Hypothetical Four: Reforming Employment Agreements
(Quinn Kelly)

Table 8 vs. Winner of Hypo 1

Larry Litigator is called by his good corporate client Hi-Tech's in-house General Counsel, Sam Smooth, who wants Larry to defend a claim brought by several former employees of Hi-Tech seeking to invalidate non-compete and non-solicitation agreements (the "agreements") which they entered into while employees of Hi-Tech. The employees are now working for Hi-Tech's competitor, Ultra-Tech. He has learned that the employees have been reaching out to customers of Hi-Tech to encourage them to move their business to Ultra-Tech. Larry agrees to take on the case. When he reviews the agreements, he finds that the agreement for one of the employees was dated a few weeks before the date his employment began. The second former employee's agreements were signed the date he started at Hi-Tech. He learns through talking with the Company's HR Director that it is standard company policy to require execution of these agreements for all sales personnel and other corporate executives as a condition of employment. The agreements for the third employee were dated some 6 months after he started work. The HR Director explained that something had fallen through the cracks and when they realized that the agreements had not been signed told that employee his employment was contingent upon his signing the agreements which he did. The HR Director had concerns with whether these agreements were lawful but because of Sam's influence in the Company, required the employees to sign .The former employees all claim that they had not been told they would have to sign these agreements before accepting offers of employment and did not feel they were in a position to refuse to sign them when presented. The agreements have very broad language, prepared by Sam Smooth, barring the employees from working from any competitor anywhere within the US and from reaching out to both current, past and potential customers of Hi-Tech upon leaving employment.

After talking with Sam, Larry concludes that the best strategy is to seek to reform the agreements to narrow their scope and improve the prospects of enforceability and files pleadings seeking to reform the covenant not to compete for five years following employment.

What are five issues the Court may consider when deciding whether to reform the agreements?

1. **Bad faith** by the employer defeats reformation

2. **Lack of notice to e'ee:** Giving no advance notice to prospective employees that they will be required to sign a non-compete agreement does not represent good faith.

3. **No consideration** for signing the non-compete.

4. **Condition of continued employment:** Since each of the former employees had already changed their positions and were not in a position to meaningfully negotiate at the time they were asked to sign the agreements, requiring them to sign them as a condition of continued employment did not represent good faith.

5. **Too broad: time/geography/customers:** A covenant not to compete should last no longer than necessary for the employees replacements to have a reasonable opportunity to demonstrate their effectiveness to customers.