LAW OFFICES OF JONATHAN M. COOPER

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INSIDE THIS ISSUE

Why One School Didn't Report to the Police a Student Who Lit a Classmate on Fire

Last month, it was reported that an eighth grade student found a lighter in a school bathroom, and then, while the rest of the class was watching a video, decided to light a fellow student's pants on fire.

And the school didn't report the incident to the police until the next day.

To be sure, the mere fact that it would enter anyone's mind to undertake such an offensive and violent action is downright frightening. But the school's lack of response to this incident is - on some level - perhaps even greater cause for concern, and here's why:

The school was apparently looking out for its own self interest before that of its students.

I have to believe the school recognized that this incident was serious, if only because a contrary truth would be patently absurd. Therefore, the only reason I can divine for the school's failure to report this incident promptly was the school's fear that an investigation could have negative repercussions for the school, perhaps being found guilty of negligent supervision. And in so doing, they made something very clear: the school puts its students' safety second. And that is simply unacceptable.

"How Do You Manage All Those Kids?"

For those of you who aren't in the know, my wife is due to give birth at the end of this month. In case anyone is "keeping score," well, on second thought, never mind. Let's just say it isn't our first.

When I've shared this information with any number of my colleagues and friends, invariably one of the first questions I'm asked is "How do you manage all of those children?"

Fortunately for me (and my children), the harder parts of it are handled by a far more skilled parent – *my wife*.

Therefore, in honor of Mother's Day, I dedicate this issue of my firm's newsletter to my wonderful wife, Lauren.

When Helping a New Employer Solicit Your Former Clients May Not Be "Improper"

In a fascinating – and significant – April 28 decision, New York State's highest court answered the following question:

> *How far can you go to help your new employer solicit your former clients under New York law?*

In *Bessemer Trust Co., N.A. v. Branin*, Branin was a former executive of Brundage, who sold its assets, including its good will, to Bessemer for $75 million in August, 2000, with $50 million of the purchase price being payable up front, and the remaining $25 million being contingent on Bessemer and its

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We strongly encourage the readers of our monthly newsletter to provide feedback about issues they would like to see addressed in our future publications.

To do so, please contact us through our website, www.JonathanCooperLaw.com or via e-mail at jmcooper@jmcooperlaw.com

What the Courts May Do When the Plaintiff Cannot Remember the Accident

Contrary to popular belief, a plaintiff does not necessarily have to take the witness stand at trial in order to sustain his or her burden of proof in a negligence case; some examples of where that doctrine is applied include cases where the plaintiff was either severely injured in a manner that damaged his memory - or killed. In those cases, the court may hold a plaintiff to a lesser evidentiary standard - and even shift the burden of proof to the defendant.

The seminal case on this issue is the 1948 case of *Noseworthy v. City of New York*, 298 N.Y. 76, 80 N.E.2d 744 (1948). In that case, the plaintiff-decedent was killed by a subway car belonging to the City of New York, and was therefore (obviously) unable to testify as to why he was on the subway tracks before the incident; to the contrary, this information was solely in the defendants' possession.

This rule has been specifically extended to cases involving amnesia. For example, in *Sala v. Spallone*, 38 A.D.2d 860 (2d Dept. 1972), one of New York's appellate courts stated as follows:

> "The trial court committed reversible error in denying plaintiff's request to charge the jury that he should be held to a lesser burden of proof if the jury is satisfied, from the medical and other evidence presented, that he suffers from a loss of memory that makes it impossible for him to recall events at or about the time of the accident and that the injuries he received as a result of the accident were a substantial factor in causing his memory loss."

To be clear, however, before a plaintiff may avail him or herself of the "*Noseworthy* charge," it must be shown by clear and convincing evidence that the plaintiff's loss of memory makes it impossible for the plaintiff to recall the events of the incident.

This is not - by any means - an easy burden.

"Before a plaintiff may avail himself of "the Noseworthy charge," it must be shown by clear and convincing evidence that the plaintiff's loss of memory makes it impossible for him to recall the events of the incident."

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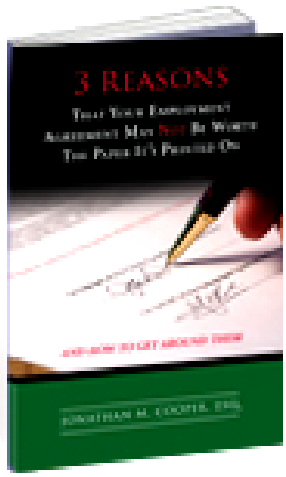
3 Reasons That Your Employment Agreement May Not Be Worth the Paper It's Printed On

(And How to Get Around Them)



by Jonathan M. Cooper

This **FREE Book,** which explains some of the most common ins and outs of employment agreements in New York, including non-compete and non-solicitation clauses and ***why there are often not enforceable under New York law*** is available for download directly from:

www.EmploymentContractBook.com

When Helping Solicit Your Former Clients May Not Be Improper

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principals meeting certain performance benchmarks. Branin, who was Brundage's largest individual shareholder, received just over $9 million as his share of the sale. Branin continued to work for Brundage for just under 2 years, at which point he sought different employment.

Although Branin did not have any written non-compete agreement barring solicitation of former clients (which, given the magnitude of the asset purchase agreement is, to say the least, rather puzzling), he went out of his way not to actively solicit any of his former clients that were part of the asset purchase agreement when he finally left in June, 2002. In fact, he didn't even tell any of those clients he was leaving; rather, when these clients contacted Branin privately, he informed them that he was pursuing work with a different firm in the field because this new firm's operating philosophy "was more appropriate for him."

"While a seller may not contact his former clients directly, he may, in response to inquiries made on a former client's own initiative, answer factual questions."

Some clients, including his largest one, went out of their way to follow him, and left Bessemer. And this lawsuit followed. In response to a question posed by a federal appeals court, New York State's highest court concluded its opinion as follows:

"The issue in which the Second Circuit seeks our guidance is to what degree a seller may assist his new employer in responding to inquiries made by a former client … we conclude that certain activity within a new employer's firm must be permissible … While a seller may not contact his former clients directly, he may, "in response to inquiries" made on a former client's own initiative, answer factual questions … a seller's "largely passive" role at [a client] meeting does not constitute improper solicitation in violation of the "implied covenant."

To my thinking, this is a good and logical rule.

***COMMUNICATION POLICY**: As a general rule, Mr. Cooper does not accept unscheduled phone calls. This policy affords Mr. Cooper the ability to pay closer and more focused attention to each case, resulting in more efficient and effective representation for his clients. Moreover, it avoids the endless and needless game of phone tag played by most businesses and law firms. To schedule a phone call or in-person appointment with Mr. Cooper, please call his office at 516.791.5700.*

Lead Paint Violation Prompts Recall of Toy Story 3 Bowling Game

After finding that its Toy Story 3 Bowling Game violated the lead paint levels allowed under the Federal guidelines, G.A. Gertmenian and Sons, LLC voluntarily recalled its product. But here's what disturbs me about this particular product recall:

The "new" permissible lead level requirements have been on the books for over two (2) years - since February 10, 2009.

Simply put, there is no excuse for this; these products - roughly 600 units - were almost certainly manufactured and put into the stream of commerce well after that law became effective.

Under the circumstances, I do not understand why there is no stiffer penalty for this manufacturer than simply being compelled to issue a voluntary recall.

(A picture of the recalled product with the identifying information is below.

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