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Can Employees be Legally Restrained from Doing Business with their Former Employer's Customers?

By Steve McNichols

Non-compete and non-solicitation provisions contained in employment contracts have generated a great deal of interest and legal activity in California in recent years. Disputes over these provisions present two diametrically opposed economic and social policies. From the employee's point of view, these provisions inhibit an employee from engaging in his or her profession, trade or business. It would be unfair to require an employee to change his or her business in order to find new employment. The employer, on the other hand, wants to protect itself from a former employee taking away business and/or customers when the employee leaves the company. The employer may have spent a great deal of time and effort developing these customers, and it can be unfair to allow the employee to take advantage of the former employer's efforts.

California has enacted a statute which declares void,

with one exception, every contract provision by which anyone is restrained from engaging in a lawful profession, trade or business of any kind. The exception referred to in the statute relates to the situation where a person sells a business along with the goodwill of that business. In these situations, non-compete agreements are enforceable. The obvious reason for this exception is that a party selling a business along with the goodwill is being paid for the continuing relationship with the customers. Under those circumstances, it would be unjust to allow the seller to compete against his former company for that continuing business. Therefore, California law will enforce a non-compete agreement against a former *partner* or *owner* of a business who has sold the business with its goodwill and has agreed not to compete.

Enforcing agreements that restrict the activities of former *employees* is another matter. On the one hand, California law allows a contractual provision that prohibits an employee from using former employer's

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IN THE LAW - Elder Abuse

By Theresa N. Muley

Reported cases of elder abuse are increasing every year. Because the United States populace will grow substantially grayer over the upcoming decades, elder abuse is a topic that concerns all of us.

Elder abuse in California is prohibited by the Elder Abuse and Dependant Adult Civil Protection Act, codified in Welfare & Institutions Code §15600, et seq. This legislation acknowledges that people over 65 years of age may be subjected to abuse, neglect or abandonment, and that physical impairment or other health problems place them at greater risk. This is especially true where the elder is dependant upon a caregiver or a person who is in a position of trust.

Elder abuse can involve physical abuse, neglect, financial abuse, abandonment, isolation, abduction or other treatment with resulting physical harm, pain or mental suffering. If the elder is suffering from mental capacity problems, such as Alzheimer's disease or

dementia, or is susceptible to undue influence, the risk of being abused increases due to these vulnerabilities.

Generally, neglect of an elder involves the failure to use reasonable care by a person taking care the of elder, and can include failure to provide food, clothing, shelter, physical and mental health care, or failure to protect the person from health and safety hazards, malnutrition or dehydration.

Isolation involves the intentional acts of preventing an elder from receiving visitors, telephone calls and mail, but can also include false imprisonment or physical restraint of an elder. However, in general, these same actions are not considered elder abuse if the actions are taken pursuant to doctor's instructions or are performed in response to a threat of danger to property or physical safety.

Financial abuse occurs when a person or entity takes, secrets or retains property of an elder for a

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Can Employees Be Legally Restrained...cont.

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trade secrets. The term "trade secrets" encompasses a vast number of things. For example, it can include technology, processes, procedures, sales routes, techniques, business plans, and even recipes.

In certain instances, customer list and customer information can also be protected as a trade secret. In determining whether the customer information is a trade secret, the courts will look at whether or not the identity of the customers in a particular industry is easily ascertainable or whether the list can only be developed over time and with special effort. Further, the courts will look at whether or not the information that the employee has contains additional information beyond the mere identity and contact information of the customers. This could include information regarding the special needs and requirements of the customer.

In most instances, the courts will enforce a provision in an employment agreement that prevents a former employee from *soliciting* customers of his former employer. This type of provision does not prevent an employee from sending out notices to customers of his former employer that he is leaving and then accepting business from them when the customer initiates the contact.

In some situations, the courts have enforced a broader provision that prohibits an employee from soliciting or *accepting* business relating to specific products and services from customers that he became acquainted with while working with his former employer. Enforceability of these provisions is treated on a case-by-case basis. The legality of such a provision depends upon the extent to which it precludes the employee from pursuing his profession, trade or business. In making this determination, the courts look at the provision itself, as well as the make up of the market for the business. Therefore, for example, if the term of the non-solicitation agreement is short, it is more likely to be enforceable than if it is longer. The number of potential clients in the market is also significant. If the non-solicitation provision has the effect of only restricting a narrow portion of the market and leaves a substantial segment of the market open to the employee, then it is likely to be enforceable. For example, if the former employer has only a small share of the market, then it is more likely

that the employer will be successful in preventing a former employee from accepting business from their customers. This can also be accomplished by an agreement, which limits the prohibition from soliciting or accepting business to a small number of key customers or products of the employer. The courts will also consider the degree to which the former employee is actually competing with its former employer.

