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TEN QUESTIONS TO ASK YOUR CLIENT WHEN DEFENDING AGAINST EFFORTS TO ENFORCE A RESTRICTIVE COVENANT OR CONFIDENTIALITY AGREEMENT

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There are few circumstances in the practice of law that require more quick thinking and improvisation than defending a client at a temporary restraining order ("TRO") hearing mere hours after meeting them for the first time. Yet, frequently this is the exact circumstance that attorneys find themselves in when defending clients against the efforts of their former employers to enforce a restrictive covenant or confidentiality agreement. In the limited time that you have to prepare for a TRO hearing, every second counts.

This is part two of a two-part series. In part one, we identified the 10 questions you should ask if your client is a former employer seeking enforcement of a restrictive covenant or confidentiality agreement. In this second part, we examine the other side of the coin. Most of the issues explored in part one remain pertinent when defending against enforcement, but we have endeavored to avoid repetition. Before you appear on behalf of your defendant client at a TRO hearing, here are 10 questions that you will want to ask. Obtaining quick and accurate answers to these may not only determine your client's fate at the impending TRO hearing, it may shape the course of the entire litigation.

1. Who is the client and are there any conflicts?

Just because things are moving quickly does not excuse the immediate due diligence and client intake functions one must undertake prior to taking on representation. Your very first priority must be determining who your client(s) will be and that there are no conflict issues that inhibit your representation of the client(s) in the looming hearing.

In many cases, the current employer agrees to fund the defense of their new employee, whether or not the current employer is a party to the lawsuit. In either event, the most important step is delineate the terms of the arrangement, such as determining whether the employer and the employee will retain separate counsel, the indemnification conditions and how legal costs will be handled. Where the employer will retain separate counsel, consider entering into a joint defense agreement. At a minimum, ensure that your engagement letter proactively addresses how you will handle any potential conflicts if a conflict develops later in the representation. It is best to have a form joint representation letter prepared for quick and easy modification when this type of representation arises. The precious minutes saved can be crucial.

2. Did you receive a cease & desist letter or any other written communication from your former employer?

Once an employer has decided to pursue emergency injunctive relief against a former employee, the time-sensitive nature of the dispute often results in a race to the court house, rather than the more deliberate, gradual escalation of conflict that often precedes litigation. In many cases, however, the first step taken by a former employer is to send a cease & desist letter to the former employee and/or their new employer. This action frequently serves the dual purpose of attempting to obtain the desired results without the costs of a lawsuit and setting up the new employer to become a potential defendant against a tortious interference claim. Furthermore, the former employee and the former employer may have exchanged more congenial correspondence regarding the employee's departure, such as retention offers or personal well wishes. Try to obtain any available communications related to the employee's departure and new employment immediately. They may serve as the basis for a waiver or estoppel defense, particularly if the former employer made representations about the scope or enforceability of any applicable agreements.

3. Do you have any confidential/proprietary information or other company property in your posession?

Any means any. Given the proliferation in the volume of data that passes through our hands on a daily basis (emails, texts, electronic documents, paper copies, etc.) it is challenging for any individual to confidently conclude that they do not possess any of their former employer's data. Try to identify two categories of information: (1) information that was deliberately removed from the former employer; and (2) information that was inadvertently retained. The first category includes emails that were forwarded to a personal email account, documents saved onto external storage devices or uploaded to the cloud, or physical documents that were removed from the former employer's office, especially in the final weeks of employment. The second category includes documents that may have been created on a personal laptop years ago or reference documents stored at a home office. As soon as possible, you need to identify the universe of documents in both categories. In most cases, returning these documents at the earliest possible date can reduce the need for an injunction and cut off any accruing damages resulting from the potential use of the confidential information at issue.

4. What would be the consequence of complying with the terms of the proposed injunction?

Defending against litigation arising out restrictive covenants or confidential information agreements is costly, time-consuming and can cause irreparable harm to an individual's reputation within their industry. If the employee has committed a technical breach of contract, they may be liable for attorney fees, even in the absence of meaningful economic damages. In those cases, contesting the claims may only serve to increase the consequences of the breach by driving up attorneys' fees. Additionally, there may be a possibility of reaching an agreement that would permit the employee to continue working for his current employer, albeit with temporary restrictions in place (such as limiting the work to certain customers or a certain geographic area). Such an agreement is almost always preferable to being sidelined by a temporary or preliminary injunction while a lawsuit slowly winds its way towards trial.

5. What was the timeline of key events leading to your departure from your former employer and acceptance of a new position?

