Letter Of Intent

(continued from page 3)

Don't get us wrong. A letter of intent can be made binding. If the parties clearly intend it to be such and use appropriate language to remove any possible ambiguity, then it will likely be construed as binding. In fact, there are certain elements of the letter of intent that should be binding.

Finally, the parties should make sure that provisions regarding confidentiality of the deal and its terms, the no-shop clause or standstill agreement whereby the seller essentially agrees not to entertain any more offers, thus effectively taking the company out of the market, and the need for each party to pay for its own expenses, should be binding.

Denny S. Roja is a member of Carr, McClellan's Corporate and General Business Group.

Overfunded IRAs

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In this case, the remaining IRA balance becomes an element of the decedent's estate.

Why is there cause for concern? Depending on the size of the IRA balance and various aspects of the decedent's assets and estate planning, the IRA balance can face triple taxation and a combined confiscatory tax bite of 80% or more!

Distributions to a Designated Beneficiary upon the death of the IRA owner are income taxable to the beneficiary in the same manner as the lifetime distributions to the IRA owner. The timing of distributions following the owner's death depends upon whether the owner died prior to or after the Required Beginning Date.

An IRA owner must begin to receive payments from his IRA no later than April 1 of the calendar year following the year in which the owner attains age 70-1/2 (the "Required Beginning Date"). Postponement of this date in special circumstances was included in late 1996 federal legislation.

If an IRA owner dies before the Required Beginning Date, the IRA must be paid out under the "Five Year Rule". There are important exceptions to the Five Year Rule, depending upon how a beneficiary designation was completed.

If death occurs after the Required Beginning Date, payout to a Designated Beneficiary must occur at least as rapidly as the payout to the deceased IRA owner in effect as of the date of the IRA owner's death. If more than one Designated Beneficiary has been named (for example, two or three children), the life of the designee having the shortest life expectancy must be used.

The Designated Beneficiary must be named by the Required Beginning Date – or payout timing may be based with reference only to the life expectancy of the IRA owner. If the IRA owner's spouse is the Designated Beneficiary and the owner dies after the Required Beginning Date, then payout may occur over the joint and survivor life expectancy of the owner and his or her spouse.

The only sure things in life are death and taxes

Estate planning professionals are necessarily concerned with the date of death composition of their clients' estates. Hence, the income tax issues associated with IRAs present only a starting point for IRA analysis. Described below are a number of important death tax rules.

The entire date of death IRA balance of an owner-decedent is included in his or her estate for estate tax purposes. Payments in annuity form from IRAs to a surviving spouse qualify for marital deduction treatment. Special irrevocable marital trusts may also be created to receive IRA distributions, but these trusts must comply with a variety of extremely complicated provisions. An unlimited estate tax charitable deduction may be taken with respect to all assets included in a decedent's gross estate distributable to charitable organizations.

The deferred income tax liability is not eliminated at death; one important exception to this rule involves distributions to charities. Since charities are by definition tax exempt, they escape payment of all deferred income tax with respect to an IRA.

The special "penalty taxes" for excess lifetime distributions also apply to excess death accumulations. The source of such accumulations may be (a) non-withdrawal of required minimum distributions; (b) above-average investment returns; or (c) rollovers from qualified plans. Both the marital deduction and the charitable deduction are unavailable in the context of the excess accumulations excise tax. Special elections available to surviving spouses may postpone the above-described taxes.

As already noted, the combination of the above-described income, estate and excise taxes can result in an effective rate of taxation exceeding 80%.

IRAs have become an important component (in many instances, the only component) of retirement planning. Close attention to IRA distribution post-death payout and tax issues is crucial to achieving one's estate planning goals, and minimizing the government's raid on these assets.

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Carr, McClellan, founded in 1945, has offices in Burlingame and San Francisco. The firm provides full-service legal advice to many closely-held businesses and major corporations in the Bay Area's leading industries, as well as to investors and families.

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Strategies for Business

Vol. 7 No. 2
Spring 1997

The Letter Of Intent In An M&A Transaction

By Denny S. Roja, Esq.

