

# “Cooperation Agreements” with Departing Employees: An Easy Way To Avoid a Whole Lot of Trouble

BY GORDON SCHNELL

There is a variety of conduct in which a former employee may engage that can wreak havoc upon a company. Some of the more obvious harms that a former employee can inflict on a company include using or disclosing the company's confidential or proprietary information and trade secrets, encouraging the company's remaining employees to leave the company, soliciting the company's clients, starting a competing business, or simply joining the employ of an existing competitor.

Virtually all of this potentially damaging conduct can easily be avoided (or at least significantly discouraged) through the simple use of contractual tools such as confidentiality, non-disclosure, non-solicitation, and non-compete agreements. These agreements could legally prohibit a departing employee from engaging in much, if not all, of the prescribed conduct. They are commonplace in the business world, and as long as they are reasonable in terms of their scope and duration, they will be, and have routinely been, enforced by the courts.

## Refusal to Cooperate

What is often overlooked by companies, and something that can be far more damaging than any of the conduct described above, is the potential for a former employee to refuse to cooperate with the company in connection with a lawsuit in which the company is a party or government investigation in which the company is a target. This refusal can take several forms. First,

the former employee may refuse to appear voluntarily as a witness on behalf of the company to support the company's claims or defenses in the lawsuit or investigation. Second, the former employee may act directly against the interests of the company by providing voluntary assistance to the company's adversary.

Third, the former employee may refuse to cooperate with the company in connection with his or her involuntary appearance as a witness (by subpoena or other compulsory process) called by the company's adversary or the government. Any of this conduct can have serious ramifications for the company, particularly if the former employee maintained a key position in the company and is uniquely situated to either substantiate or undermine the company's position regarding the subject on which the lawsuit or investigation is focused.

A former employee's refusal to appear voluntarily on behalf of the company may send an irreversible signal to a judge, jury, or governmental body that the former employee would not have supported the company's position. More importantly, the former employee may be the only witness, or at least the best suited one, to provide critical information in support of the company. Think about a breach of contract action where the principal negotiator of the contract is a former employee; or a government investigation into a company's business practices where the company's president or chief operating officer recently resigned.

Without the cooperation and voluntary testimony of such key witnesses, the company will have a much more difficult time supporting or explaining its conduct.

A former employee's voluntary assistance to the opposing side, or refusal to cooperate in connection with involuntary appearances, can have even more dire consequences. Without the former employee's cooperation, the company cannot exert any kind of “control” or “influence” over the information the former employee discloses. The company loses its ability to prepare the former employee for his or her appearance or interview, cloak this preparation under the attorney-client privilege, and direct the course of the deposition, examination, or interview through objection and witness instruction. The results can be devastating as the former employee will be much more likely to provide damaging information, particularly if he or she left the company under less than ideal circumstances.

## The Good News

The good news is that companies are not helpless in all of this. Like those tools commonly employed to prevent former employees from disclosing confidential information, stealing employees or clients, or competing against the company, a cooperation agreement is a simple contractual tool that companies can use to prevent (or at least discourage) their former employees from refusing to cooperate in connection with any lawsuits or investigations brought against them.

## What to Include

What follows is a basic road map (with some sample language) of what should be contained in a standard cooperation agreement.

**Consideration:** As with any contract, a cooperation agreement must contain consideration provided for the former employee's agreement to cooperate. Not only is this consideration necessary for the legal validity of the contract, but it is also necessary to induce the departing employee to enter into the agreement. The form of the consideration is not important. But, it should ideally be something with value that accrues or increases over time. In this way, the company can maintain for as long as possible some measure of leverage over the former employee to ensure compliance with the agreement (without resorting to the courts for enforcement).

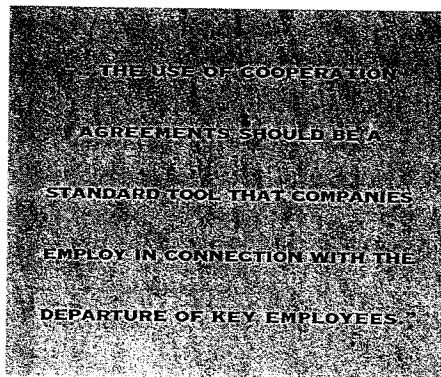
**Confidentiality:** The agreement should contain a provision which prohibits the departing employee from disclosing non-public information obtained through his or her employment. If such disclosure is mandated by law (through subpoena or otherwise), the former employee should be required to provide the company with written notice to allow the company time to object to the mandated disclosure.