Injunctive relief is an equitable remedy. Creating a compelling narrative that positions your client's conduct as equitable and the enforcing employer as inequitable and heavy-handed is crucial, even at the earliest stages of litigation. Understanding the sequence of events that led to the employee's departure is the first step in building this narrative. Additionally, these disputes often include a personal component that can intensify hostilities. Exploring the personal relationships and business interests underlying the dispute is a necessary prerequisite to identifying a path to resolution, as well as to advocating in the most effective manner on behalf of your client to the court and opposing counsel.

6. Have you posted anything on social media (including LinkedIn) about your departure fromyour former employer and your newposition?

It is remarkable how frequently intelligent and otherwise sensible businesspeople will post information on a social media profile that could incriminate them in pending litigation. Privacy settings provide a false sense of security, but nothing is truly private, especially if the employee is "friends" with or "followed" by former co-workers. Take stock of any incriminating posts and ensure that the former employee agrees to refrain from posting anything related to the dispute on social media. Reiterate that contact via social media (such as a sending a LinkedIn request) to former clients, vendors or co-workers could generate suspicion or even evidence of unlawful solicitation.

7. Do you remember signing the contracts that your former employer alleges you have breached, and, if so,do you remember the context?

The complaint and application for a temporary restraining order will often attach a copy of any applicable agreement. Increasingly, employers are relying on electronic acceptance of agreements, instead of traditional handwritten signatures. If the employee remembers accepting the agreement, explore whether they recall the circumstances surrounding acceptance. Like any contract, the agreements at issue must adhere to the traditional requirement of manifesting mutual assent. For electronic agreements, the employer must be prepared to demonstrate some record of acceptance that complies with applicable legal standards. In the wild and wooly world of TRO hearings, an employer may try to cut corners and may have taken the fact that the agreement was "signed" as a given. Be prepared to raise any concerns about the validity of the acceptance at the TRO hearing.

8. What steps did the former employer take to protect confidential information?

If the first step an employer takes to protect its confidential information is to file a lawsuit, it may already be too late. Just requiring employees to sign a confidential information agreement upon hire may be insufficient, if the employer takes no further steps to define, protect and limit access to confidential information. If the information at issue was stored digitally, did the employer limit access through password protections or by granting access to a limited subset of employees? If the information was stored in hard copy, did they use a designated room or storage space with controlled access? Did they label specific documents as confidential with a "confidential" or "proprietary" stamp? Did they provide training to employees on how to handle confidential information? When such information is shared with third parties, such as customers or vendors, is the third party required to sign a non-disclosure agreement in order to gain access to the information? The absence of any or all of these measures may indicate that the employer failed to take adequate steps to preserve their confidential information and may provide a good faith, plausible explanation for why the employee preserved or removed copies of documents that fell within the facial definition of confidential information set forth in the applicable agreement.

9. Did You Disclose Your Post-Departure Plans to Your Former Employer?

Rightly or wrongly, employers often impute ill-intent to an employee's departure if they cover up their plans to work for a competitor. If an employee provides false information during an exit interview about their future plans, then you can expect the former employer to use this evidence to impeach the employee. Be prepared to address this proactively. If, on the other hand, the employee disclosed their future plans to their previous employer, explore exactly what they disclosed and to whom and what evidence might demonstrate that disclosure. An employer's actions after learning that an employee intends to depart for a competitor could be grounds for asserting an affirmative defense to their enforcement efforts (such as waiver or estoppel).

10. How is Your New Job Different than Your Old Job?

If the previous employer has alleged a breach of a non-competition covenant, then determining whether the employee's current or contemplated employment violates the covenant is a crucial step. The previous employer may be operating on limited or speculative information about the employee's new position. As a result, their enforcement efforts may exceed the scope of the covenant. Try to identify key differences between the previous position and the current or contemplated position. Hone in on distinctions that would undermine the protectable employer interests allegedly served by non-compete. For example, if an engineer who formerly worked on designing commercial airplane engines accepted a position at a competing aerospace company, then your strategy will differ depending on whether the employee is working on engines or braking systems. If it is engines, is it the same kind manufactured by the prior employer? Even if the previous employer is attempting to enforce a confidential information agreement, rather than a non-compete, engaging in the same analysis will arm you with the knowledge you need to defend against an "inevitable disclosure" theory.

Conclusion

As lawyers, we are accustomed to marshalling the relevant facts and exhaustively researching the applicable law before committing to a position. Defending a client at a TRO hearing against a former employer does not afford you that luxury. Nevertheless, you still have a duty of candor to the tribunal, and a duty to your client to mount the most effective defense under challenging circumstances. Answering these questions will not guarantee success, but it will put you provide with some shortcuts for identifying key issues and strategies that may shift the odds.

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