

ABOUT DAVIDOFF MALITO & HUTCHER LLP

A Leading Full Service Corporate Law and Government Relations Firm with active practices in:

- Government Relations & Lobbying
- Corporate & Securities
- Mergers & Acquisitions
- Banking, Finance & Venture Capital
- Litigation
- Real Estate
- Land Use & Zoning
- Bankruptcy/Creditor's Rights
- Trusts & Estates
- Administrative Law
- Construction Law
- Computer & Internet law
- Healthcare Law
- Labor & Employment Law

Upcoming Events:

- On **April 5, 2005**, Michael G. Zapson will host a seminar on **Estate Planning** at 7:00 p.m. at **Corbin & Reynolds American Grille**, 20 W. Park Avenue, Long Beach, New York 11561.
- On **April 7, 2005**, we will sponsor the annual Spring Luncheon and Fashion Show hosted by the **National Center for Disability Services**, at the **Garden City Hotel**, Garden City, New York.
- On **April 8, 2005**, the **Epilepsy Foundation of Long Island** will honor our founding partner **Robert J. Malito** at its 2005 Dinner Dance being held at 7:00 p.m. at the **Crest Hollow Country Club**, Woodbury, New York.
- On **April 26, 2005**, we will co-sponsor, together with **Hill & Knowlton**, a political and legislative forum at 8:00 a.m.
- On **April 26, 2005**, Michael G. Zapson will make a presentation to the **Community Bankers' Mortgage Forum**, at 5:30 p.m. at **Westbury Manor**, Westbury, New York.
- On **April 22, 2005**, Howard S. Weiss will participate in a panel on the **Historic and Legal Underpinnings of Land Development Regulation in New York** at 8:30 a.m. at the **New York Hotel Pennsylvania**, New York, New York.
- On **June 9, 2005**, we will be a **Gold Sponsor** of the **2005 Long Island/NY Metro Capital Forum**, presented by the **Long Island Capital Alliance**, at the **Huntington Hilton Hotel**. At the Forum, **Neil M. Kaufman** will moderate a panel discussion of venture capitalists.

For more information regarding any of these events, please contact Neil M. Kaufman at (516) 248-6400 or nmk@dmlegal.com.

The information contained herein is not to be construed as legal advice.

Davidoff Malito & Hutcher LLP
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CORPORATE CHRONICLE

PROTECTING TRADE SECRETS THROUGH
NON-COMPETITION AGREEMENTS

By Peter M. Ripin, Esq.

With a rapidly improving economy, companies are placing an increased emphasis on keeping and attracting the best employees. What happens, then, when your "star" employee—the one you've invested heavily in and entrusted with your company's best kept trade secrets—decides to abandon ship and join the competition? Is there anything you can do to stop him?

The answer may well depend upon whether your employee has signed a non-competition agreement restricting his ability to work for the competition. In a recent case, a hotel amenities supplier, Pacific Direct, Inc. ("Pacific"), hired the former senior vice president for sales and marketing for Marietta Corporation ("Marietta"), a competitor, whose responsibilities included high level product development and marketing. Shortly thereafter, Marietta sued to prevent the employee from working for Pacific on the grounds that the employee had, or would inevitably use, confidential trade secrets acquired during this employment which would cause irreparable injury to Marietta.

The court denied Marietta's request. While acknowledging that the misappropriation of a trade secret could give rise to the irreparable harm required to prevent the employee from moving to a competitor, the court noted that there was no proof that the employee had actually disclosed any proprietary information and, in the absence of a non-competition agreement, the court said that it was unwilling to create an "implied-in-fact restrictive covenant."

Had there been a restrictive covenant in place, the result might well have been different. Indeed, the court specifically noted that the employee had an expired employment contract containing an express covenant not to compete and a provision stating that any breach or threatened breach of the restrictive covenant would give rise to injunctive relief. In view of the fact that Marietta had allowed this agreement to lapse and had executed a new confidentiality agreement with the employee which did not contain a restrictive

covenant, the court concluded that it was "clearly anticipated" that the employee might change his employment after acquiring plaintiff's confidential information.

