What a Consultant Needs to Know About the Law to Operate a Successful Consulting Practice

February 18, 2015

CNSV-IEEE CPP
Topics to Be Covered Today:
Forms of Business Entity
Contract Language for Consultants
Summary of Copyright and Trademark as Intellectual Property Protection
Unfair Trade Practices
Forms of Association

Under California law, a person can choose to do business under a variety of forms

The basic types of forms of business include:

- Sole proprietorships
- Partnerships
- Corporations
- Joint ventures
- Unincorporated associations

Use of each form has advantages and disadvantages

Examples
Sole Proprietorship

Operating as a sole proprietorship does not require setting up any special entity from which to operate your business.

However, county governments may require that you file a fictitious business name statement if you are doing business under a name which is different from your own personal name.

For example, “James Jones Consulting” is a fictitious business name which is not likely to require the filing of a fictitious business name statement.

However, “Intelligent Software Design” is a name likely to require a fictitious name filing because your first and last name do not appear in the name of the business.
General Partnership

A general partnership is an association of two or more persons to carry on a business for profit as co-owners.

Unlike a corporation, it is not a separate and distinct legal entity from the partners who operate the business.

All states except Louisiana have adopted the Uniform Partnership Act, which sets forth the rights and duties between partners and the liability of partners to third parties.
General Partnerships

General partners have personal liability for the acts of a general partnership.

Partnerships should document their terms in a written partnership agreement.

Areas to be covered by the partnership agreement include:

1. The amount of time to be devoted by each of the partners to the partnership business.
2. The percentage of ownership of each partner.
3. The allocation of and timing of distribution of profits of the partnership.
Partnership Agreement Terms

4. The identification of loans by partners to the partnership, and the terms of repayment of those loans

5. How the partnership will be terminated

6. The location of the partnership

7. The terms of a purchase agreement between partners in the event of the death or disability of a partner
If the creation of the partnership involves a transfer or acquisition of real property, or obligations which cannot be performed within one year, a written agreement is required by law.

When you open a partnership bank account, the bank will ask for a copy of the written partnership agreement.
Partners’ Fiduciary Duties

General partners generally owe each other a fiduciary duty.

A partner may not take personal advantage of another partner

A partner may not harm the partnership by having an undisclosed conflict of interest

For example, a partner must disclose to his or her partner if that partner has an interest in a company with which the partnership is doing business

Having a written partnership agreement is a good idea even if not required by law
This fiduciary relationship is another reason to have a written partnership agreement.

The written partnership agreement should identify the extent of activities which are permissible outside the scope of the partnership business.

Even without an express understanding, the law does not permit outside activities which harm the partnership.
Authority of a General Partner

Every partner is an agent of the partnership for the purpose of conducting or operating its business, including the execution (signing) of the partnership name on any instrument (written document).

The general partner is ordinarily entitled to bind the partnership. The major exception would be where the partner actually lacks specific authority to act for the partnership in a particular matter, and the person with whom the partner is dealing knows of the fact that the partner has no authority.
Apparent Authority

It may appear to third parties that a partner has authority to act for or bind the partnership, when he or she does not actually possess that authority.

If the partnership does not act to negate the appearance of authority, the partner who lacks actual authority may be vested with apparent authority as to the third parties without knowledge of the lack of authority, and the partnership will be bound by the acts of that partner.

Examples
Apparent Authority

The existence of this doctrine is a strong argument for laying our clearly, in writing, specific aspects of the authority of each partner.

It also means that the partnership should notify third parties of the actual extent of each partner’s authority.
Partnerships may be dissolved by certain specified acts.

These acts are listed at Sec. 31 of the Uniform Partnership Act.

A court may have the power to dissolve a partnership based on the application to dissolve of a partner, or the application to dissolve by a purchaser of a partner’s interest.
Limited Partnerships

The general partner in a limited partnership has general liability for the acts of the partnership, just as if he or she were the general partner of a general partnership.

