speech by Dr. Edwards.) The evidence indicates that Dr. Edwards developed good professional relationships with customers under the sponsorship and aegis of the Hope programs. As when sales representatives establish close relationships with customers and develop good will, Hope has a legitimate interest in not having its consultants go into business with Hope’s

customers. This is a familiar pattern, and an employer is generally entitled to take reasonable steps to protect itself from that form of competition.

## 2. *Reasonable Scope*

If the 2002 Agreement applied, the court would need to consider whether it is reasonable in scope, in terms of the time period, the activities prohibited, and the geographic or customer limitations.

The one year time limit appears to be reasonable, to the extent that any specific prohibitions are reasonable. Indiana courts have not been troubled by one year covenants that are otherwise reasonable. *Unger v. FFW Corp.*, 771 N.E.2d 1240, 1245 (Ind. App. 2002); see also, *e.g.*, *McGlothen*, 705 N.E.2d 1069 (affirming trial court grant of preliminary injunction enjoining former employee from competing with employer in contravention of one-year non-compete agreement).

The scope of activities is complex because of all the different prohibitions in Section 2. The scope of activities and geographic and customer restrictions are all interwoven, so the court discusses them together.

Subsection 2(a) provides that Dr. Edwards may not “Provide any PLC Services to any client or customer of the Foundation other than in the capacity as a Consultant of the Foundation.” Ex. 17. The court assumes this prohibition

would apply only to then-current customers of Hope. Even with that understanding, this prohibition would prevent Dr. Edwards from providing PLC Services to any client or customer of Hope, regardless of whether Dr. Edwards himself provided any services through Hope or developed any working relationships with those customers. Such a prohibition would not be reasonable, just as a sales person ordinarily cannot be prohibited from competing outside his or her former sales territory. *E.g.*, *Donahue v. Permacel Tape Corp.*, 127 N.E.2d 235, 241 (Ind. 1955); *Vukovich v. Coleman*, 789 N.E.2d 520, 525 (Ind. App. 2003); *Medical Specialists, Inc. v. Sleweon*, 652 N.E.2d 517, 523-24 (Ind. App. 1995).

Subsection 2(b) provides that Dr. Edwards may not:

Compete with the Foundation by providing or soliciting, directly or indirectly, any PLC Services to any person or entity within the following geographic regions: (i) in any state of the United States; (ii) in any province of Canada; or (iii) in any foreign country or jurisdiction in which the Foundation, its employees, officers, agents or consultants have provided any PLC Services during the twelve (12) months prior to the termination of the agreement. . . .

Ex. 17. Hope reads the qualification on PLC Services provided in the last 12 months as applying only to countries other than the United States and Canada. The court agrees. That means that the geographic prohibition in this case would apply from the Rio Grande to the Arctic Ocean. This prohibition is not reasonable. It applies regardless of whether Hope has any customers in any state or province, let alone whether Dr. Edwards himself had any contact with such customers. The prohibition is not tied to Hope's legitimate and protectable interests. Dr. Edwards

was a part-time consultant who gave some speeches and made some on-site visits for Hope. He did so in many states and more than one province of Canada. But his work was not like a sales representative's work in a prescribed territory, where he would have learned a lot about prospective customers who never became actual customers.

Subsection 2(c) provides that Dr. Edwards may not hire or attempt to hire any current employee of Hope or any person who was an employee of Hope in the past 12 months. *Id.* There is no evidence that Dr. Edwards has done so, has tried to do so, or has any intention of doing so. His website lists two other persons who have provided consulting and speaking services to Hope, but they have not been employees of Hope. This portion of the agreement does not require further comment.