*You agree that you will not use or disclose to any third party, directly or indirectly, any confidential or proprietary information pertaining to the Company, unless such disclosure is permitted by the Company or required by law. Confidential or proprietary information shall include any information concerning the Company which is not otherwise publicly available and which was obtained by you as a result of your employment with the Company. If*

*such disclosure is required by law, you will provide the Company within 72 hours written notice that such disclosure is required.*

**Non-Disparagement:** The agreement should contain a provision which prohibits the departing employee from making adverse public statements against the company or otherwise disparaging the company.

*You agree that you will not disparage or make adverse public statements against the Company, or any of its directors, officers, or employees.*



**Future Cooperation:** The agreement should contain a provision which requires the departing employee to fully cooperate with the company in any lawsuits or investigations in which the company believes the former employee would be a relevant witness.

*You agree to cooperate fully with the Company and its counsel in connection with any legal matters relating to the Company in which the Company determines that you are a relevant witness. Your cooperation will include meeting with the Company's attorneys, providing the attorneys with requested information, consenting to depositions and interviews, and appearing as a witness on behalf of the Company in any private or government lawsuit in which the Company is a party, or any government investigation, formal or*

*informal, in which the Company is a target, subject, or called upon to be interviewed or examined under oath as a third party. Except as otherwise provided in this agreement, with respect to any such depositions, interviews, and appearances, you agree to be represented by the Company's counsel and to work with such counsel in preparation therefor.*

**Voluntary Participation:** The agreement should contain a provision which prohibits the departing employee from participating in, encouraging, or providing voluntary assistance with respect to any lawsuit brought against the company by a private party. It would not be advisable to extend this provision to prohibit such voluntary participation in connection with any government proceedings. Such an agreement would likely be viewed very negatively by the courts and potentially conflict with various state and federal laws designed to encourage and protect the reporting of corporate misconduct to the government authorities.

*You agree that you will not, without the Company's consent, voluntarily assist or cooperate in any way with any party or attorney in any private lawsuit in which the Company is a party. You further agree that you will not voluntarily participate in any such action, and that you will not solicit, encourage, or do anything to induce any party to bring such an action. You further agree to provide the Company within 72 hours written notice if any party or attorney not affiliated with the Company attempts to contact you in connection with any such action.*

**Involuntary Participation:** The agreement should contain a provision which requires the departing employee to cooperate with the company, and

CONTINUED ON PAGE 10

give the company proper notice, if he or she is required to involuntarily participate (by subpoena or other compulsory process) in an action or investigation involving the company. This provision is important to give the company time to object to the compulsory process, and to work with the former employee in preparation for the involuntary appearance.

*You agree to cooperate fully with the Company and its counsel in connection with any legal matters relating to the Company in which you are called as an involuntary witness (by subpoena or other compulsory process). Your cooperation will include providing the Company within 72 hours written notice of the subpoena or other compulsory process, meeting with the Company's attorneys, providing the*

*attorneys with requested information, and working with the attorneys in preparation for your involuntary appearance. Except as otherwise provided in this agreement, with respect to any such involuntary appearance, you agree to be represented by the Company's counsel.*

**Right to Individual Representation:**

A cooperation agreement should attempt to secure the departing employee's agreement to be represented by the company's counsel in connection with any future proceedings involving the company. However, such an agreement would likely be unenforceable because of the absolute right of a client to choose his or her own counsel and the potential for a conflict of interest arising from counsel's dual representation of the company and the former employee. Therefore, it is advisable to

include in a cooperation agreement the right of the former employee to use his or her own counsel instead of, or in addition to, the company's counsel. Even with this right, it is likely that the former employee would agree, if not expect, to be represented by the company. This is particularly true in light of the former employee's broad obligations to cooperate outlined herein, and the fact that such representation would be free.

*Notwithstanding any other provision in this agreement, you are entitled to appoint, at your own expense, your own counsel to represent you, in lieu of or in addition to the Company's counsel, in connection with any legal matters covered by this agreement. The selection by you of your own counsel shall in no way detract from or interfere with any of the obligations to cooperate with the Company that you have agreed to herein.*

In the current environment of revolving door corporate loyalties, multi-billion dollar lawsuits, and aggressive government enforcement, the use of cooperation agreements should be a standard tool that companies employ in connection with the departure of key employees. If drafted and employed wisely, these agreements can be a lifeline for a company that finds itself at the center of a dispute or investigation that it never anticipated. ❁

**GORDON SCHNELL**

*is a partner of Constantine & Partners, a nationally recognized boutique law firm specializing in antitrust and trade regulation litigation and counseling. Mr. Schnell is also a contributing author of The Merger Review Process: A Step-by-Step Guide to Federal Merger Review, published by the American Bar Association Section of Antitrust Law. He can be reached by e-mail at gschnell@cpny.com*