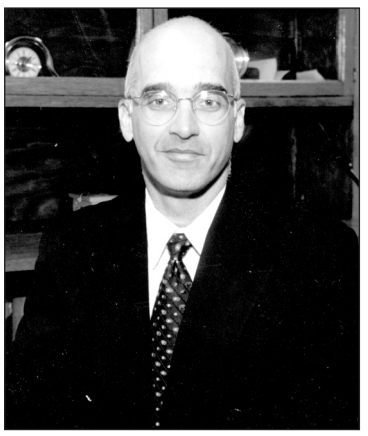
Business & Real Estate

Non-competition agreements



By Samuel Peluso, Esq.
Elderlaw Specialist

In business, participants often attempt to gain advantage over others in the scramble for consumers of their respective products and/or services. This can be done in many ways, including by attempting to develop a better manner of conducting business through innovation and design. Development and implementation of that innovation and design, however, most often includes the use of employees. What was once a secret approach to delivering a better product, has now been shared, and the possibility then exists for an employee taking the idea, replicating and/or improving upon it and thereby undermining the business advantage the employer once maintained. Some folks might suggest that a business owner should have the right to protect what advantage has been developed from employees with ideas of making it their own. Protection of innovative ideas could arguably provide a safe-haven for forward-thinking business owners allowing them the opportunity to continue being so. Such protection often comes in the form of non-compete agreements, wherein former employees are not permitted to work within a certain industry for a period of time and/or within a given geographical area.

On the other hand, limiting the opportunity of employees to improve their lot in life through better employment or starting their own business could have a stifling effect on the economy, not to mention the individual him or herself, whose career can be an extension and expression of their very being. Advances in business, perhaps like other aspects of life, result from developments that occurred prior and the predecessors in business that facilitated same. Who can really claim an idea all their own, having not been borrowed at least in part for its development and realization? Competition is healthy and to limit it by undermining the possibility of others to earn a livelihood in an industry they have selected and trained in could be seen as overbearing as well as illogical and unproductive. Also, these former employees would give little credence to the fact that they signed such an agreement at the commencement of employment, claiming that such writings are little more than "contracts of adhesion," which essentially are documents drafted by one party, often one-sided and sometimes to the detriment of another, and that does not allow for fair negotiation. Such contracts are generally frowned upon by the courts and often found unenforceable.

Some states have laws that make non-compete agreements unlawful. There is reportedly a movement within this state to do so, however, the present law is such that the courts will consider the enforceability of such agreements on a case by case basis and rendering a decision is not necessarily an all or nothing affair. Sometimes, the court will "blue-pencil" such an agreement, modifying terms so that they become more reasonable and fair, often less one-sided in favor of the employer.

New Jersey case law provides for an assortment of tests and considerations when reviewing the enforceability of such agreements. The starting point for such an analysis includes considering whether the agreement is necessary to protect the employer's legitimate interests in enforcement, whether it would result in undue hardship to the employee and if it would be injurious to the public.

The test also includes a general notion of reasonableness. In other words, the restrictions on employment must be reasonable in terms of time, geography and scope. Also, the courts look at whether the former employee truly had access to proprietary information and if the former employer is using the agreement less as a way of protecting such information or moreso as a means of controlling competition. What might be reasonable post-employment restrictions for a corporate executive, who had access to trade secrets and strategies and had negotiated an employment contract with a non-compete agreement may be different from those for a hairdresser who simply signed an assortment of documents upon commencement of employment that included such an agreement and who now wants to open a shop in an adjoining town.

As can happen when there is a break-up in any relationship, things can get messy. When, as in some cases, the dispute involves smaller retail establishments, poorly crafted non-compete agreements and former employees that want to work, the court is left to clean-up and make peace between what might be an overly protective employer looking to limit competition and an ex-employee seeking to build upon and profit from the information and knowledge imparted by a former employer. Each side may want either a free market or protection from it when it is to their advantage.

In such instances, often both sides can little afford the distraction and expense of litigation. When such a reality is ignored, however, the courts will attempt to sift through the human element, which may include a capacity if not an inclination to gain advantage at what might be the expense of another, to keep commerce open and profitable and do so while continuing to protect the consumer.

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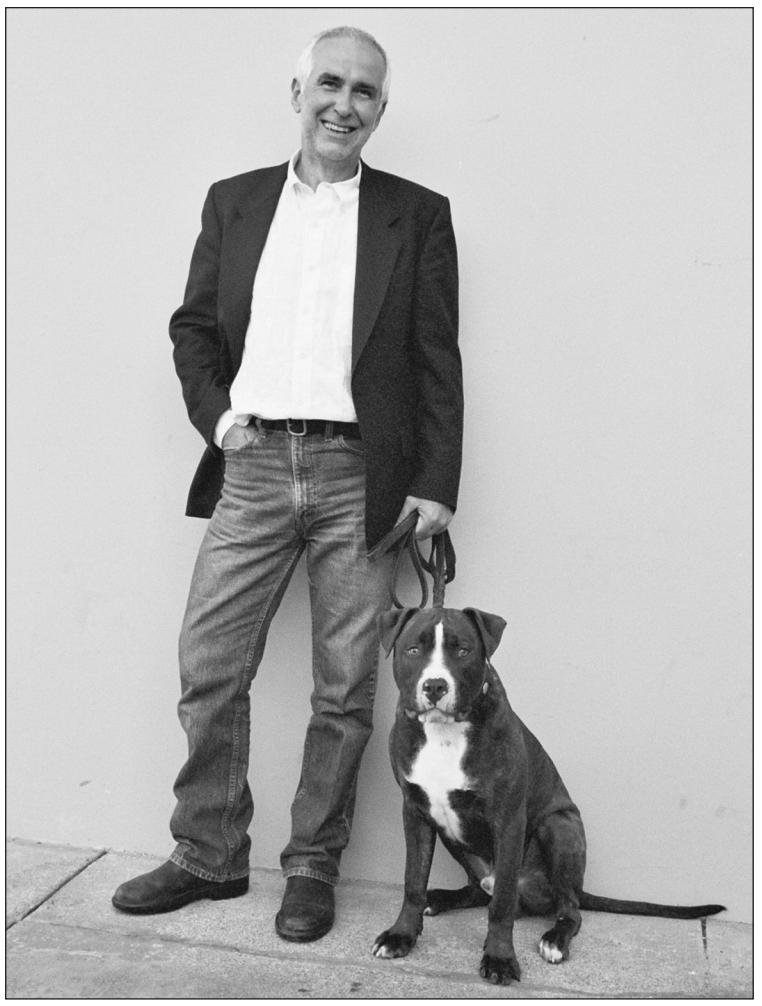

Dr. Ian Dunbar with Dune.
Photo courtesy James & Kenneth Publishers

Dog behavior, training workshop set for April 24

TINTON FALLS — Purr'n Pooch Pet Resorts presents "Simple Solutions for Common Dog Behavior and Training Problems," a workshop with Dr. Ian Dunbar on Thursday, April 24, from 9:30 a.m. – 5:30 p.m. at 86 Gilbert Street West.

Dr. Dunbar, founder of the Association of Pet Dog Trainers, is an animal behaviorist, veterinarian and creator of the world's first off-leash puppy classes.

This is a people-only workshop suitable for both pet owners and professionals. The workshop has been approved for 6 CEUs by the CCPDT and IAABC. Registration is $120. Group discounts are available. For more details and to register, visit www.purrnpooch.com.