Subsection 2(d) provides that Dr. Edwards may not: "Solicit, sell or provide PLC Services to any existing or potential client or customer of the Foundation with whom the Consultant had contact, or of whom Consultant became aware as a result of his or her association with the Foundation or directly or indirectly divert or influence or attempt to divert or influence any PLC Services business of the Foundation to a competitor of the Foundation." *Id.* To the extent this subsection might have applied to Hope customers and potential customers with whom Dr. Edwards actually had contact on behalf of Hope, it appears to have been reasonable and tied to Hope's legitimate and protectable interests. *E.g., Cohoon v.*

*Financial Plans & Strategies, Inc.*, 760 N.E.2d 190, 195-96 (Ind. App. 2001) (enforcing covenant that prohibited former employee from contacting clients and contacts with whom employer had done business in past year); *Hahn v. Drees, Perugini & Co.*, 581 N.E.2d 457, 461-62 (Ind. App. 1991) (striking prohibition on competing for employer's past customers but enforcing prohibition on present customers with whom departing employees had contact); *Standard Register Co. v. Cleaver*, 30 F. Supp. 2d 1084, 1096 (N.D. Ind. 1998); *Norlund v. Faust*, 675 N.E.2d 1142, 1155 (Ind. App. 1997) ("The use of territorial boundaries is only one method of limiting a covenant's scope, and when a covenant not to compete contains a restraint which clearly defines a class of persons with whom contact is prohibited, the need for a geographical restraint is decreased."), citing *Field v. Alexander & Alexander of Indiana, Inc.*, 503 N.E.2d 627, 635 (Ind. App. 1987), and *Seach v. Richards, Dieterle & Co.*, 439 N.E.2d 208, 213 (Ind. App. 1982); *Commercial Bankers Life Ins. Co. of America v. Smith*, 516 N.E.2d 110, 114 (Ind. App. 1987).

To the extent this subsection might apply to customers of whom Dr. Edwards only *became aware* as a result of his association with the Foundation, it appears to reach too far. Virtually any school, public or private, or school district is a potential customer of Hope. Learning of a customer's existence does not provide a sufficient connection to Hope's legitimate interests to justify such a broad prohibition. The last phrase about diverting or attempting to divert business from Hope is far too broad to be enforceable.

Subsection 2(e) provides that Dr. Edwards may not: “Act in any capacity or accept any employment in which disclosure or use of the Foundation’s Confidential Information would facilitate or support the performance of Consultant’s duties.” Ex. 17. If there were evidence that Dr. Edwards had access to any currently valuable confidential information, the court might need to give this provision more attention. See *Donahue v. Permacel Tape Corp.*, 127 N.E.2d 235, 239-41 (Ind. 1955); accord, *Ackerman v. Kimball Int’l, Inc.*, 652 N.E.2d 507, 510 (Ind. 1995) (dicta). There is no such evidence, and without it, this prohibition is far too broad to be enforceable.

Subsection 2(f) is a broad and unlimited prohibition on competition with Hope. Because it lacks any reasonable limits, it also is not enforceable.

Thus, if Hope could show that the 2002 Agreement were still in effect, the only portion of Section 2 that might reasonably be applied to Dr. Edwards is the portion of subsection 2(d) that prohibits him from soliciting, selling, or providing PLC Services to existing or potential customers of Hope with whom Dr. Edwards had contact on behalf of Hope. Indiana law warns courts against re-writing parties’ contracts to turn what is unreasonable into something the court deems reasonable. *E.g.*, *Licocci*, 445 N.E.2d at 561 (“courts may not create a reasonable restriction under the guise of interpretation, since this would subject the parties to an agreement they had not made”); *Product Action Int’l, Inc. v. Mero*, 277 F. Supp. 2d 919, 928 (S.D. Ind. 2003). Under the “blue pencil” doctrine, however,

if a covenant is clearly separated into parts, and if some parts are reasonable and others are not, the contract may be severed or “blue penciled” so that the reasonable portions may be enforced. *Dicen v. New SESCO, Inc.*, 839 N.E.2d 684, 687 (Ind. 2005); *Licocci*, 445 N.E.2d at 561 (“if the covenant is clearly separated into parts and some parts are reasonable and others are not, the contract may be held divisible”). Such efforts to save a covenant are limited to applying terms that already exist in the contract; the court may not add terms. *Licocci*, 445 N.E.2d at 561; *JAK Productions, Inc. v. Wiza*, 986 F.2d 1080, 1087 (7th Cir. 1993); *Burk v. Heritage Food Serv. Equip., Inc.*, 737 N.E.2d 803, 814-15 (Ind. App. 2000). Although the doctrine can sometimes produce rather wooden or artificial results, it also can discourage over-reaching by employers. The doctrine can allow the parties’ agreement to operate to the extent it is lawful while protecting the employee’s reliance on the terms of the contract. See generally *Product Action Int’l Inc.*, 277 F. Supp. 2d at 926-30 (discussing blue pencil doctrine).