It has been a long and emotional process, but finally the owner has agreed to sell. The price is set, the timing worked out, the key terms agreed upon, and the financing considerations developed. At the negotiating table, a handshake seals the deal.

While a deal has been struck, much actually remains to be done and many a deal subsequently falls apart. Why? Sometimes the ensuing due diligence activities reveal hidden problems that are and should be "show-stoppers."

Other times, however, differences of opinion subsequently arise concerning what was said and heard by the parties who shook hands. This is where a letter of intent enters the picture. Without a well-crafted letter of intent, a deal can become inordinately complicated and may even fall apart.

What is a Letter of Intent?

When negotiations reach a substantive stage, the basic terms should be memorialized by executing a letter of intent. A letter of intent is a short document, typically 3 to 10 pages long, that summarizes the essential points in the proposed acquisition transaction. Its main purpose is to ensure agreement on the major issues in the transaction before each side commits substantial resources to due diligence and detailed negotiations.

The letter of intent typically outlines the proposed form of transaction as well as the detailed terms of the agreement including the consideration paid, any proposed risk reduction mechanisms, employment agreements, noncompetition provisions, investment banking fees, and the tax, accounting and securities structures to be used. It will typically contain a "no-shop" or "no-solicitation" provision, also known as a standstill agreement. This prevents the seller from further shopping the business.

Typically, the letter of intent is nonbinding, except for certain terms that will be discussed later. Despite its nature, the letter of intent represents strong evidence of serious mutual intent to consummate the transaction.

Why do we need a Letter of Intent?

It is possible to go directly from the handshake to a purchase and sale agreement – or what is known as a definitive agreement. And there are situations in which this would be the preferred route. In the vast majority of deals, however, this is not recommended. The definitive agreement is rarely uncomplicated and is often strewn with thorny issues. Going directly to a definitive agreement is like travelling without a road map. Consequently, going the direct route may lengthen the process rather than shorten it.

Properly done, a letter of intent can avoid many misunderstandings, eliminate expense and delay, and, most importantly, ensure that the parties really have a deal. The written word has a ceremonial, sobering quality. Terms put down on paper assume a sense of finality and are less likely challenged in subsequent negotiations.

Even with the best of intentions, a verbal understanding could be missing key elements or contain crucial ambiguities. Both seller and buyer may ignore important issues, hoping that they will be resolved later. They may also be trying to avoid a confrontation. Sometimes a statement is misunderstood because the listener wants to, or expects to, hear something else. Other times, the ambiguity is intentional. The letter of intent should identify and resolve all significant omissions and ambiguities, unless they serve a strategic purpose.

It is important to maintain an air of finality during the discussion of the letter of intent. Any suggestion that the terms set forth in the letter are only tentative will diminish the value of the document. At any rate, if the decision is made to utilize a letter of intent, each party should strive for a document which will maximize its leverage in future negotiations with respect to the terms of the transaction.

What should be in a Letter of Intent?

The letter of intent represents a tension between the conflicting interests of the buyer and seller. From the seller's standpoint, it is important that the letter of intent be explicit and detailed with respect to the material terms of the transaction. The buyer may want highly general language which

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leaves room for future maneuvering and negotiations when his bargaining position is stronger; the seller may desire the very opposite. However, in a competitive bidding situation, both parties may be motivated to move quickly to a definitive agreement and a closing.

Ideally, the letter of intent should include the following basic elements:

(1) price;

(2) payment terms and other basic economic components of the deal;

(3) the assets to be purchased and the liabilities to be assumed, or the stock to be purchased;

(4) the major conditions that must be satisfied before the deal can be consummated, e.g. financing, completion of due diligence, approval of board of directors, satisfactory environmental tests;

(5) the scope of work to be done before the binding contract can be signed;

(6) any significant risk reduction mechanisms for the buyer and seller such as provisions for buyer due diligence, an exclusive dealing period (no-shop), confidentiality, break up fees, and any other requirements that must be observed by one or both parties during the pendency of the deal.