Limited partners in a partnership are usually passive investors, who receive profits from a limited partnership based on the terms of the limited partnership agreement.

Their liability to outside creditors of the limited partnership is limited to the extent of their investment in the limited partnership.
Liability of Limited Partners

If a limited partnership incurs a substantial liability which appears to be in excess of the assets of the limited partnership, a third party claimant may claim that limited partners were general partners, and that their personal assets are available to pay a judgment of the limited partnership.

A court’s determination on this issue is usually based on whether the limited partners exceeded their passive role in the partnership and played active roles in the operation of the partnership business. Most states have adopted the Uniform Limited Partnership Act of 1976.

All states but Louisiana have adopted some form of the Uniform Limited Partnership Act.
Corporations for Profit

Most businesses are corporations for profit (Typical non-profit associations include churches, synagogues, and benevolent or charitable organizations)

A corporation exists as a legal person, separate from the identity of the stockholders

The corporation can take, hold, and convey property. It can sue or be sued by others
Intelligent Consultants Determine What Form of Business in Proper
Forms of Association

Sole Proprietorship

General Partnership

Corporation

Limited Partnership

Unincorporated Association
CONTRACT LANGUAGE

Liability Limitation clauses

Arbitration and Mediation clauses

Definition of Basic and Additional Services

Attorney fee clauses
INDEMNITY CLAUSES

Indemnity clauses transfer risk from one party to another.

Consulting contracts often contain indemnity clauses whereby you agree to indemnify your client for losses, and which are very broadly worded.
Consulting Agreements

Jim Jones shall be the individual at Consultant providing the consultant services to Company, unless otherwise agreed to in writing, and signed by both parties.

If any services, functions or responsibilities not specifically described in this Agreement or a Statement of Work are required for the proper performance and provision of the Services, they shall be deemed to be included within the scope of Services to the same extent as if specifically described in this Agreement.
Payment

Rate. In consideration of the Consulting Services to be performed by Consultant under this Agreement the Company will pay Consultant at the rate of $150.00 per hour for time spent on Consulting Services. Consultant shall submit written, signed monthly invoices that specify the time spent performing Consulting Services, itemize the dates on which services were performed, include the number of hours spent on such dates, and include a brief description of the services rendered. The Company shall pay Consultant the amounts due pursuant to submitted reports within 30 days after such invoices are received by the Company.
Expenses

Unless otherwise agreed by the parties, the Company shall reimburse Consultant for reasonable travel and other business expenses that are incurred by Consultant in the performance of the Services and are approved in advance by Company, in accordance with Company’s general policies, as may be amended from time to time. Consultant shall provide Company with an itemized list of all such expenses and supporting receipts with each invoice therefor.

Unpaid invoices shall bear interest at the rate of 1.5% per month from the 30th day when payment was due.
Independent Contractor

Independent Contractor. Nothing contained herein or any document executed in connection herewith, shall be construed to create an employer-employee partnership or joint venture relationship between the Company and Consultant. Consultant is an independent contractor and not an employee of the Company or any of its subsidiaries or affiliates.

The consideration set forth in Section 2 shall be the sole consideration due Consultant for the services rendered hereunder. It is understood that the Company will not withhold any amounts for payment of taxes from the compensation of Consultant hereunder.
Not Employee

Consultant will not represent to be or hold himself/herself out as an employee of the Company and Consultant acknowledges that he/she shall not have the right or entitlement in or to any of the pension, retirement or other benefit programs now or hereafter available to the Company's regular employees. Any and all sums subject to deductions, if any, required to be withheld and/or paid under any applicable state, federal or municipal laws or union or professional guild regulations shall be Consultant's sole responsibility and Consultant shall indemnify and hold Company harmless from any and all damages, claims and expenses arising out of or resulting from any claims asserted by any taxing authority as a result of or in connection with said payments.
Confidentiality

Confidentiality. Consultant shall sign, or has signed, a Proprietary Information and Inventions Agreement, in the form attached to this Agreement as Exhibit A (the “Confidentiality Agreement”), on or before the date Consultant begins providing the Consulting Services.
Indemnification.

