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DETROIT'S PREMIER BUSINESS JOURNAL  
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# Death by Theft: How to Protect Your Company from Sabotage and Unfair Competition

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# Presentation Highlights

- Update on proposed legislation to ban non-competes (Michigan and National legislation)
- How to save \$\$ and protect your business
- How to prevent theft of YOUR ideas and relationships
  - Using restrictive agreements (non-compete, non-solicit, non-disclosure)
  - Trade Secret Law
- Action plan to keep the genie in the bottle
- Hiring the competition – Do's and Don'ts



*Image courtesy of Walt Disney©*

# PROPOSED LEGISLATION TO BAN NON-COMPETES

# Proposed Legislation to Ban Non-Competes in Michigan

- House Bill 4198 introduced by Rep. Peter Lucido
- Seeks to ban non-competes, non-solicits and arguably confidentiality provisions in Michigan
- Similar legislation to ban non-competes introduced in Washington and Massachusetts
- Other states trying to making it easier to enforce non-competes (Georgia, Wisconsin)



Rep. Peter Lucido

# Freaky Fast, Freaky Greedy?



“Forget the contract, we promise not to enforce them”



# Proposed National Legislation to Ban Non-Competes for Low-Wage Workers

- Mobility and Opportunity for Vulnerable Employees (MOVE) Act – June 3, 2015
- Seeks to ban non-competes for employees making less than \$15 an hour, or the minimum wage in the employee's municipality
- Require employers to disclose non-competes to prospective employees
- Would be first federal law related to non-competes



Sen. Al Franken

# HOW TO PROTECT YOUR IDEAS AND RELATIONSHIPS

# WHAT YOU ARE UP AGAINST

“It has become appallingly obvious that our technology has exceeded our humanity.”

~Albert Einstein

- 8 GB thumb drive = 10 CD-roms or 160,000 Word documents
- Only \$12.99
- \$45-300 billion in annual losses due to trade secret misappropriation
- 80-90% - someone you know!



# What do they look like?



# Why Do They Feel Justified Stealing Your Ideas and Relationships?

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- The “justifier” (I built it, it’s mine)
- The “thief” (no one will know if I take some information and contact these customers)
- The “lawyer-wanna be” (can’t prevent me from doing this; those agreements are not enforceable)
- The “blissfully ignorant” (I didn’t know or think it was a big deal)

# STEP ONE

## Identify What You Have to Protect

**CLASSIFIED**



**TOP  
SECRET**

# Examples

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- Customer lists and information
- Engineering designs, processes, techniques
- Prices, costs, margins, mark-ups, metrics
- Internal weaknesses
- Marketing and strategic plans

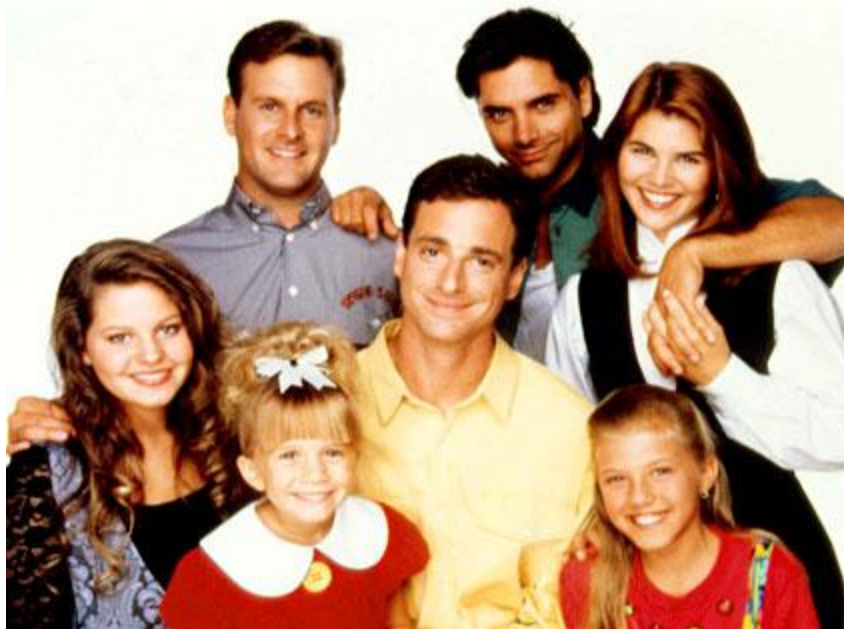
# The Relationships = The Key to Success

- Customer
- Client
- Vendor
- Supplier
- Employee
- Consultant/contractor



# Life is great now...

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# ...but prepare for the worst



# STEP TWO

## Protective Measures Available

### Non Compete Agreement

FOR GOOD CONSIDERATION, the receipt of which is here by acknowledged, the undersigned agrees not to compete with **Company Name** (Company), or its successors or assigns.

The term "not to compete" shall mean that the undersigned shall not directly or indirectly compete with the Company by serving as an officer, owner, partner, director, agent, employee or consultant to any firm or entity substantially engaged in a business similar or competitive to the business of the Company.

This agreement shall remain in effect for **Number** years from date below and shall extend to the following geographic area:

[Describe in detail]

### The Agreement

#### 1. Transfer Of Rights

This Agreement shall be binding on any successors of the parties.

by Client into a binding agreement with a buyer introduced by Finder or resulting directly from a lead supplied by Finder.