On the other hand, an employer must carefully draft any covenants that may impact an employee's right to seek employment. Some employers have included covenants not to compete in their employment contracts even though they know that they are not valid or enforceable, in the hope that the covenant may deter an employee from working for a competitor. A San Francisco Superior Court in 1999 found that an employer who terminated an employee who refused to sign this type of covenant not to compete was liable for violating public policy. The jury awarded the plaintiff \$54,000 in compensatory damages, \$125,000 in emotional distress damages, and \$1,080,000 in punitive damages. Including an illegal covenant could also violate California law prohibiting unfair competition and may be a breach of the covenant of good faith and fair dealing implied in all contracts.

One thing is certain, if the employer does not have a non-compete provision in the employment contract, the courts will not employ equity to restrain a former employee from soliciting or accepting business from his or her former employer's customers. If, however, the employer has drafted a carefully considered and limited non-compete agreement, employees can be successful in obtaining a permanent injunction restraining a former employee from doing business with their customers.

The law in this area is complex and very fact specific. Bob Randick and Julie Rose in our office, work with employers drafting enforceable non-compete and non-solicitation contracts that protect employers from unfair competition from their former employees. Brian O'Dea and I, along with other members of our litigation team, have been involved in litigating non-compete agreements for both employers and employees. If you have questions regarding a non-compete agreement, please give us a call.

MRO&T Announcements

WE ARE PLEASED TO ANNOUNCE THE ASSOCIATION OF
Holly J. Nelson

Ms. Nelson's practice will continue to focus primarily on transactional assistance for technology, start-up and international clients. Ms. Nelson assists with various strategic business start-up issues including business formation, negotiation and drafting of key contracts, source and review of funding options and development of key strategic alliances. Prior to joining McNichols Randick O'Dea & Tooliatos, LLP, Ms. Nelson was in private practice specializing exclusively in international and technology transactions leveraging her international experience, expertise and contact base.

Congratulations!

Congratulations to Lori Striker and her husband, Gary, on the birth of their second child, Melissa Ann. Born May 18, 2002, Melissa weighed in at 8lbs .04 ounces and 20 inches in length.

Avon Breast Cancer 3-Day Walk

By Shelley Jarvis

It was with great trepidation that I entered the Santa Clara Convention Center on July 12th. I had committed myself to walking in the Avon Walk For Breast Cancer. Twenty miles a day for three days, sleeping in tents at night. Santa Clara to San Francisco. What had I gotten myself into? At the time that I signed up it sounded all warm and fuzzy – a great cause – cancer research and funding mammograms for women without insurance – however, for a myriad of reasons which I won't bore you with, I never seemed to find the time to train for the event. I attempted to train one Sunday in June. I met a group of women who were walking twenty miles a weekend in preparation for the L.A. walk . . . in October!

"Oh, you're training for San Francisco? Well, you can always take the sweep van if you can't make it." These women couldn't hide their lack of belief that I would actually make it all three days. I can't blame them. I didn't think I would make all three days. I wanted to quit so many times, but I had raised the money and made the commitment.

How could I tell all those people who contributed to me that I was just too busy to actually follow through?

So there I was, sitting in the convention center dreading the next few days, looking around me when something amazing happened. I saw the faces of many men and women - all shapes, sizes, ages, and ethnicities and I realized that this event was bigger than me and my excuses. It was about helping other people. During the opening ceremonies the announcer said that for the next three days we were about to become part of a very special community, a world unto itself where altruism and selflessness abound. A world that knows only human kindness. A world where we would see the best of ourselves and others and we would realize what extraordinary things people

can accomplish when they pull together. That was it – I was inspired! I was ready to go!

What is truly amazing is that it was the truth. It wasn't a line they were feeding us to get us motivated. During the course of my three days on the road I saw so many examples of this special world I had entered. When my foot pain was too much for me to bear, my

teammates carried my pack for me; when I ran out of Gatorade, my teammates offered me theirs; when I couldn't carry my gear bag for lack of energy, my teammate carried it for me; when I couldn't get my tent set up, my teammate staked it for me; when I couldn't take another step, my teammates left me encouraging messages . . . the examples were endless. Perfect strangers felt like comrades, soldiers in this war we'd waged against breast cancer. Then there were the well wishers along the route. Every day we saw individuals and groups of people set up along the way who, while they were not walking, had committed their time to the cause. Every time we saw one of them it helped us to pass the time and

before we knew it we were a mile farther along.

It was definitely three days that I will never forget. It was difficult, beautiful, tearful, moving. I cried more times than I can remember from the pain. The physical pain of my aching body and feet; the pain of seeing a name and date of death on a t-shirt and realizing the woman was younger than me; the pain of seeing teenage kids wearing a t-shirt that said "I miss you Mom." But what really stands out was the experience itself, the kindness, the journey. As I approached my last steps entering the gate at the end, I saw a young bald woman holding a sign that read: "You Are My Heroes, I Was Just Diagnosed . . . For The Second Time. Thank You For My Hope!"



