Protecting Trade Secrets When Key Employees Move to Competitors
Recovering Confidential Business Information and Defending Against Misappropriation
A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:
Jessica Brown, Partner, Gibson Dunn & Crutcher, Denver
Jason C. Schwartz, Partner, Gibson Dunn & Crutcher, Washington, D.C.
Seth P. Berman, Managing Director and Deputy General Counsel, Stroz Friedberg, Boston

Tuesday, February 2, 2010
The conference begins at:
1 pm Eastern
12 pm Central
11 am Mountain
10 am Pacific

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If no column is present: click Bookmarks or Pages on the left side of the window.
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• and typing in the chat box your company name and the number of attendees.
• Then click the blue icon beside the box to send.
Key Employee Departures to Competitors:

How to Find and Use Smoking Gun Evidence to Protect Your Business

February 2, 2010
How to Find and Use Smoking Gun Evidence to Protect Your Business

The Speakers

Jason C. Schwartz
Employment Partner
Gibson, Dunn & Crutcher LLP

Seth Berman
Managing Director
Stroz Friedberg

Jessica Brown
Employment Partner
Gibson, Dunn & Crutcher LLP
Our Scenario

You are the General Counsel of Vulnerable, Inc., a technology company with operations in Texas, Colorado, and the District of Columbia.

You get an urgent call from your CEO, Victor Vexed, who is in a state of distress. He tells you that your VP of Sales, Rex Ruthless, has just accepted an offer to join your fierce competitor, Rival, Inc. You remember that Rex was a charismatic Texan who was laid off last month with a significant severance package.
How to Find and Use Smoking Gun Evidence to Protect Your Business

Our Scenario

After you put the phone down, you find out:

1. Vulnerable's biggest customer has just pulled out of negotiations for a contract renewal after weeks of dragging its feet.
2. The office gossip is that Rex's sales team is about to quit and its members won’t discuss their plans.
3. Your assistant cannot find any sign of Rex's laptop or company cell phone.

What do you do?
Initial Steps

Locate employment contracts
Assemble internal and external team
Preserve evidence and safeguard assets
- recover employee laptops, PDAs, etc. immediately
- summon expert IT assistance
- revoke building and remote IT access rights
- take steps to prevent tampering by other employees
- issue document preservation/hold notices
Take action with respect to those employees still in the office?
Brief internal team on privilege issues, compliance with contracts
Review Employment Contracts

Review the contracts in question
- are they signed?
- what state’s law will apply?
- are they enforceable?

In Rex’s case, assume his contract contains these relevant provisions:
- express confidentiality clause
- express prohibition against outside business interests during employment
- 24 month post-termination employee non-solicit
- 24 month post-termination customer non-solicit
- 24 month post-termination non-compete
Gather the Facts: Issues to Be Investigated

Can the rumor that Rex is joining Rival, Inc. be substantiated?
Are the three sales employees leaving to join Rival, Inc. too? May others follow? Has there been any “solicitation” of employees by Rex and/or Rival, Inc.?
Is Rex behind the failed negotiations? Are other customers being targeted?
Has Rex undertaken competitive activities for Rival, Inc. during work hours, in breach of his outside interests restriction or otherwise in breach of fiduciary duties?
Gather the Facts: Issues to Be Investigated

Has confidential information been misused, copied, and/or removed?
Has Rex informed customers of his departure or sought to entice them away?
Was Rex aware of any wrongdoing on the part of any of the other employees?
Is Rival aware of the employees’ contractual obligations to Vulnerable, Inc.? Any indicia of bad faith on the part of Rival, Inc.?
What is the financial position of Rex/Rival, Inc. to satisfy any award of damages?
How to Find and Use Smoking Gun Evidence to Protect Your Business

Gathering Evidence – The Traditional Way

Search employee offices: desk files, notepads, post-its, whiteboards etc.
Make a forensic image of the employees’ laptops, PCs
Review access to computer systems
Check cellular and office telephone records, call logs, dial-outs
Preserve voicemail messages, and voice recordings if applicable
Review photocopying records
Read expense reports
Review building security records/card access readers
Consider covert surveillance – but proceed carefully, using an experienced investigator who knows the bounds of the law
Gathering Evidence – What Might You Find?