Of course, the items covered will vary from deal to deal. The only guideline that must be followed is: Any term or "business" (as opposed to "legal") issue which either party considers important should be agreed upon and included in the letter of intent. The mistake that many parties in an acquisition make is to leave substantive business issues open, intending to resolve them at a later date, perhaps through the intervention of lawyers. Rarely does this work. They become major sources of delays, or worse, major sources of irritants and distrust in future negotiations.

The Letter of Intent as a Strategic Negotiating Tool

The period just before signing the letter of intent is the best time for the seller to negotiate the most favorable price and terms. The prospect is eager to win the company and wary of losing it to other bidders. The seller at this point has an edge with respect to such

> "Properly done, a letter of intent can avoid many misunderstandings, eliminate expense and delay, and, most importantly, ensure that the parties really have a deal."

issues as earnouts, noncompete agreements, board seats, registration rights, notes and dividends. Additionally, many companies are sold or merged to support growth that is otherwise unattainable. Key employees may be expected to continue on. So this is the time to settle significant compensation issues, incentives and conditions for continued employment.

Up to completion of the letter of intent the seller typically has control. With its signing, leverage passes to the buyer, and the seller's control declines continuously after that until the period of exclusivity ends. This is the time of greatest vulnerability to the seller. The buyer now has the go-ahead to do as much due diligence as he needs and is free to dissect the company to his heart's delight. Without proper safeguards built into certain binding elements of the letter of intent, this due diligence phase can stretch on for a long period of time, to the potential detriment of the seller. This is not the time for the seller's performance to slip, even for good reason. Neither is it the time to lose any major customer, a key employee, or an important distribution channel that might make the buyer nervous about the prospects of the business he is buying. The seller would not want this to become an excuse for the buyer to renegotiate the price, or worse, back out of the nonbinding deal. And if for any reason, the buyer backs out and the seller is "left at the altar", the seller may suffer a stigma of being damaged goods.

So the seller's strategy should be to move quickly to complete the definitive agreement. The number and magnitude of unforeseen and potentially unfavorable events that can occur between the letter and the definitive agreement are inestimable. For this reason, the seller usually prefers that so-called "no-shop" or "no-solicitation" provisions lapse within a short period of time, say 30 to 60 days. The prospect on the other hand will usually prefer to take his time scrutinizing the company – he can never know enough about it.

With the foregoing in mind, it is sometimes in the best interests of the seller to dispense with the letter of intent and proceed directly to the

About Our People

New Attorneys . . .

The firm is pleased to announce the addition of attorneys **Michele Griffith Dulsky** and **John M. Andersen** to the firm.

Michele Griffith Dulsky has joined Carr, McClellan's Litigation Group. Ms. Dulsky received her J.D. at the University of San Diego School of Law, and her B.A. at the University of California, San Diego.

John M. Andersen has joined Carr, McClellan's Estate Planning and Probate Group. Mr. Andersen received his J.D. degree from the University of California Hastings College of Law, and his B.A. from U.C.L.A.

New Director . . .

The firm is pleased to announce the election of **James F. Blood** as a director of the firm.

James F. Blood, a member of the Corporate Group, has extensive experience advising businesses in all stages of their existence, from start-up ventures to mature, well-established enterprises. His clients include emerging technology companies with cutting edge internet, software, and other technologies; companies that focus on exporting technology and consumer goods; manufacturers; service and financing companies. Mr. Blood works closely with senior management in analyzing problems, strategizing on business and legal issues, and protecting the interests of the business.

> "Why is there cause for concern? Depending on the size of the IRA balance and various aspects of the decedent's assets and estate planning, the IRA balance can face triple taxation and a combined confiscatory tax bite of 80% or more!"

Mr. Blood received his J.D. and M.A. from George Washington University National Law Center, and his B.A. from Brigham Young University. He is a member of the Board of Directors of the Regional Trade Development Alliance.

In Our Profession . . .

