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Recognizing Risk: When Pursuing A Competitive Edge Creates Exposure to Trade Secret Claims

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A well-known idiom - widely credited to Ben Franklin in the 1700s - is that *an ounce of prevention is worth a pound of cure*. Yet, few companies actively train their personnel to recognize the risk of a trade secret misappropriation claim posed by (overly) aggressive business tactics. The cost of an hour-long training session pales in comparison to the cost of defending, even if prevailing in, a trade secret action.

A trade secret claim generally requires, among other things, a defendant to have gained access to trade secret information via improper means. Such improper means often result from a zealous appetite for competitive intelligence or a business "edge." Complainants typically allege a breach of a duty of confidence (e.g., a non-disclosure or employment agreement), unauthorized access, acquisition by fraud, or an overt act of corporate espionage. In many instances, an experienced litigator can use a bit of smoke to create a reasonable inference of plausible trade secret misappropriation that will likely cause a defendant to incur significant legal expenses.

Companies can likely reduce their risk by implementing policies and providing training that advise personnel on the risks associated with certain conduct. For example, encouraging business leaders to use procedures for formally tracking and routinely reviewing contractual obligations (e.g., joint venture agreements, NDAs, customer-supplier contracts) is a good first step. Too often trade secret claims arise because certain terms of an agreement were

overlooked or forgotten over time. Even an inadvertent use of protected information can lead to a viable misappropriation claim. Setting the rules of the road and fostering compliance amongst stakeholders might help guard against such a claim.

Recent case activity over the past few years demonstrates how quickly looking for a competitive edge can lead to a trade secret problem. In *Epic* and *Appian*, the plaintiffs' evidence established that the defendants' personnel, including high-ranking executives, had gained unauthorized access to competitors' systems using false identities and login credentials. Any experienced trial attorney should tell you that this "black hat" will at least distract the fact finder, if not lead to an outright inference of misconduct. Yet, employees may view such means for obtaining competitive intelligence as appropriate in the absence of adequate training and guidance.

In a bid-rigging and trade secret scandal involving gas turbines, GE accused Siemens of illegally obtaining, disseminating, and using GE's confidential bid pricing to win the customer's business. More specifically, Siemens' personnel used dinners, gifts, and football tickets to improperly solicit GE's pricing information from the customer's personnel. Siemens ultimately settled the case with GE, and Siemens' employees plead guilty to criminal charges. While the facts of that case might be egregious, it is not hard to imagine an employee being asked to seek out a competitor's pricing information from a third party. Recognizing when one might cross a line in this pursuit is critical.

The trade secret case landscape is also littered with defendants who were alleged to have hired a competitor's former employee for the purpose of extracting competitive intelligence. How might these cases have been different had the new hire been advised and trained on the expectations concerning his, her, or their obligations to a former employer?

Corporate policies and training might not prevent one bad actor from pursuing such courses of action, but these devices may at least direct personnel in a less risky direction or allow them or others to recognize the inherent risk of such conduct before the company experiences the reputational stain and cost of defending a trade secret suit.

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