

STRATEGIES FOR PROTECTING BUSINESS INFORMATION AND RELATIONSHIPS WHEN KEY EMPLOYEES LEAVE

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James Sanders

Fly, Robot LLC

Fly, Robot is a successful startup that designs, manufactures and sells unmanned planes.

Zach, the company's top salesperson (also a founder) has abruptly resigned after an argument with the board.

Rumors are Zach intends to start a competing business.

[CEO's Expletive of Choice Here]



Employee Agreements

- Noncompete agreements signed three years ago (two years after founding)
- Nondisclosure agreements
- Employee nonsolicitation agreements

Step 1: Lock Down Information

- Deny network access
- Deny physical access
- Remotely wipe portable devices



Step 1: Lock Down Information

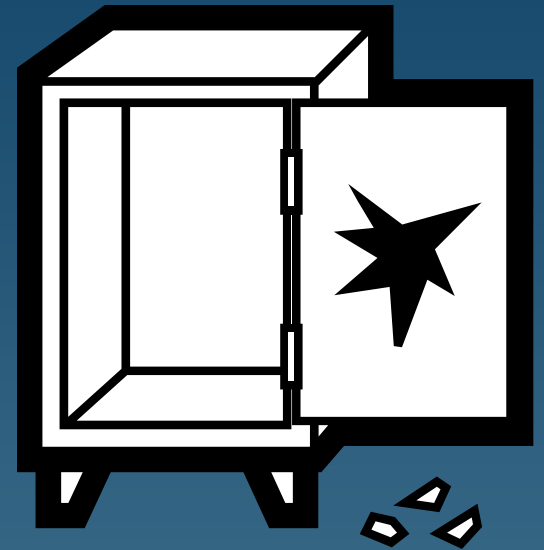
- Inventory and secure all hardware
- Inventory backup and storage systems
- Suspend deletion of electronic information

Step 2: Gather Information

- Gather pertinent agreements
- Identify those in the know
- Review e-mails and network activity
 - Don't forget browsers
- Monitor ongoing e-mail traffic

What Are We Looking For?

- Data transfers
- Mass deletions
- Plots and machinations
- Unusual or incriminating activity



Step 3: Assess Threat

- What does he know?
- What does he intend?
- How much harm can he do?

Step 4: Announce Your Concerns

- Exit interview
- Compliance letter
- Copies of agreements

New Development

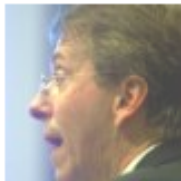
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People



Kevin Hamilton 1st

Partner at Perkins Coie LLP

Greater Seattle Area | Law Practice

Current

• **Partner at Perkins Coie LLP**

Education

• **Georgetown University Law Center**

Connections

68 connections

Websites

• **Company Website**

Public Profile

<http://www.linkedin.com/pub/kevin-hamilton/8/765/7a8>

New Development

- Per LinkedIn: Zach has joined Ginormous Corp., a California-based defense contractor as VP of Sales, UAV Division
- Ginormous does not have a UAV Division

Step 5: Assess Your Case

- Noncompete includes:
 - Choice of law provision
 - Choice of venue and jurisdiction provision
 - Attorneys' fees and costs to prevailing party

Step 5: Assess Your Case

- No obvious counterclaims
- No clear waivers
- Zach quit

Got Him!!



Enforcement of Noncompetes

- Noncompetes are not like other contracts
- Balance of interests:
 - Employer's legitimate interests
 - Employee's interest in making a living
 - Public interest

Legitimate Protectable Interests

- Trade secrets
- Other confidential information
- Goodwill / relationships

Relationships and Goodwill

- Goodwill is a business asset
- Pre-existing relationships may not be protectable
- Mention goodwill in noncompete

Fly, Robot LLC



Ginormous Corp.



Step 6: Take Action?

- FYI letter
- Cease and desist letter
- Lawsuit with temporary restraining order

New Development

- Ursula, Director of Technology, announces her departure for Ginormous Corp.
- Ursula was not given stock when she signed noncompete agreement
- She describes new job as founding UAV Division of Ginormous Corp.

Trade Secrets



Trade Secrets

Information of any kind that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Not Trade Secrets

- Public information
- Patented inventions
- Non-public information
 - If not "novel"
 - If easily recreated
 - Reverse engineering is allowed

Trade Secrets

- Research strategies and next steps
- Negative information
- User feedback?
- Key suppliers

Trade Secrets

- Marketing strategies
- Customer information?
- What doesn't work

Trade Secrets in Plain View

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FIRM HIGHLIGHTS

- Perkins Coie Expands San Diego Office With Emerging Companies Group
- Perkins Coie Seattle Ranked Top Firm by Corporate Board Member
- Perkins Coie Named to List of 2011 Top Ten Family Friendly Firms by Yale Law Women



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Trade Secrets in Plain View

- Websites and marketing materials
- Trade shows and presentations
- LinkedIn and Facebook
- Visitors without NDAs
- Unsecured computer drives

Take Action: Ursula?

- Noncompete?
- Trade secrets
 - Actual misappropriation?
 - Threatened misappropriation?
 - Inevitable disclosure doctrine

Zach's Noncompete

- Definition of prohibited competition
- Geographic scope
- Temporal scope
- Severability and modification clause

Take Action: Zach?

- Noncompete
- Employee nonsolicitation?
- Trade secrets

Questions?