Steven D. Anderson will become a vice president of the Family Service Agency of San Mateo County in June, 1997. Mr. Anderson has also been appointed a Trustee of the Endowment Trust, First Presbyterian Church of Burlingame.

James R. Cody was appointed the Chairman of the St. Catherine of Siena School Board for 1996-97.

Denny S. Roja was appointed Vice President and member of the Board of Directors of the Silicon Valley Chapter of the Association of Corporate Growth, a national organization of professionals involved in corporate strategy, corporate development, and mergers and acquisitions.

Carol B. Schwartz was appointed Vice President of the Peninsula Ballet Theatre.

Lisa H. Stalteri was reappointed as chair of the Real Estate Section of the San Mateo County Bar Association, reelected to the Board of Directors of the Child Care Coordinating Council of San Mateo County, and reappointed as the SAMCEDA representative on the Peninsula Partnership.

W. George Wailes was elected to the board of the Hillsborough Schools Foundation.

Moira C. Walsh was elected to the Board of Directors of San Francisco Court Appointed Special Advocates, a non-profit organization assisting abused and neglected children in the Bay Area.

FAMILIES & INDIVIDUALS

OVERFUNDED IRAS: THE HIGH COST OF SUCCESS

By Steven D. Anderson, Esq.

What the Government giveth, the Government taketh away...

Some years ago, Congress established Individual Retirement Accounts as a means of encouraging and assisting individuals to plan and save for their retirements. However, Congress also established a staggering maze of rules that, intentionally or otherwise, penalize individuals who succeed in building retirement nest eggs.

When income taxes are combined with estate tax and excise taxes on excess accumulations (and despite the enactment of special year-end legislation in 1996), the tax burden on retirement plan balances in the form of Individual Retirement Accounts ("IRAs") can be enormous.

DISTRIBUTIONS MAY BE "TOO EARLY" "EXCESSIVE" OR "INADEQUATE"

Distributions from IRAs typically constitute all ordinary income. There is no capital gain element and no basis in the IRA unless nondeductible after-tax contributions were made. In addition to paying normal income taxes on these distributions, additional taxes and penalties await the unwary.

EXCISE TAXES APPLY TO DISTRIBUTIONS DEEMED BY CONGRESS TO BE "TOO EARLY."

A 50% penalty is triggered if distributions do not equal or exceed the minimums called for by the statutory and regulatory provisions applicable to IRA payouts. The 50% penalty tax applies to the difference between the amount distributed and the amount which was required to be distributed.

If "excess distributions" are withdrawn (i.e., distributions exceeding certain hypothetical annuity amounts), an excise tax of 15% of the excess

"HOW DOES THE AVERAGE RETIREE STAY WITHIN THE RULES OF ALLOWABLE DISTRIBUTIONS? BY COMPLYING WITH FORMULAS THAT OFTEN ARE COMPLEX AND CONFUSING."

distribution is imposed. If a lifetime lump-sum distribution is taken, the excise tax threshold is five times the annual distribution amount.

15% EXCISE TAX PENALTY SUSPENDED

Congress, under the terms of the Small Business Jobs Protection Act of 1996, suspended the collection of the 15% excess distributions excise tax for distributions occurring after December 31, 1996, but before January 1, 2000.

Before you give "thanks," you should reflect on the fact that Congress enacted this suspension as a revenue-raising measure designed to encourage individuals to remove funds from their IRAs (paying taxes thereon) during the suspension period. In many cases, leaving funds in the IRA where they can continue to grow on a tax-deferred basis may be a better decision even when there is a risk of future excise taxes. This suspension does not apply to excess accumulations at the death of a plan participant.

MINIMUM AND MAXIMUM DISTRIBUTION RULES

How does the average retiree stay within the rules of allowable distributions? By complying with formulas that often are complex and confusing. And the more successful you have been in your retirement savings endeavor, the more complex the formulas and issues become.