Indemnification. Each party hereby agrees to indemnify and hold the other party harmless from and against any and all liabilities, losses, damages, costs, and expenses (including without limitation reasonable attorneys’ fees) related to (i) such party's breach of any obligation, representation or warranty under this Agreement, or (ii) the intentional or negligent act or omission of such party or any of its officers, directors, members, managers, employees, agents, representatives or contractors.
Limitation of Liability

Limitation of Liability. IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR ANY LOST PROFITS OR FOR ANY CONSEQUENTIAL, INCIDENTAL, SPECIAL OR INDIRECT DAMAGES OF ANY KIND, WHETHER ARISING IN CONTRACT, TORT, OR OTHERWISE, AND REGARDLESS OF WHETHER THERE HAS BEEN A NOTIFICATION OF THE POSSIBILITY OF SUCH DAMAGES. A PARTY’S MAXIMUM AGGREGATE LIABILITY FOR ANY DAMAGES CLAIM REGARDING THIS AGREEMENT WILL NOT EXCEED THE VALUE RECEIVED BY SUCH PARTY HEREUNDER.
Attorneys’ Fees, Notices

Attorneys’ Fees. In the event of any dispute regarding the terms and duties of the parties under this agreement, the prevailing party in any litigation or arbitration shall be entitled to recover its attorneys’ fees, expert fees, and legal costs associated with resolving the dispute.

Notice. Any notice or communication permitted or required by this Agreement shall be deemed effective when personally delivered or deposited, postage prepaid, in the first class mail of the United States properly addressed to the appropriate party at the address set forth below. Email to the below email addresses will also constitute sufficient notice. If email addresses change, or responsible individual changes for each party, that party shall update the other party with that information.
Entire Agreement and Amendments. This Agreement constitutes the entire agreement of the parties with regard to the subject matter hereof, and replaces and supersedes all other agreements or understandings, whether written or oral. No amendment or extension of this Agreement shall be binding unless in writing and signed by both parties.
Applicable Law and Venue

Governing Law, Severability. Venue. This Agreement shall be governed by the laws of the State of California. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision. Any legal action to be filed, or arbitration to be had regarding any dispute shall be brought in Santa Clara County, California.
Advice of Counsel. EACH PARTY ACKNOWLEDGES THAT, IN EXECUTING THIS AGREEMENT, SUCH PARTY HAS HAD THE OPPORTUNITY TO SEEK THE ADVICE OF INDEPENDENT LEGAL COUNSEL, AND HAS READ AND UNDERSTOOD ALL OF THE TERMS AND PROVISIONS OF THIS AGREEMENT. THIS AGREEMENT SHALL NOT BE CONSTRUED AGAINST ANY PARTY BY REASON OF THE DRAFTING OR PREPARATION HEREOF.

Execution in Counterparts. This Agreement may be executed in several counterparts, all of which shall constitute one agreement.
Non-Disclosure Agreements

As a part of CONSULTANT’s work for CLIENT, CONSULTANT agrees that he or she has received, or will receive certain confidential, proprietary and/or trade secret information owned by CLIENT.

CONSULTANT acknowledges that this CLIENT information he or she acquired or will acquire while doing work for CLIENT derives economic value, actual or potential, from not being generally known to others in the relevant industry or industries. Such technical, non-technical, and business information may include information relating to CLIENT’s business, products, processes, pricing, customers and distributors.

CONSULTANT agrees not to use or disclose such confidential CLIENT information to anyone outside of CLIENT’s organization without prior permission from CLIENT.
Confidentiality, Non-Disclosure, Trade Secret

CONSULTANT agrees that such unauthorized use or disclosure of CLIENT’s confidential or proprietary information would be adequate cause for immediate termination of any business relationship with CLIENT.