In contrast, in another recent case, the court held that restrictive covenants contained in two former employees' employment agreements were enforceable to the extent necessary to protect the former employer's client relationships and goodwill. Although the court recognized that there were "competing concerns" in balancing an employer's legitimate right to protect the fruits of its labor against an employee's right to freedom of employment, the court concluded that:

These competing concerns are properly resolved by the parties through their freedom to contract... Thus, it is not the Court's province to determine the best way to balance the parties' interests. To the contrary, the Court's duty is merely to determine the extent to which the parties' agreement is reasonable under this analysis and to enforce it accordingly. (emphasis in original)

Since the court determined that the non-compete provisions were reasonably limited in time and geographic scope and necessary to protect the employer's legitimate business interests, it enforced the restraints.

The moral of the story is clear—be sure to "lock" your employees into enforceable non-competition agreements. It just might mean the difference between keeping, or sharing, your trade secrets.

OUTSIDE DIRECTORS PAY PERSONALLY

While outside directors of U.S. public companies are often concerned about potential liability to shareholders or others, many have derived comfort from statistics showing that very few such directors, after receiving the benefit of director and officer insurance and indemnification, ever actually are forced

to reach into their own pockets to pay anything. Even that might be changing now, at least in the most egregious cases, in light of news that the outside directors of both Enron and Worldcom agreed to pay \$31 million collectively in connection with the potential settlement of lawsuits relating to those two scandal-ridden companies.

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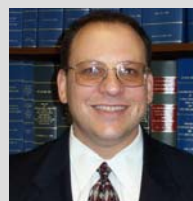
FROM THE EDITOR

Dear clients and friends:

In this issue, in addition to our feature articles and Current News & Notes, we have included descriptions of several of our firm's industry-specific practice areas. If you are interested in or would like further information about any of these industry practices, please contact the partner indicated therewith, or you may always feel free to contact me at (516) 247-4425 or nmk@dmlegal.com.

We have also, as promised, brought back our popular "Company Spotlight" feature.

Many thanks to my partner Peter M. Ripin for his contributions to this newsletter, including his outstanding article regarding protecting trade secrets on page 1. Peter is a leading attorney in representing hotels and other hospitality industry participants and has particular expertise in Internet-related disputes.



Neil M. Kaufman
Senior Partner,
Corporate & Securities
Practice

GOVERNMENT

We have one of the leading government relations and lobbying practices in New York. We assist our clients, including Fortune 500 companies, leading non-profit institutions, trade associations and businesses and governmental and quasi-governmental agencies of all types, in addressing their governmental challenges in unparalleled ways.

Contact: Sid Davidoff at (212) 557-7200 or sd@dmlegal.com or Bob Malito at (516) 248-6400 or mcf@dmlegal.com.

OUTDOOR ADVERTISING

We represent leading members of the outdoor advertising industry in the New York metropolitan area in all aspects of their activities, including acquisitions, agreements with advertisers, leasing, litigation (including First Amendment issues), governmental permits, defense of enforcement proceedings and in lobbying matters.

Contact: Mark Geraghty at (646) 428-3236 or elp@dmlegal.com or Patrick J. Kilduff at (646) 428-3272 or pj@dmlegal.com.

FASHION

We counsel many of the owners of large, well-known fashion brands in all aspects of their business, especially with respect to protecting their trademarked brands and trade secrets, and licensing these brands to third parties.

Contact: Charles Klein at (646) 428-3240 or ck@dmlegal.com.

HOTELS & HOSPITALITY

We have represented numerous institutions and individuals in the hotel and hospitality industries, including:

- hotels, including in connection with advertising disputes and website domain name piracy;
- timeshare developers and managers, including in disputes involving management agreements;
- franchisees, including in actions seeking to terminate their franchise agreements; and
- catering facilities.

In addition, our attorneys have written, lectured and been interviewed on legal issues affecting the hotel and hospitality industries, including new laws affecting hotel management agreements, protecting trade secrets through non-competition agreements; and on-line marketing issues including pop-up and keyword advertising.

Contact: Peter Ripin at (646) 428-3209 or pmr@dmlegal.com.

HEALTHCARE

We represent healthcare providers such as medical practices, doctors and dentists, nursing homes, home health agencies and related businesses, including medical management and billing companies, with respect to their day-to-day business issues and transactional and regulatory matters. We provide practical, real-world solutions for our clients in this highly regulated and competitive industry.

Contact: Ben Geizhals at (516) 247-4429 or ben@dmlegal.com.

