



the *Sidebar*

STRATEGIES FOR KEEPING THE LAW ON YOUR SIDE

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> *An Employee's Duty of Loyalty: What an Employee Cannot Do Before Resigning*

By Andrew A. Kimler, Esq.

The Duty of Loyalty

Generally speaking, employees owe their employers a duty of good faith and loyalty during the period of their employment. A troublesome situation may arise, however, when an employee contemplates leaving his or her job to join a competitive enterprise. New York courts have held that an employee may incorporate a competing business while still employed by a prior employer. Likewise, employees who contemplate leaving their employment may take certain preliminary steps toward the creation of a competitive enterprise. Nevertheless, the courts have also held that employees may not engage in acts of disloyalty while they are employed.

Examples of Disloyalty

As to what constitutes disloyalty, the sky is the limit. For example, as noted above, the mere formation of a new corporation in and of itself does not constitute a breach of an employee's duty of loyalty. Notwithstanding this, however, if an employee uses his or her employer's time, facilities, computer database or confidential information for the benefit of a new competitive enterprise, then the employer may have a basis for bringing a claim against the employee for breach of the duty of loyalty. It is important to note that even if the employee has not diverted any business or improperly utilized trade secrets, he or she may nevertheless be deemed to be in breach of the duty of loyalty if the competitive enterprise was created on company time. In other words, employees are obligated to devote their full time and attention to the work at hand and may not devote their energies to the new competitive enterprise.

Another example of disloyalty involves not only the creation of a competitive enterprise but the actual commencement of the new business while the employee is still employed. Employees who engage in such activities may face claims for breach of the duty of loyalty. Likewise, an employee must refrain from diverting business opportunities from the present employer to a new competitive enterprise. Even if the diversion of the business opportunity is not completed by the time the employee resigns, it has been held that an employee cannot lay the groundwork for the theft of a corporate opportunity and then complete the theft after he or she has resigned.

The solicitation of employees and the diversion of business from one's current employer to a new competitive enterprise has also been found to be actionable by the courts even if the employee solicits clients who have had a long-term relationship with the employee while he or she was employed by the prior employer. In addition to the fact that employees should refrain from soliciting an employer's clients before

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resigning, it has also been found that employees who lessens their work before resigning may be deemed to be in breach of their duty of loyalty.

The Employer's Remedies

If an employee violates the duty of loyalty, an employer may pursue a number of remedies. Among other things, it has been held that an employee who breaches his or her duty of loyalty to an employer may be required to forfeit his or her entire compensation from the date of the first "faithless" act. Moreover, a court may direct the former employee to account for all profits earned as a result of the breach of the duty of loyalty. One appellate court has held that the employer may

seek either the "disgorgement" of the disloyal employee's profits or the profit that the employer would have earned but for the disloyal conduct of the employee. An employer may also seek an injunction that prevents the employee from doing any further damage by reason of the employee's disloyal conduct.

Suffice it to say, while employees are not precluded from leaving their employers and going into competitive enterprises, any attempt to do so in a manner that is deemed to be in violation of an employee's duty of loyalty may subject the former employee to a variety of legal claims. Since litigation is both costly and consuming, departing employees would be well-advised to take the high road and to avoid engaging in any disloyal activities during the period of employment. ■

> *Exploring the Guardianship Solution*

By Ryan D. Mitola, Esq.

EVENTUALLY, YOU OR SOMEONE YOU KNOW MAY BE FACED WITH THE DIFFICULT CHOICE OF DETERMINING WHETHER A LOVED ONE REQUIRES SPECIAL ASSISTANCE. EVERY PERSON'S SPECIFIC NEEDS ARE DIFFERENT AND, THEREFORE, THE NECESSITY FOR ASSISTANCE MAY BE AS SIMPLE AS ARRANGING FOR TRANSPORTATION OR MAY BE MORE INVOLVED, SUCH AS PLANNING FOR LONG-TERM CARE. IN THAT REGARD, ARTICLE 81 OF THE MENTAL HYGIENE LAW WAS CREATED TO AID PEOPLE WHO HAVE NOT EXECUTED ADVANCE-PLANNING DIRECTIVES SUCH AS POWERS OF ATTORNEY OR HEALTH-CARE PROXIES.

