Restrictive Covenants and Trade Secrets

By Brian C. Whitaker and Chad D. Olsen

Convenient data storage devices and other means of transferring information can be a nightmare for employers hoping to protect trade secrets. Potentially misappropriated trade secrets can include nearly any "information . . . that . . . [d]erives independent economic value . . . from not being generally known to, and not being readily ascertainable . . . by the public or any other persons who can obtain commercial or economic value from its disclosure or use." NRS 600A.030(5).

The failure to take steps to protect sensitive information may result in the loss of trade secret protection, which may compromise competiveness and innovation. In *Frantz v. Johnson*, the Nevada Supreme Court made it clear that, in determining whether information is entitled to trade secret protection, courts will consider "the extent and manner in which the employer guarded the secrecy of the information." 116 Nev. 455, 999 P.2d 351, 358–59 (2000).

Restrictive covenants between employers and employees, even at-will employees, provide a simple way for employers to help protect trade secrets. Such restrictive covenants often include four components: non-competition, client non-solicitation, non-disclosure, and invention assignment.

Non-competition

While Nevada law permits employers to use non-compete components, the law requires that such agreements be "supported by valuable consideration and . . . otherwise reasonable in its scope and duration." NRS 613.200(4); *see generally Camco, Inc. v. Baker*, 113 Nev. 512, 936 P.2d 829, 832 (1997) ("[A]n at-will employee's continued employment is sufficient consideration for enforcing a non-competition agreement."). To illustrate, in *Hansen v. Edwards*, a podiatrist and his Reno-based employer entered into an agreement that prohibited the podiatrist from "engag[ing] in the practice of surgical chiropody within a radius of 100 miles of Reno on the termination of employment." 83 Nev. 189, 426 P.2d 792, 793 (1967). No time limit was mentioned. *Id.* The court reasoned that a non-compete provision is "unreasonable . . . if it is greater than is required for the protection of the [employer] . . . or [if it] imposes undue hardship upon the person restricted." *Id.* In the end, the court held that the non-compete provision was unreasonable and modified the provision to "a confinement of the area of restraint to the boundary limits of the City of Reno and a time interval of one year." *Id.* at 794.

Other case law shows that determining reasonable scope and duration is a fact-sensitive inquiry. *See, e.g.*, *Traffic Control Servs. v. United Rentals Northwest, Inc.*, 120 Nev. 168, 87 P.3d 1054, 1055–56 (2004) (illustrating a reasonable provision that provided a one-year duration and 60 mile radius); *Camco, Inc.*, 113 Nev. 512, 936 P.2d at 832 (invalidating a provision that provided a 50 mile radius and five-year duration, and reasoning that territorial restrictions must be limited to areas where the employer "established customer contacts and good will"); *Jones v. Deeter*, 112 Nev. 291, 913 P.2d 1272 (1996) (striking down a non-compete provision that provided a 100 mile radius and a five-year duration); *Ellis v. McDaniel*, 95 Nev. 455, 596 P.2d 222, 224 (1979) (upholding a non-compete provision that prohibited competition within two years after termination and within five miles of the city limits). In sum, "[t]here is no inflexible formula for deciding the ubiquitous question of reasonableness." *Ellis*, 95 Nev. 455, 596 P.2d at 224.

Client non-solicitation

The second component often included in restrictive covenants is client non-solicitation. *See, e.g.*, *Pinnacle Performance v. Hessing*, 17 P.3d 308, 311 (Idaho 2001) ("[E]mployers are entitled to protect their businesses from the detrimental impact of competition by employees who, but for their employment, would not have had the ability to gain a special influence over clients or customers."); *Dam, Snell & Taveirne, Ltd. v. Verchota*, 754 N.E.2d 464, 470 (Ill. Ct. App. 2001) (reasoning that employers have a "protectable interest in preventing its former employees from both soliciting and performing . . . work on behalf of its . . . clients").

There is no Nevada case law showing a standard that applies exclusively to client non-solicitation agreements. It seems, therefore, that the reasonableness standard that is applied to non-compete agreements will also apply to cli-

ent non-solicitation agreements. In fact, in *Shainin II, LLC v. Allen*, "the parties agree[d] that there is no Nevada case law on whether a non-competition agreement is reasonable if it prohibits an employee from soliciting or performing services for any of the former employer's clients." 81 U.S.P.Q. 2d (BNA) 1129 *16 (W.D. Wash. 2006). The court then concluded that it "has little basis to find that the Nevada Supreme Court would uphold a non-competition clause that bars an employee from performing services for any of an employer's clients, without regard to geographic location or whether the employee himself had performed services for the client." *Id.* at 17–18.

In *Fillpoint, LLC v. Maas*, the court held that the client and employee non-solicitation terms in an employment agreement were "too broad" after finding that the "agreement even barred . . . solicitation of potential customers." 146 Cal. Rptr. 3d 194, 204 (Cal. Ct. App. 2012). The court stated that, at the employee's expense, the agreement unreasonably extended the anticompetitive reach of the employer beyond its established good will. *Id.*; *see also Seabury & Smith, Inc. v. Payne Fin. Group, Inc.*, 393 F. Supp. 2d 1057, 1063 (E.D. Wash. 2005) (finding one-year restriction on working with former clients to be reasonable); *W. R. Grace & Co., Dearborn Div. v. Mouyal*, 422 S.E.2d 529, 532 (Ga. 1992) ("[T]he prohibition against post-employment solicitation of *any* customer of the employer located in a specific geographic area is . . . unreasonable . . . .").