Recently accessed information/restricted data
Business plans
Resumes
Letters, calls, emails, faxes to competitors or potential competitors
Evidence of malice/bad faith
Gathering Evidence – Then What?

Collect documentary evidence first
Then proceed with witness interviews
Interview friendly sources first
• did Rex tell you where he was going?
• did he ask you to join him?
• did he take anything from Vulnerable?
Then interview the targets when you have good incriminating evidence

Such evidence might also be found through less traditional means
Gathering Evidence - Forensic Reconstruction (1)

Link File analysis is conducted to reconstruct file access activity showing access to a particular document:

- **Name:** Burgundy PR UK 2006 v2.DOC.Ink
- **File Ext:** .ink
- **File Type:** Link
- **File Categ:** Windows
- **Description:** File, Archive
- **Last Accessed:** 05/3207, 09:11:14AM
- **File Created:** 08/29/06 03:03:18PM
- **Last Written:** 09/29/06 03:04:08PM
- **Link Modified:** 09/29/06 03:04:08PM
- **File Acquired:** 05/21/07 06:38:35PM
- **Starting Ext:** 0C-C180790-448
- **Ext Enttype:** 1
- **Fname:**
- **Permissions:**
- **References:** 0
- **Physical Location:** 7,703,748,544
- **Physical Sector:** 15,045,353
- **Evidence File:** Laptop
- **File Identifier:** 17,045
- **Full Path:** C:\Documents and Settings\user\Recent\Burgundy PR UK 2006 v2.DOC.Ink
- **Short Name:** BURGUN~1.LNK

Link file shows this document was accessed on a particular date and time and was actually located on his computer in this location.
Gathering Evidence - Forensic Reconstruction (2)

Analysis of Document Server also yielded evidence of restricted file access to relevant documents:

```
ODMA->GetDocInfo: [9/12/2006 @ 13:29:0249]
  Called by MS Word
  Calling Doc Id :ODMA\PCDOCS\NYDOCS1\764343\7
  Item: ODM_NAME
  Returning #764343 v7 [2006]

ODMA->GetDocInfo: [9/12/2006 @ 13:29:0249]
  Called by MS Word
  Calling Doc Id :ODMA\PCDOCS\NYDOCS1\764343\7
  Item: ODM_TITLETEXT
  Returning #764343 v7 [2006]

ODMA->GetLeadMoniker: [9/12/2006 @ 13:29:0249]
  Called by MS Word
  Calling Doc Id :ODMA\PCDOCS\NYDOCS1\764343\7
  Returning ODM_E_FAIL
```

```
ODMA->CloseDoc: [9/12/2006 @ 13:30:0221]
  Called by MS Word
  DocId: :ODMA\PCDOCS\NYDOCS1\764343\7
  Shadow( 1 )  PagesPrinted( 0 )
```
### Gathering Evidence - Forensic Reconstruction (3)

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<th>Request IP</th>
<th>Request</th>
<th>URL</th>
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<tr>
<td>[25/Mar/201 -0500]</td>
<td>169.37.161.75</td>
<td>GET</td>
<td><a href="http://www.sowood.com/img/contact.gif">http://www.sowood.com/img/contact.gif</a></td>
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Metadata analysis is conducted on all files of new company’s laptop to show ownership.