The blue pencil doctrine would allow the court to edit subsection 2(d) as follows, so that Dr. Edwards could not: “Solicit, sell or provide PLC Services to any existing or potential client or customer of the Foundation with whom Consultant had contact, ~~or of whom Consultant became aware~~ as a result of his or her association with the Foundation ~~or directly or indirectly divert or influence or attempt to divert or influence any PLC Services business of the Foundation to a competitor of the Foundation.~~” If the 2002 Agreement were still in effect, this narrower portion of subsection 2(d) could be enforced for one year as reasonable.

## II. *Irreparable Harm, Balance of Harms, and Public Interest*

Looking beyond the likelihood of success on the merits, the court must also consider the risk of irreparable harm to Hope, the balance of harms as between Hope and Dr. Edwards, and the public interest. *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992).

The types of interests that Hope seeks to protect here are generally thought to deserve injunctive relief. It is difficult to quantify the harm to good will, the disruption of a customer relationship, and the loss of future business opportunities that might or might not have come to fruition. See *Barnes Group, Inc. v. Rinehart*, 2001 WL 301433, \*23 (S.D. Ind. Feb. 26, 2001) (Tinder, J.) (granting preliminary injunction to enforce covenant not to compete); *Ram Products Co. v. Chauncey*, 967 F. Supp. 1071, 1085-86 (N.D. Ind. 1997) (injunctive relief granted in part and denied in part); see generally *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386 (7th Cir. 1984).

If the court issued injunctive relief, the court would be inflicting similarly irreparable harm on Dr. Edwards and his fledgling independent consulting business. Hope points out that it would have no objection if Dr. Edwards wanted to return to his work as a high school principal or wanted to teach at the university level. Of course, it is not at all likely that Dr. Edwards could find such a position on short notice. The injunction that Hope seeks would disrupt promising customer relationships that either have resulted or are about to result

in valuable contracts for Dr. Edwards. That sort of injury is similarly difficult to quantify, especially when a business is new.

In evaluating the balance of harms, the court must consider its options and must then assume that its decision at the preliminary injunction stage is wrong. The objective is to minimize the risk of error. See, *e.g.*, *AM General Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 831 (7th Cir. 2002); *Abbott Laboratories*, 971 F.2d at 12. In this case, an error in either direction would inflict substantial irreparable harm on the victim of the error. This factor does not weigh for or against injunctive relief.

The public interest here plays a relatively unusual role, and one that weighs against injunctive relief. The public interest refers to the interests of those who are not parties before the court. *Abbott Laboratories*, 971 F.2d at 12. In this particular case, those interests include those of school districts, school administrators, teachers, and students. Even if Hope had shown it were likely to prevail on its assertion that the 2002 Agreement is still in effect, the reasonable scope of an injunction would need to be limited to providing services to Hope customers and potential customers with whom Dr. Edwards had contact on behalf of Hope. That would include several school districts that Dr. Edwards has been negotiating with over the last several months. Injunctive relief to deny those customers their choice of service providers would be contrary to the public interest.

For purposes of this analysis, the court assumes that the services provided by Hope and Dr. Edwards are valuable to schools, especially to public schools. The school customers in question, the court must conclude, prefer Dr. Edwards and have confidence in him. They are in the midst of long-term relationships with him. Another consultant would have to start over again, building trust and relationships, the good will that can justify a non-compete agreement in the first place. That would disrupt, delay, and add costs to projects that the court must assume are valuable and important efforts to improve public education. If there is in fact a breach of contract, the public interest in this case, unlike a typical private commercial dispute, weighs in favor of relying on a later damages remedy as between Hope and Dr. Edwards, without interfering with the customers' programs, even though it may be difficult to calculate damages.

Accordingly, the court denies plaintiff Hope Foundation's motion for a preliminary injunction.

So ordered.

Date: April 12, 2006

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DAVID F. HAMILTON, JUDGE  
United States District Court  
Southern District of Indiana

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