CONSULTANT agrees that CLIENT may suffer irreparable injury and damage should CONSULTANT violate the terms of this agreement, for which money damages would be insufficient.

Termination of the business relationship between CLIENT and CONSULTANT as a result of CONSULTANT’S unauthorized and improper disclosure or use of CLIENT’S trade secret or proprietary information shall not limit or prohibit any remedies otherwise available to CLIENT as a result of such disclosure or use by CONSULTANT of trade secret or proprietary information of CLIENT.
Carefully review or have an attorney review any critical documents such as contracts, leases, partnership agreements or related documents.

Stating you did not read a document, or were not aware of provisions of a document which you signed or agreed to is not going to relieve you of the effect of such provisions.

Being aware and familiar with contractual language in documents which pertain to your business will help you to avoid unwarranted risks and liabilities.
Carefully Consider Choices on Document Language
Copyright

Copyright is a form of protection grounded in the U.S. Constitution and granted by law for original works of authorship fixed in a tangible medium of expression.

Copyright covers both published and unpublished works.

The rationale for copyright is to encourage creativity and innovation by not allowing creative works to be copied.

Why should a person create a work from scratch, if they can just copy someone else's work?
Sec. 102:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device

Works of authorship include the following categories:
(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.

(b) In no case does copyright protection extend to any idea, process, system, method of operation, concept, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in a work.
Originality

Originality means that the work was independently created by the author, as opposed to copied from other works, and that it possesses at least some minimal degree of creativity.

Works of authorship include literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.
Fixed Form Required

Preserved in a "tangible medium of expression from which [it] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device"

A "literary work" is created for copyright purposes when it is recorded on tape, or written down, but it has not been created if the words are not recorded, transcribed, or otherwise "fixed in a tangible medium of expression"
Extent of Copyright Protection

Copyright protection extends only to the form of expression of an idea, not to the idea itself.

Thus, copyright does not protect any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, fixed or embodied.
Trademark

A trademark, or in the case of services, a service mark, usually consists of an identifying symbol.

It may be a well-known word (Kleenex, Scotch tape).

A familiar design (Ford Motor Co. blue oval).

A popular container (such as the Coca-Cola bottle).

A distinctive building design (In and Out Burger Building or McDonald’s Building).
Registered mark does not protect trademark outside of U.S.

However, if own a trademark application pending before the USPTO, or of a registration issued by the USPTO, you may seek registration in any of the countries that have joined the Madrid Protocol by filing a single application, called an "international application," with the International Bureau of the World Intellectual Property Organization, through the USPTO
Also, certain countries recognize a United States registration as a basis for filing an application to register a mark in those countries under international treaties. The laws of each country regarding registration must be consulted.
Federal registration is not required to establish rights in a trademark

Common law rights arise from actual use of a mark in commerce

Generally, the first to either use a mark in commerce or file an intent to use application with the Patent and Trademark Office has the ultimate right to use and registration

However, there are many benefits of federal trademark registration
If you own a valid federal trademark registration and the infringing use is in interstate commerce, you can use Section 1114(1) of the Act:

Any person who shall, without the consent of the registrant

(a) use in commerce any reproduction, counterfeit, copy or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or
(b) reproduce, counterfeit, copy or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive;
(c) shall be liable in a civil action by the registrant for the remedies hereinafter provided. 15 USC Sec. 1114(1)

A full search should be made of United States Patent Office records and trade directories for the trademarks of both parties and for any package designs and slogans that might be the subject of federal registration
A search of such records can be obtained at moderate cost from companies specializing in these searches. In order to locate similar third party marks on competitive goods, it would be wise to search in the entire field for the plaintiff's product.

The search will show whether either trademark in issue has been federally registered and may also show both federal registrations and possibly unregistered trademarks that are the same as or similar to those in issue.
(a) Do either you or the prospective defendant own a federal registration for the trademark?