Non-disclosure and invention assignment

Courts generally perceive non-disclosure and invention assignment agreements favorably because they do not restrict an employee's ability to work or find employment. *See Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 761 (Iowa 1999) ("Nondisclosure-confidentiality agreements enjoy more favorable treatment in the law than do noncompete agreements" because "noncompete agreements are viewed as restraints of trade which limit an employee's freedom of movement among employment opportunities."). Accordingly, a court is likely to enforce such an agreement if unambiguous and reasonable. *See Ringle v. Bruton*, 120 Nev. 82, 86 P.3d 1032, 1039 (2004) ("[W]hen a contract is clear, unambiguous, and complete, its terms must be given their plain meaning and the contract must be enforced as written . . . .").

For instance, in *Revere Transducers*, the court applied the reasonableness test to non-disclosure and invention assignment agreements by balancing the low burden placed on the employee with the need to protect the employer's business. 595 N.W.2d at 762. Specifically, the court stated,

> the following test should be applied in determining whether a nondisclosure-confidential or invention assignment agreement is enforceable:
>
> (1) Is the restriction prohibiting disclosure reasonably necessary for the protection of the employer's business;
>
> (2) is the restriction unreasonably restrictive of the employee's rights; and
>
> (3) is the restriction prejudicial to the public interest?

Id.

In the end, the court held that the agreements were enforceable. *Id.* at 763.

In *Traffic Control Servs.*, the Nevada Supreme Court stated:

> Employers commonly rely upon restrictive covenants, primarily nondisclosure and noncompetition covenants, to safeguard important business interests. "The non-disclosure covenant limits the dissemination of proprietary information by a former employee, while the non-competition covenant precludes the former employee from competing with his prior employer for a specified period of time and within a precise geographic area.

120 Nev. 168, 87 P.3d at 1057 (2004).

These restrictive covenants, however, are subject to intense judicial scrutiny. *See Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 117 P.3d 219, 225 (2005) ("[W]e strictly construe the language of covenants not to compete; and in the case of an ambiguity, that language is construed against the drafter."). Further, modern technology makes transferring sensitive business information both effortless and nearly unnoticeable.

It is imperative, therefore, that employers and their counsel carefully draft restrictive covenants. Failing to provide adequate safeguards may lead to the loss of trade secret protection. *See Frantz*, 116 Nev. 455, 999 P.2d at 358–59 (protecting customer and pricing information as a trade secret because, inter alia, the employer guarded "its secrecy"); *see generally Saini v. International Game Technology*, 434

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Pro Bono Corner

Volunteer of the Month: Airene Williamson

By R. Christopher Reade

The Legal Aid Center of Southern Nevada is pleased to have instituted a new program to recognize the outstanding efforts of attorneys to provide pro bono services to citizens of lesser means in Southern Nevada. While its annual recognition of its volunteers has become an annual event, attorneys in Southern Nevada are making great contributions throughout the year which deserve recognition. Each month, the Legal Aid Center will recognize an attorney who has gone above and beyond the minimum requirements for pro bono publico service expected of every attorney as its Volunteer of the Month. The program recognizes an attorney each month in the areas of civil practice or family law and will present monthly awards at the Civil Judges and Family Court Bench/Bar Meetings.

The first recipient of the Volunteer of the Month Award is **Airene Williamson** of the Williamson Law Office, who received her award at the Civil Judges Meeting on February 27, 2013. Williamson has made pro bono service an integral part of her practice from her firm's inception in 2012. Williamson exemplifies the multiple ways that attorneys can participate in pro bono services, volunteering her time for Landlord/Tenant Ask-A-Lawyer programs, Bankruptcy Ask-A-Lawyer programs, and Legal Aid Small Business Project, while also taking on pro bono clients involving probate, foreclosure, lending, and commercial transactions. Williamson indicated that the freedom that came with the creation of her own firm also brought the ability to allow her to fulfill her desire to be more involved and apply her legal talents for the benefit of the community. She has been pleased by the rewarding nature of the work and the difference her advocacy and assistance makes.

Williamson has found that her pro bono service has both assisted her clients and served her growing practice. She appreciates the opportunities to get exposure and experience in areas of the law which might not otherwise be open to a new firm. Her pro bono clients have shown their gratitude by referring their friends and associates to Williamson for their legal needs. Williamson noted that her pro bono work has helped her develop a brand both in the legal community and amongst prospective clients, giving her marketable skills. Williamson is telling her friends how much a difference pro bono makes in her own career and in the life of the people she serves. C

R. Christopher Reade is an attorney at Reade and Associates with over 15 years experience in commercial, real estate, and corporate litigation and construction law. He is a member of Legal Aid Center's Pro Bono Advisory Council and is a past recipient of numerous awards, including Pro Bono Attorney of the Decade. To learn more about volunteer opportunities with Legal Aid Center, contact Melanie Kushnir at mkushnir@lacsn.org or 702-386-1070 (ext. 137).

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F. Supp. 2d 913, 919 (D. Nev. 2006) ("[D]isclosure of confidential information or trade secrets" creates serious harms, "which are not readily addressed through payment of economic damages"). C

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