Minimum required distributions depend on the age of the IRA owner and/or the Designated Beneficiary, and maximum allowable distribution amounts are determined by the Internal Revenue Code. Distributions from an IRA are required to be made over (a) the life of an IRA owner; (b) the lives of an IRA owner and a "Designated Beneficiary"; or (c) a term of years not exceeding the life expectancies of either of the foregoing alternatives. In addition, married IRA owners can elect to "recalculate" the life expectancy each year.

THE ISSUES EXTEND BEYOND THE ORIGINAL IRA OWNER

A further set of issues, pitfalls, and taxes await the IRA owner who dies "early", i.e., without living to the life expectancy age that is used by the minimum and maximum distribution rules.

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definitive agreement. It may coincidentally be in the best interests of the buyer. The sooner the parties reach a formal agreement, the more likely the transaction will be consummated. In the sale of a public company, much information about the seller is public, which reduces the need for warranties and representations. The seller should settle as many substantive points as possible before completion of a letter of intent.

IS THE LETTER OF INTENT BINDING?

Some years ago, there was little question about the nonbinding nature of the letter of intent. Courts routinely ruled that a letter of intent was binding only if the parties clearly intended it to be binding. Otherwise, it was not. This conclusion was based on the principle that since the parties contemplated the negotiation and execution of a definitive written agreement, no binding contract exists until its occurrence. Essentially, the parties were agreeing to reach a later agreement.

Nonetheless, there are well-established legal bases as well as judicial enthusiasm for finding letters of intent binding. Parties in merger and acquisition transactions and their lawyers who are responsible for shepherding a substantial contingency-filled deal through to conclusion, should be aware of these pitfalls. The infamous Pennzoil case cast a lot of uncertainty on the hitherto tranquil waters of the letter of intent. In Texaco v. Pennzoil Co. (Tex Ct App 1987) 729 SW2d 768, a Texas jury awarded Pennzoil more than $10 billion in damages against Texaco for interfering with a memorandum of agreement or letter of intent.

Generally, a letter of intent is not intended to be a binding contract. Many legal practitioners continue to believe that a letter of intent is not binding. Its brevity dictates that a lot of legal provisions have to be left for future negotiation. Key legal elements such as the parties' warranties and representations, covenants, conditions to closing, and indemnification are usually not included.

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"NONETHELESS, THERE ARE WELL-ESTABLISHED LEGAL BASES AS WELL AS JUDICIAL ENTHUSIASM FOR FINDING LETTERS OF INTENT BINDING."

PROTECTING YOUR COMPANY'S VALUABLE TRADE SECRETS: DON'T GIVE YOUR PLAYBOOK TO THE PACKERS

By James F. Blood, Esq.

Did Bill Walsh cause the 49'ers to miss the 1997 Super Bowl when he failed to diligently guard certain 49'er trade secrets?

While in Green Bay for a 1996 game against the Packers, Bill Walsh was asked for his autograph. As the story goes, Walsh mistakenly handed this fan his famous list of the 49'ers first fifteen scripted plays. Reportedly, the lucky autograph seeker, a Packers fan, gave this list to someone in the Packers' organization, but Packers' coach, Mike Holmgren, claims no knowledge of this list.

Although Bill Walsh's action was not the reason the 49'ers missed the Super Bowl, the story illustrates how easy it is to lose important trade secrets, the effects of which can be both serious and difficult to ascertain.

Failing to maintain confidentiality of information can prove devastating to a company or individual. A company that loses its trade secrets is a company on its way to destruction. Gone is the competitive edge and the ability to leverage the unique technology that the company has worked so hard to create.

In an age where technology evolves on a daily basis and where competition is intense, a company cannot afford to be careless or lackadaisical. Sophisticated industrial espionage is a problem, but far more often problems result from sloppiness, inattention to establishing sound protective practices and procedures, and a failure to follow through.

Most losses of a company's trade secrets can be avoided by taking the time and making the effort to conscientiously protect those secrets. The related time, effort and expense is minor in comparison with the consequences of not doing so.

WHAT IS A TRADE SECRET?