#### 2. Termination

This Agreement may be terminated before its initial term is completed by any party at any time, for any reason, provided that at least 30 days advance written notice of termination is given to the other party.

# Restrictive Covenants – Don't Be A Hulk

- Non-Competition
  - Most effective protection
  - Subject to most scrutiny
- Non-Solicitation
  - Typically easier to enforce than non-compete
  - More geared towards protecting relationships
- Confidentiality/Non-Disclosure
  - Generally easily enforceable
  - Less effective with trade-secret protection



# Enforceability of Restrictive Covenants

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- Sale of Business
  - More deference and leeway
  - Sophisticated entities/persons – equal bargaining power
  - 5-10 years
- Employment
  - More difficult to enforce
  - 6 months to 3 years

# Trade Secret Law

- Given increased usage of social media, take inventory of trade secrets and available protections to “keep the genie in the bottle”
- Uniform Trade Secret Act – “Reasonable efforts” to protect and/or maintain secrecy
- Key Questions
  - What information does the company place on social media?
  - Who owns the blog or other social media credentials?
  - What types of protections exist for trade secrets?



# Save \$\$\$\$ - Think LONG TERM

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- “Money is tight, let’s just wait...”
- \$1-2k < LOSS OF ENTIRE BUSINESS
- Deterrent Effect
- Foundation for future legal success  
(with significant financial savings)

# Practical Issues in Today's Job Market

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- Increased movement in 2015
- More competition for top talent
- Increased leverage for potential employees
- Less willing to sign non-compete agreements
- Jimmy John's sets a bad example.

# Strategies to Deal with Practical Issues

- “Team” approach
  - “We all sign them”
  - Protects all involved
- Narrowly tailor the agreements
  - Duration
  - Geography (limited to customers and/or areas that person is responsible for and/or exposed)
  - Scope of activity (limited to types of projects, areas of responsibility, etc.)
- Communication
- Additional consideration



# Emerging Issues with Social Media

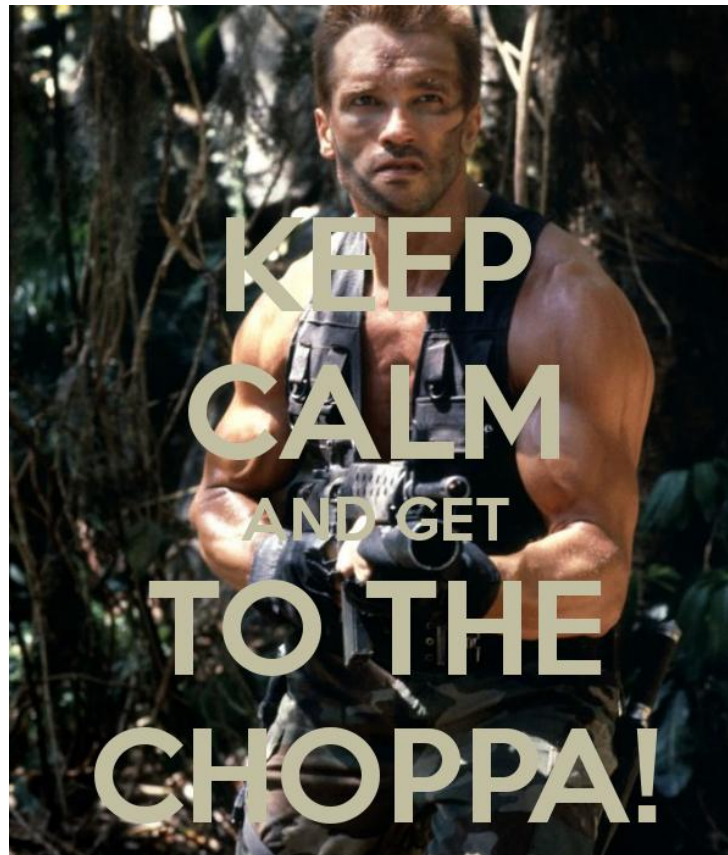
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- Who owns the actual social media accounts?
  - Outline ownership and access at the outset of employment if at all possible
- Beware what your employees post on social media accounts
- What about solicitations and/or connections on social media?

# Step Three

## Immediate Actions/Remedies When Your Assets Are Threatened

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# Your Assets Have Been Taken or Are at Risk – Now What?

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- Move quickly and aggressively (where appropriate)
- Get your experts involved immediately
- Preserve the evidence (electronic evidence is crucial – get it in the hands of the pros, not your IT department)

# Don't wait!



# Hiring the Competition – Be Careful!!

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- Defending a lawsuit - \$25,000 - \$500,000
- Adverse effect on day-to-day operations
- Adverse effect on reputation and relationships with customers/vendors

# Hiring Do's

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- Interview – ASK if he or she has a restrictive agreement with previous employer
- Have your attorney review/analyze restrictive agreement
- Analyze litigious nature of previous employer

# Hiring Do's

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- Balance risks (e.g. defending a lawsuit) vs. rewards (how much value does this person bring?)
- “White hat” language in YOUR employment agreement



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# Questions?

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