Cartoon by Laird Neuhart

Clients on the Go - Zurado Corporation

By Everitt Beers

Zurado Corporation and its founder and president, Todd Marques, have just filed a United States patent application for an innovative universal remote control device using wireless technology. Mr. Marques' invention of a Universal Device Management system allows a user to control consumer electronics (e.g., televisions, stereos, DVD players), household appliances, computers, handheld digital assistants (PDAs), automobile subsystems, and office equipment, all with just one handheld remote control.

The Universal Device Management (UDM) system allows a user to control all these varied products, from any number of vendors, using wireless technology and a universal user interface. The technology allows the remote control to automatically discover eligible devices in close proximity and configure itself to control those devices.

Using Universal Device Management, a person will be able to use a single remote control (which could be a general purpose handheld PDA running the UDM system) to control myriad devices

in many locations throughout a day. For example, in the morning, the UDM controller could be used to manage household devices, such as a thermostat, a toaster, and a coffee maker. On the way to work, the same controller could be used to control automotive subsystems, such as a car stereo or heating and cooling systems. On a commuter train, the controller could be used with information and ticketing kiosks. Finally, upon arrival at work, the controller could be used to control office equipment and the office environment, such as lights, photocopiers, fax machines, computers, and printers. Consumers will use the same UDM-enabled PDA or handset throughout the course of their daily activities, whether interacting with household systems and devices, controlling performance and navigation systems in their cars, seeking information from a public kiosk, or operating office machines.

Presently Zurado Corporation is completing final development of its new technology and is seeking additional capital funding to bring UDM to market.

Epicurean Delight

By Nick Tooliatos

Given that I am off on military duty, when it came time for me to contribute an article on "epicurean delights," I could not think of a better recipe to share with all of you other than the old Army morning "stick-to-your ribs" staple a.k.a. "SOS." SOS is not a cry for help in Army vernacular. Rather, it stands for the rather vulgar word for waste -- on a shingle. Polite people refer to it as Creamed Beef on Toast. Obviously, the toast is the shingle. I will leave to your imagination what the creamed beef represents. Despite its name, the taste is phenomenal.

While I know you will love this, one cold Saturday morning when there are lots of chores to be done outside, my suggestion is that you have your cholesterol checked before you eat it. It might stop your heart by midday!

Eat, enjoy, and as we say in the Army -- HOOAH!

Ingredients

- 1 pound ground beef
- 1/4 cup all-purpose flour
- 1 cube beef bouillon
- 3/4 teaspoon salt
- 1 pinch ground black pepper
- 2 1/4 cups milk
- 1/4 teaspoon Worcestershire sauce

Directions

Brown beef in a large skillet over medium high heat. Stir in flour, bouillon, salt and pepper. Sauté all together for about 5 minutes or until flour is absorbed. Gradually stir in milk and Worcestershire sauce. Bring all to a simmer, stirring constantly. Cook until thickened, about 5 to 10 minutes. Serve hot over toast or a biscuit, preferably with a scoop of scrambled eggs and three or four sausage links. Use plenty of Tabasco sauce!

Going Places - AGRITURISMO

By Bob Randick

If your spouse is insisting upon a European vacation but you can't face three weeks of crowded cities, long lines and endless museums, consider a farm stay for part of your experience. Most European countries are now actively promoting tourism in rural areas, with overnight accommodations at working farms. Many of the governments are promoting rural tourism by subsidizing farm renovation to create guest accommodations. They have found this to be a partial solution to failing small farms and the flight from rural areas to the larger cities. The farmers now have additional sources of income by taking in paying guests and being able to market their farm products directly to the guests and other tourists in the area. In Britain the experience is known as "farmstay holidays," in France the rural lodgings are called "gites," and in Italy the program is known as "agriturismo."

On the recommendation of a friend, my wife and I recently spent an "agriturismo" week on a farm in southeastern Tuscany. The farm, called Podere Malabiccia, is located in the Val d' Orcia region of Tuscany about forty minutes southeast of Sienna. The guest building is a 300 year old farmhouse which has been carefully and creatively restored over the past fifteen years by its current owner, Ermano Gardani, an architect from Milan. Although Ermano moved to Tuscany over fifteen years ago, in the neighboring village he is still referred to as "the architect from Milan." The farmhouse contains large common rooms furnished in Italian country style, two wings with two bedrooms and a bath each, and a tower suite. Podere Malabiccia is a working farm producing olives for the local olive oil industry. It also has fruit trees, a vegetable garden, and a vineyard.