The Role of the Guardian

Generally speaking, the person who is appointed by the court to assist a person in need is called a "guardian." The person in need is initially referred to as an "alleged incapacitated person" or an "AIP." In most cases, the court will appoint a family member to be the guardian of an AIP, unless there are no suitable family members to serve. A guardian may be appointed to make decisions concerning the "person" and/or "property" of the AIP. More specifically, a guardian of the person is someone appointed by the court to handle the personal affairs of the AIP, and the guardian of an AIP's property is someone appointed by the court to be responsible for managing the assets, the income and the financial affairs of such person.

When a request for a guardianship is made, the court will grant the guardian the least amount of authority and control necessary to provide for an AIP's specific needs. This is done to afford the AIP the opportunity to retain as much independence and dignity as possible. Guardianships will therefore be considered as a last resort, after all other forms of intervention or advance-planning techniques have proved to be futile.

The Procedure to Appoint a Guardian

To commence a proceeding to have a guardian appointed, the party filing the application, or "petitioner," must file an application in the Supreme Court of the county where the AIP resides. The petitioner may be a friend, a family member or the AIP himself. Indeed, elderly or sickly persons may realize that they are slowly losing the ability to care for themselves, that they have no one to trust and/or that they are being wrongfully influenced by another. Under these limited circumstances, an AIP may directly petition the court for a guardian.

After filing the petition, the court will appoint a court evaluator to represent the interests of the AIP. Typically, the court will also appoint an attorney for the AIP if the AIP requests counsel, the AIP does not consent to the guardianship or where the court determines that the appointment of counsel would be helpful to the resolution of the case. The court evaluator interviews the AIP and all interested parties. The interested parties generally include an AIP's spouse, his or her children, the AIP's parents and adult siblings. After interviewing the parties and reviewing the facts, the court evaluator files a report with recommendations to the court.

The Considerations of the Court

An AIP is entitled to a trial by jury and his or her representatives may present evidence and cross-examine witnesses. After considering all of the evidence, the court will determine whether the AIP is in need of a guardian and should be considered an "incapacitated person," or "IP." In that regard, the court can appoint a guardian if it determines that such guardianship is necessary to provide for the personal and property needs of the AIP and that the AIP is likely to suffer harm because he or she is unable to understand or appreciate the nature or consequences of being unable to care for his or her person and/or property. The court may also appoint a guardian if it determines that the AIP knowingly consents to the proposed appointment.

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> Co-Op Boards Granted Greater Discretion with Respect to Objectionable Tenants

By Robert Bommarito, Esq.

A DECISION BY NEW YORK'S HIGHEST COURT COULD DRASTICALLY INCREASE THE RIGHTS OF CO-OP BOARDS. THE COURT OF APPEALS HAS RECENTLY UPHELD AN APPELLATE COURT DECISION THAT APPLIED THE BUSINESS JUDGMENT RULE TO A CO-OP BOARD'S DECISION TO EVICT A TENANT-SHAREHOLDER FOR OBJECTIONABLE CONDUCT. THE DECISION MAKES IT EASIER FOR A CO-OP TO EVICT TENANTS WHO ENGAGE IN OBJECTIONABLE CONDUCT.

The Tenant's Objectionable Conduct

The case involved a tenant-shareholder, David Pullman, whom the board accused of objectionable conduct over the course of several years. The conduct included making alterations to his unit without board approval, making numerous unfounded complaints about his neighbors (including 16 letters in a one-month period) and filing lawsuits against the board and neighbors. The board argued that Mr. Pullman had violated the proprietary lease by engaging in objectionable conduct and therefore the board was entitled to cancel his lease by obtaining the vote of two-thirds of the directors. The board of directors held a meeting at which two-thirds of the directors and a majority of the shareholders voted to terminate Mr. Pullman's lease. The court agreed with the co-op board and affirmed the termination of Mr. Pullman's lease.

The Role of a Proprietary Lease

Generally speaking, a co-op owner's rights are governed by a proprietary lease. Most proprietary leases contain a provision that allow the co-op to terminate the lease by a two-thirds vote

The Guardian's Powers

The extent of the guardian's powers depends on the AIP's specific needs. These powers may include, but are not limited to, the authority to: (1) create guardianship bank accounts; (2) commence Medicaid planning; (3) make gifts; (4) commence litigation; (5) compromise claims from creditors; and (6) make routine medical decisions on behalf of the IP. The drafters of Article 81 of the Mental Hygiene Law understood that "the needs of persons with incapacities are as diverse and complex as they are unique to the individual."