The California Uniform Trade Secrets Act defines "trade secrets" as information, including a formula, pattern, compilation, program, device, method, technique, or process that:

1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. (Civil Code §3426.1(d).)

Simply calling something a trade secret does not necessarily make that thing a trade secret. However, if a company is unsure whether certain of its information would be deemed its trade secret, it is prudent to treat the information as a trade secret anyway.

If a company comes across information that it believes may be trade secrets of another company, it must be extremely careful to avoid claims of misappropriation. Misappropriation can result in criminal as well as civil penalties and damages.

Information that is independently developed, obtained through reverse engineering, or is found in the public domain, is no longer a trade secret.

Protecting one's trade secrets and avoiding the appearance of having misappropriated another's trade secrets takes diligence in a number of areas. The remainder of this article discusses two major areas: employees and computer systems.

DEALING WITH EMPLOYEES: KEEPING TRADE SECRETS SECRET AND AVOIDING MISAPPROPRIATION

PRE-HIRING

Taking care starts in the hiring process. Before an employee begins work, he or she must be made aware of the importance of maintaining trade secrets and of the necessity of avoiding claims of misappropriation. Examples of questions that should be asked during the hiring process include:

• what is the name, address and industry of the former employer, and what tasks were performed for the former employer?

• what general information was gained from the prior employer that may be used by the new employer (without disclosing trade secrets)?

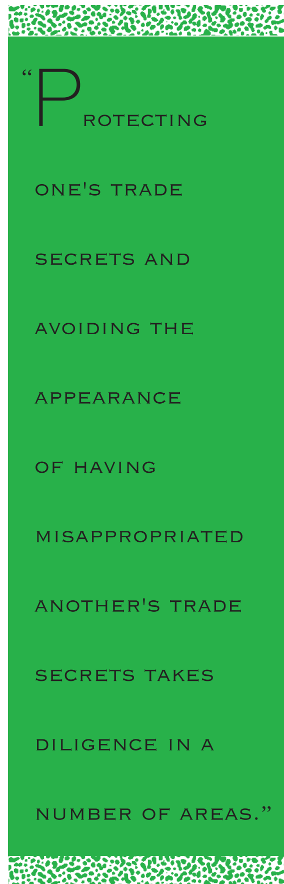
• what is the motivation for seeking this job?

• are there any employment agreements, confidentiality agreements, or invention assignment agreements to which the potential new employee is a party?

• how did the candidate acquire the skills and information necessary for the new job?

• how often has the employee changed jobs?

Answers to these questions will help determine if the prior employer will have claims of misappropriation, and if the candidate has the skills to work in the position the employer seeks to fill without using another company's trade secrets. More companies are aggressively policing their prior employees. Informix recently filed a lawsuit against Oracle to prohibit eleven former Informix developers from working at Oracle because of concern about using trade secrets.



POST-HIRING

When a company determines that a candidate will not use another company's proprietary information in the new job and hires that person, the following steps should be taken:

• have the employee sign a confidentiality and invention assignment agreement;

• ensure that the employee documents all work performed in the new position;

• educate the employee regarding keeping information secret;

• periodically reinforce the importance of maintaining confidentiality; and

• to the extent that an employee possesses trade secrets of another employer that conceivably could be used by the new employer, establish clean room procedures to avoid even the appearance of possible misappropriation.

POST-EMPLOYMENT

When an employee leaves a company, it is essential to brief him or her about obligations to maintain the confidentiality of the company's trade secrets. The employee should be reminded of the provisions of the confidentiality agreement and, if possible, should sign a statement that acknowledges his or her understanding regarding the ongoing obligation to maintain confidentiality.

If the employee has access to any trade secrets in tangible form, whether documents, drawings, charts, models, software, or otherwise, the employee should deliver all of those items to the company. Access to computer systems must be restricted, passwords changed, and keys returned.

NON-COMPETITION

As part of the employee's employment agreement or confidentiality agreement, an employee should agree not to compete with the company during the period of his or her employment, without prior written consent. Clearly specifying this requirement in an agreement discourages the employee from placing himself or herself in a compromising situation.