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<td>K150</td>
<td>10/10/2007 10:25</td>
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<td>10/10/2007 15:37</td>
<td>2/2/2009 17:41</td>
<td>K150</td>
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</table>
How to Find and Use Smoking Gun Evidence to Protect Your Business

Gathering Evidence - Forensic Reconstruction (5)

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<td>03/20/00 06:30:02AM</td>
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<td>04/2/00 09:33:36AM</td>
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<tr>
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<td>05/02/01 12:25:46PM</td>
</tr>
</tbody>
</table>

Note the Creation Date of the file is after the Last Written Date. This phenomena occurs when a file is moved from one device to another. The creation date in this instance is the date the file was moved.

Note the incremental progression of creation date. Showing that a large number of files are being transferred from a thumb drive to this new computer.
Gathering Evidence - Forensic Reconstruction (6)

Device analysis showed the existence of a SanDisk Cruzer thumb drive being plugged into the new machine. Device was subsequently recovered empty, but analysis showed that these very documents were being recovered from deleted space.
How to Find and Use Smoking Gun Evidence to Protect Your Business

Gathering Evidence

Temporary Internet cache can be reconstructed to find web-based emails between individuals.

Subject Line

Email Address

Let's discuss this deal on Yahoo instead of company servers. Someone may be looking in on us.
How to Find and Use Smoking Gun Evidence to Protect Your Business

Live Incidents
“Why is Norma getting transferred?”

Keyword search for AOL screen name: bigcompanycio

jsmith@http://5.18.1.170/was/filters.php?handle1=bigcompanycio&handle2=none
What Can Be Done?

Send a “cease and desist” letter? Purpose:

• To halt or slow the conduct
• To obtain admissions or further indicia of guilt
• To demand reaffirmation of contractual obligations and possibly other concessions
• To demonstrate reasonableness and the need for injunctive relief
• To provide additional time to gather evidence and draft pleadings
What Can Be Done?

Include or otherwise notify Rival, Inc.? Purpose:

• Have the company reconsider its course of action
• Have Rival think twice before improperly recruiting any other Vulnerable, Inc. employees
• Put Rival on notice of the contracts so that, if it proceeds, it may be liable for intentional interference with contractual relations
What Can Be Done?

Just lay low and then file suit? Purpose:
• Obtain quick legal relief
• Catch Rex and Rival by surprise
• Win the potential race to the courthouse
Need to decide first whether a lawsuit is worthwhile
• This is a question best considered very early on
If not, consider non-legal alternatives
• protect/consolidate customers – senior involvement
• reassure and motivate remaining employees
• motivate departing employees to remain?
Should We Sue?

Evaluation of strength of case/likelihood of success
Harm suffered
Costs
  • Legal costs
  • Customer relationships
  • Management time
  • Cross-claims
Potential relief
  • Injunctive relief
  • Damages
Should We Sue?

Reputational issues
  • Marketplace
  • Competitors
  • Employees and Prospective Employees

Other alternatives
  • Pre-suit discovery/settlement
  • ADR
  • Criminal referral
Initial Litigation Issues

Who should you sue
Who should you sue
What claims should you assert
  • Breach of contract
  • Common law duties of loyalty/fiduciary obligations
  • Misappropriation:
    • common law
    • statutory protections
    • “inevitable disclosure” doctrine
  • Statutory protection of electronic data (e.g., Computer Fraud and Abuse Act)
Initial Litigation Issues

What claims should you assert (continued)

- Tortious interference with contractual or business relations
- Unfair business practices/employee raiding theories
- Conspiracy

Whether and how to file for a TRO

- What conduct should you seek to restrain

Whether and how to seek a preliminary injunction

Whether and how to seek expedited discovery
Discovery Considerations

Exposure of Vulnerable’s sensitive and trade secret information
Risks of “cross contamination” impacting future business activities
Use of confidentiality agreements and protective orders to restrict
use of discovery
  • “attorneys’ eyes only” designations
  • resulting need for expert support
Third party discovery considerations
  • telephone records
  • internet-based private email accounts
Document management and related considerations and burdens
Settlement

Consent order vs. settlement agreement
Terms of settlement
Compliance monitoring
Any Questions?

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