A guardian must also have sufficient time to tend to the IP's specific needs. Thus, a guardian must visit the IP at least four times a year and must also file an annual report with the court, which is subject to review. A guardian who does not comply

of the directors, if the tenant engages in objectionable conduct. In the past, courts have refused to automatically enforce the decisions of co-op boards that sought to evict tenant-shareholders. Rather, co-op boards had to follow the same procedure as the owners of other rental properties and had to take the tenant to housing court and persuade the court that there was a basis for evicting the tenant-shareholder. In other words, the court was not bound by the decision of the board.

The Business Judgment Rule

The Court of Appeals relied on the business judgment rule in making its decision. The business judgment rule was created to protect corporate boards against judicial second guessing. The rule states that a court will not modify a corporate board's decision unless the board acted outside the scope of its authority, did not have a legitimate corporate purpose or acted in bad faith. The business judgment rule was first applied to co-op boards in 1990 in a landmark New York decision entitled *Levandusky v. One Fifth Ave. Corp.* Although co-op boards have had the protection of the business judgment rule for many years, the rule has never been interpreted so broadly as in the Pullman case.

The Benefit to Cooperatives

The Pullman case provides a great benefit to co-op boards because, based on its ruling, the court is essentially saying that a co-op board's decision to cancel the lease of a tenant-shareholder who engages in objectionable conduct will be upheld if the decision complies with the co-op's procedures and the business judgment rule. In other words, the court will not second-guess the decision of the cooperative. Critics of this decision argue that co-op boards will be tempted to overreach their powers and evict tenants based on personal grudges and not afford tenants their chance to prove their cases in court. This decision will surely be the subject of much litigation in the future as co-op owners and boards struggle over what constitutes "objectionable conduct." ■

with the directions of the court may be removed. The guardian may also be compensated for his or her efforts, but such compensation is subject to the discretion of the court.

Clearly, guardianship proceedings are complex and potentially emotional matters that require thoughtful analysis and consideration prior to commencement. Indeed, becoming a guardian is a serious commitment, and the decision to become a guardian should not be taken lightly. If you have any questions or concerns regarding guardianship proceedings, want to learn more about advance-planning directives, or if you feel that a loved one may be in need of a guardianship, feel free to contact Capell Vishnick for assistance and advice. ■

> Side Briefs

Capell Vishnick is proud to announce the launch of our Web site, located at www.capellvishnick.com. We invite you to be a frequent visitor to our Web site. The content will be continually updated to reflect important new developments at our firm as we continue to grow.

Christopher J.L. Deziel lectured at the 2004 Long Island Tax Practitioners Symposium, which was conducted jointly with the Internal Revenue Service and the Nassau/Suffolk Chapter of the National Conference of CPA Practitioners, at the Melville Marriott on November 17, 2004. Chris's presentation was the topic of New York's new Uniform Principal and Income Act as it applies to fiduciary accountings.

Capell Vishnick was proud to be a sponsor of the Women Against MS "Spotlight 2004" Luncheon, held at the Crest Hollow Country Club on October 5th. The luncheon was attended by more than 500 individuals who are dedicated to winning the war against multiple sclerosis. Jennifer Messina and Joe Milizio served on the WAMS luncheon committee, which "produced" this wonderful event.

Joseph G. Milizio participated in the National Multiple Sclerosis Society Conference in Denver, from November 10-13. Joe participated in workshops presented to M.S. Society leaders as well as the National Team Captain Rally, where he represented the Long Island chapter in events attended by the most successful team captains nationwide.

Joseph Trotti has been elected vice president of the board of the Community Education Council, an organization dedicated to expanding opportunities for parents to take a leadership role in the reform of New York City's public schools.

Ryan Mitola, a litigation associate, has been elected president of the Roslyn Gardens Tenants Corporation board of directors and is on the board of directors for the Queens County Columbian Lawyer's Association.

Our long-time partner, **Howard Capell**, has chosen to move on and has therefore withdrawn from the firm to pursue other professional goals. We wish him well.

Congratulations to **Colleen Morici**, **Mary Shields** and **Linda Parnell** for being chosen "Team Member of the Month" at Capell Vishnick. ■



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