Under California law, a company may not restrict an employee's ability to work for a competitor after the termination of the employment relationship. Any such restriction generally will be held to be unenforceable. However, an employee's obligation to maintain the confidentiality of trade secrets continues after employment is terminated. Just because an employment relationship has terminated does not mean that the employee may use those trade secrets in his or her next job.

COMPUTER SECURITY

It is not difficult for hackers to break into most companies' computer systems. In fact, there are a number of books and magazines that walk the reader through the steps of how to break into a computer system.

In the February 3, 1997, issue of Fortune, the author of the article "Who's Reading Your E-mail?" arranged a test with a Fortune 500 company to determine its system security. Professional hackers hired for this experiment were able to invade the heart of the company's system in about 12 hours, a break-in that took much longer than most.

Citibank provides an example of the importance of maintaining computer security. In 1994, hackers made $10 million in illegal transfers. Most of this money was eventually recovered. However, this resulted in great embarrassment to Citibank, not to mention lost customers.

Despite firewalls and other efforts to maintain security, it is very difficult to ensure complete protection. One must be continuously vigilant, and stay current with regard to advances in both hacker techniques and counter initiatives and products. Additional suggestions are included among the recommendations that follow.

PRACTICAL SOLUTIONS

There is no way to ensure complete confidentiality of trade secrets. Nevertheless, the following simple procedures can provide significant protection:

• don't say anything over a cell phone that you don't want publicized;

• mark confidential documents as "confidential trade secrets";

• limit the amount and type of information disclosed to potential clients;

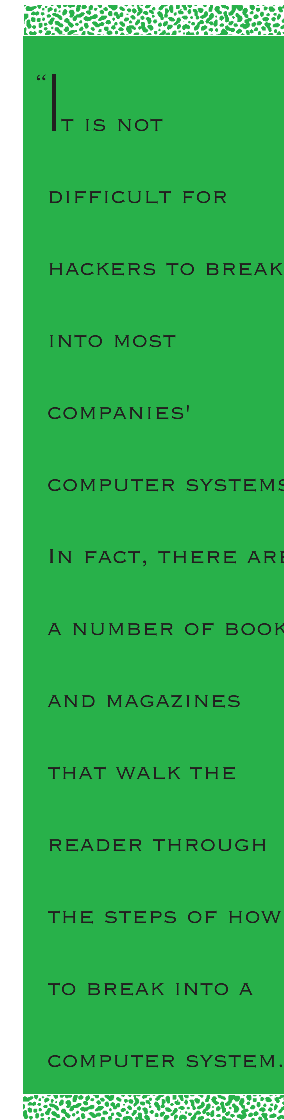
• if confidential information will be disclosed to another party, first enter into confidentiality agreements;

• do not indiscriminately divulge confidential information to others, even if there is a confidentiality agreement;

• avoid the temptation to provide "hot" information to clients, friends, the media, and trade show or convention participants;

• restrict access to confidential information to those with a need to know;

• use a shredder to destroy sensitive documents – taking documents found in a company's dumpster is legal;



• frequently communicate policies regarding trade secrets and conduct training programs;

• appoint an individual to have responsibility for monitoring trade secrets;

• do not leave valuable information in plain view;

• check references for employees and contractors;

• do not permit unlimited access to the company's facilities;

• restrict access to sensitive information maintained on the computer;

• follow strict procedures regarding passwords and virus protection;

• use encryption to protect extremely sensitive information;

• ensure that the computer system is not subject to intrusion by hackers;

• ensure the security of any network connection between the office and any off-site location, such as home.

IN SUM: DON'T GIVE YOUR PLAYBOOK TO THE PACKERS.

It can be extremely difficult and costly to prove the theft of a trade secret and then to recover damages. Once the toothpaste is out of the tube, it's hard to put it back. A company would be well advised to devote substantial time and attention to establishing a trade secret protection program. Otherwise, there may be no trade secrets to protect.

James F. Blood is a member of Carr, McClellan's Corporate and General Business Group.

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