BANKING

We represent banks and borrowers in all aspects of lending transactions. Our clients include some of the best-known and most prestigious lending institutions in the New York area. Our expertise includes everything from complex commercial lending transactions, whether secured or unsecured, to commercial and residential real estate loans, including construction and development financing.

Contact: Stuart Perlmutter at (516) 247-4410 or sp@dmlegal.com or Michael Zapon at (516) 247-4433 or mgz@dmlegal.com.

INDUSTRIAL DEVELOPMENT BONDS
AND OTHER GOVERNMENT
FINANCING BENEFITS

We have a very active practice in representing clients who are acquiring new operating facilities or purchasing manufacturing equipment for their operations. We have been instrumental in obtaining various forms of tax relief and other benefits through local, federal and state programs. This includes assistance in connection with law cost financing through the issuance of Industrial Development Bonds or other financing techniques. We are extremely active throughout the New York metropolitan area, including New Jersey, and throughout the country.

Contact: Jeff Citron at (646) 428-3233 or cit@dmlegal.com.

RESTAURANTS

We have long represented many of New York's leading restaurant and club venues in all aspects of their business, including:

- forming the ownership entity;
- defining the relationship among owners;
- employee matters;
- obtaining all necessary permits and licenses; and
- resolving disputes with government agencies

Contact: Arthur Goldstein at (212) 557-7200 or agg@dmlegal.com.

NOT-FOR-PROFIT

Many of New York's leading not-for-profit foundations, charities and quasi-governmental agencies turn to our firm for advice with respect to formation, management, employee, trust and other matters.

Contact: Howard Presant at (646) 428-3282 or hbp@dmlegal.com.

CURRENT NEWS & NOTES

SEC EXTENDS SOX SECTION 404
COMPLIANCE DATE FOR
NON-ACCELERATED AND
FOREIGN FILERS

On March 2, 2005, the Securities and Exchange Commission announced a one-year extension of the date by which non-accelerated filers (reporting companies with public floats of less than \$75 million) and foreign filers must comply with the internal control over financial reporting, evaluation and management certification requirements under Section 404 of the Sarbanes-Oxley Act of 2002. Non-accelerated and foreign filers must now begin to comply with these requirements with respect to their first fiscal years ending on or after July 15, 2006.

GOOGLE IS FIRST ISSUER SUBJECT
TO SEC ENFORCEMENT ACTION
FOR VIOLATING RULE 701

High flying search engine company Google, Inc. and its in-house general counsel have recently entered into a consent order relating to violations of Rule 701 with respect to issuing over \$80 million in unregistered stock options. Between 2002 and 2004, Google is alleged to have failed to provide the required financial information to properly utilize Rule 701 while selling more than \$5 million of options in a 12-month period. General Counsel David Drummond is alleged to have been aware of the violation but to have failed to advise the Google board to cease the practice.

HEDGE FUNDS FIND LOOPHOLE

Shortly after the recent enactment of hedge fund registration requirements by the SEC, a key loophole has emerged. So long as investors commit their funds for two years or more, the hedge fund is not required to register. Many of the estimated 7,000 U.S. hedge funds are already seriously considering changing their redemption rules to take advantage of this loophole.

SEC POSTS 8-K FAQ

In light of the recent expansion of the Form 8-K filing obligations, the SEC recently made available frequently asked questions relating thereto. These are available at www.sec.gov/divisions/corpfin/form8kfaq.htm.

SEC CREATES SMALL PUBLIC
COMPANY ADVISORY COMMITTEE

Responding to complaints from many small public companies about how onerous it is for them to fully comply with all the provisions of the Sarbanes-Oxley Act, which was created with large companies like Enron and Worldcom in mind, the SEC has established an advisory committee to examine the impact of SOX on small public companies.

DM&H COMPANY SPOTLIGHT: 3G ULTRASOUND, INC.

Our client 3G Ultrasound, Inc. has developed a patent-pending probe technology for its newly FDA-approved Sonalis Ultrasound system that enables surgeons and other doctors to do pinpoint targeting of needle placement in both orthogonal views simultaneously for any type of therapeutic delivery. This is a huge advance that allows for superior treatment of patients. The first application of this new technology is to enable urologists to better and more safely implant seeds in the prostate for brachytherapy. 3G Ultrasound has begun taking orders for these systems, with Kodak providing servicing. Application to breast cancer and other diseases should follow closely.

We look forward to assisting 3G Ultrasound with respect to its business, financing, legal and strategic challenges.

