

Deciding: To Ditch or Not to Ditch Design Display

Instructions for the Attorney

You have assessed Dale's legal claims and considered various options as follows:

(1) Dale leaves voluntarily and fights a legal battle over the non-compete.

If Dale leaves the company voluntarily and begins to work for the competition (or sets up a competitive business on his own), and if Design Display seeks to enforce it through a motion for preliminary injunction, the non-compete provision in his employment agreement will likely be enforced, at least to some degree. A judge might reduce the time period from two years to 18 months or one year, and somewhat shrink the geographic area.

The court, sitting in equity on a motion for preliminary injunction, might possibly reject the preliminary injunction motion, if you (and Dale) can establish the company's "unclean hands" by its alleged breaches of Dale's employment agreement or violation of his shareholder rights. That would be great, but you wouldn't bank on it. Dale seems to have gone along with some of these changes because of the financial circumstances. The company will no doubt provide colorable explanations on the other issues. Thus, you see only a slim chance of proving the company's "hands" to be sufficiently "unclean" to void the non-compete. *This legal work is likely to cost \$25,000.* A hearing on a temporary restraining order (\$10,000) would occur within a few weeks. The preliminary injunction hearing would take place within a few months thereafter (\$15,000).

(2) Dale continues at Design Display, but brings legal action as a shareholder

While working at Design Display, Dale could threaten or bring a shareholder derivative action, or breach of fiduciary duty to a minority shareholder, asserting that the company is squandering funds. You have no idea what such an action would yield, but Dale clearly has a right to attend shareholders' meetings and to see the corporate books and records. It would not yield significant money for Dale because any recovery goes to the corporation (and he only has 5%).

This option might give Dale some leverage for settlement. It might make him a sufficient thorn in the side of the company that they would release him from some or all of the non-compete in exchange for return of his 5%. *This legal work is likely to cost \$5000 for filing suit, \$15,000 for discovery, and an additional \$25,000 if it ever went to trial. The cost of negotiating a settlement after filing suit would likely be \$5,000. Trial would not take place for 2 years.*

(3) Dale leaves Design Display and files a breach of contract action

Dale could leave Design Display and file suit for breach of his employment contract, based on the reduced salary, reduction of commission percentages and "diversion" of customers. He could file a summary judgment motion, seeking a declaration that the contract was no longer in force.

The problem, of course, is that the company could “cure” the alleged breaches. *Legal work to trial would be approx. \$35,000, perhaps \$20,000 through summary judgment. Summary judgment might be heard in six months, but it would not get to trial for 18 months or two years.*

- (4) Dale continues to work at Design Display, while attempting to negotiate terms of departure and work at Upscale.

Dale could remain at Design Display while seeking to negotiate terms under which he could leave AND take the Upscale Design job. As leverage, he could assert his right to hold the company to the letter of the employment contract. If this is not successful, Dale would still retain the options listed above.

You don't know what terms, if any, Design Display would agree to. One possible term to propose is that the non-compete be reduced to a “non solicit.” Dale would be permitted to go to Upscale Design and compete in the marketplace for new customers. But for a certain period of time (a year or two), Dale would not approach his old customers or those of others at Design Display.

Dale could attempt to negotiate himself (with your advice, in the background) or you could become directly involved, and negotiate with Design Display or, most likely, its attorney. On the one hand, you are a lawyer and you would be less emotional in the negotiations. On the other hand, when businesses learn that an employee has counsel, they often become anxious, defensive and adversarial to the employee.

If Dale's offer at Upscale Design becomes known, you are concerned that Design Display would contact Upscale Design and threaten litigation, which might cause Upscale to withdraw the offer.

Legal work to advise regarding negotiations and write up an agreement would be approximately \$3,000. If you were directly involved, the bill might run as high as \$5,000.

- (5) Dale could simply continue to work at Design Display. Pass on the Upscale Design opportunity. Perhaps line up another commission sales job in a business that does not compete.

Discuss these options with Dale. Invite him to think of other options. Assist Dale in deciding which option to select.