The days at Podere Malabiccia found a comfortable routine; breakfast at the farmhouse, day trips to the neighboring hill towns, a return to the farm in the late afternoon for wine, cheese, and fresh fruit, and then dinner at a restaurant in one of the local villages. The closest village, about a mile away, is the walled village of Petroio, which is known as the center of the Tuscan terracotta industry. Petroio sits on the crest of a hill with narrow winding streets, which, as I discovered, are not as wide as a rental car. The hill towns of Montepulciano and Montalcino are each about one half hour drive from the farm. They are great destinations for a long lunch accompanied by a *Vino Nobile di Montepulciano* or a *Brunello di Montalcino*. Our local excursions also took us to Sant 'Anna In Camprena, the former monastery at which portions of "The English Patient" were filmed, the renaissance town of Pienza, the Roman baths and spa at Bagno Vignoni, and the abbey church of Sant 'Antimo founded by Charlemagne in 781.

Throughout Tuscany there are a great number of agriturismo farms which offer lodging. They are all well marked by signs on the roads, and many of the large ones have web sites. The web site for Podere Malabiccia is www.malabiccia.toscana.nu. The web sites for others can be found by searching under the names of the Tuscan villages or under the term "podere," which means country property. The cost of an agriturismo stay is also a breath of fresh air for your travel budget. We paid thirty five dollars per person per night for the lodging including breakfast. The drawbacks are few. You will need a car to fully enjoy your stay and many guest facilities do not have telephone or e-mail access; but, with a few words of Italian and a good map, you can have a great rural vacation. Buon Viaggio!

Elder Abuse...cont.

(Continued from page 1)

wrongful use or intent to defraud. The law deems this requirement satisfied if the property is taken in bad faith.

There are criminal penalties which result from proven elder abuse, which can extend to four years in prison. In a civil action, a party may recover their financial damages, including attorney's fees. Other code sections provide for the forfeiture of inheritance, double damages for value of property recovered, rescission of property transfers and the appointment of a conservator.

The best way to protect against elder abuse is through regular involvement with the elder, to monitor their health, welfare and happiness. If elder abuse is suspected, the person can report the

abuse to police or Adult Protective Services. Financial abuse can be minimized by the use of a living trust or other estate planning documents. It is important that the estate plan be prepared and executed before the elder is considered incompetent to sign a will or transfer property. If you would like further information, please feel free to contact Steve McNichols, Nick Tooliatos or Theresa Muley at 925-460-3700.

Steve McNichols and Theresa Muley recently obtained a judgment for recovery of real property exceeding \$1.3 million dollars in favor of a family whose grandmother had been abducted from California by another family member, hidden in another state, prevented from contacting her family and robbed of the bulk of her real and personal property.



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Avon Breast Cancer 3-Day Walk - A different perspective!

By Julie Rose

The four walkers, Annette Neuhart, Shelley Jarvis, Christine Vincent and Julie Rose and one volunteer crew member Scott Boccia of McNichols Randick O'Dea and Tooliatos would like to thank their family, friends, co-workers and clients for their support for their participation in the Avon 3 Day Breast Cancer Walk from San Jose to San Francisco. It was quite the adventure for all.

While Scott was on the advance crew setting up the route, we four walkers spent 5 hours standing in line on Thursday to complete registration for the event which started the next day. Friday morning we arrived a bit bleary eyed at the set time of 6:00 a.m. to begin the walk. Following the opening ceremonies and safety instructions we hit the cement at 8:30 a.m. from the Santa Clara convention center. Meanwhile, Scott was on the road between Santa Clara and Skyline Boulevard setting up direction and safety signs. Lunch was served at the 15 mile mark, which was about 2:30 in the afternoon. Everyone finally got to drop their weary bodies at Bay Meadows Race Track, 18.7 miles later, where we camped for the night.

Everyone was back on the road at 7:30 a.m. and headed for Skyline Boulevard, the second camp stop. While temperatures were

warm at Bay Meadows, the weather turned ugly near Skyline. The walkers knew that they were in trouble when the event crew began handing out Mylar thermal blankets three miles from the camp site. The fog roared through the campsite from 3:00 p.m. through the night and into the early morning. It was so thick it was difficult to find the port-a-potties once the sun set.

Back on the road at 7:30, everyone headed for the final trek into San Francisco. The route wound through Pacifica, Fort Funston, along the Great Highway, turned into Golden Gate Park, proceeded through the Presidio and ended up on the Marina Green for the closing ceremony.

Though Scott did not get any credit for doing the walk, by the time he had transected the route several times each day installing, re-installing and removing the signs, he covered about half the course.

In all there were 4400 walkers and 400 volunteer crew members. The group raised a net of \$7,000,000 which will all go to breast cancer research and early detection testing for low income women.