(b) Does any third-party registered, or unregistered, trademark exist that is the same as, or similar to, those in issue?
On the basis of the search report, you may be able to ascertain whether your trademark is "weak," in the sense that there are numerous third-party uses of similar marks, or that the mark is descriptive when applied to the particular product.

Status copies of the registrations should be obtained from the United States Patent Office, Washington 25, D.C.
Additional Questions

(a) Is the client or prospective defendant an owner of record?
(b) Is each registration presently valid?
(c) Has either registration expired?
(d) Has an affidavit of continued use been filed under 15 USC Sec. 1058a?
(e) Has an affidavit been filed under 15 USC Sec. 1065 so that the right to use the mark in commerce has become incontestable?
If a federal registration exists, a copy of the application file history for each should be obtained from the Patent Office.

The file history, a public record, will contain all documents pertaining to the prosecution of the application, including the application itself, amendments, responses to office actions, and specimens of the label or packaging showing use of the mark. The file history will also carry any notices that the registration has been involved in litigation.
An inquiry into the history of past infringements of the client's mark should be made. All past litigation and the present status of any past infringements should be reviewed.

Counsel should determine whether either the client or prospective defendant owns a state trademark registration for its mark. If so, copies should be ordered from the secretary of state of the particular state where state registration occurred.
First use in interstate commerce should be determined

Evidence of prior use by a predecessor or assignor and evidence of use on products other than those in issue territories where the client's product is sold

Specimens of each label, tag, carton, name plate, or package that bears the client's trademark, including any and all revisions or modifications in the manner of trademark display, should be secured
Distribution channels of your product to ultimate consumer

This inquiry should also cover the types of individuals who purchase the client's products

In particular, whether or not they are educated concerning the particular goods and unlikely to be misled
Determine the market circumstances under which sales are solicited and made.

Do your trade areas and that of the prospective defendant overlap?

Investigate any actual damage sustained from the opponent's acts, such as lost sales resulting from customers' confusion and injury to business reputation arising from the defendant's misleading sales of an inferior product.
All evidence of communications indicating confusion, such as misdirected orders, telephone calls, and mail, should be obtained.

Complaints directed to the client about the defendant's product. The client's field representatives who have firsthand information should be interviewed on this general subject.
Where there is any evidence that the defendant has palmed off its product as that of the client, this area should be explored in detail, and data concerning witnesses and dates and places of occurrence should be obtained.
Obtain data similar to that of client concerning the defendant's trademark usage, advertising, territories, first use dates, various packaging to investigate likelihood of confusion.

Review the past history of relations between the client and the defendant, such as agreements on trademarks, prior infringements by either party and notices of infringement, and prior unfair commercial activities or efforts to restrain trade.
Trademark Infringement

Infringement of a registered mark occurs, under the Federal Trademarks Act, when a third party uses the same or a similar mark in interstate commerce, thereby causing a likelihood of confusion.

Essentially the same facts that establish trademark infringement can also establish common-law unfair competition.
Unfair Trade Practices

The California Unfair Competition Law allows a private plaintiff to proceed under it to seek redress for conduct which violates any predicate statute, unless the defendant is privileged, immunized by another statute, or the predicate statute expressly bars its enforcement under the unfair competition law.

As a general matter, parties may be held jointly and severally liable for unfair competition. However, the concept of vicarious liability has no application to actions brought under the unfair business practices act; rather, a defendant's liability must be based on his or her personal participation in the unlawful practices and unbridled control over the practice.
Actions to enjoin unfair competition may be brought by the injured party. Such actions also may be prosecuted by the Attorney General or any district attorney or, under specified circumstances, a county counsel, a city attorney or city prosecutor in the name of the people of the State of California upon their own complaint, or upon the complaint of any board, officer, person, corporation or association.
An unlawful competition law lawsuit commenced by a prosecutor is brought fundamentally for the benefit of the public and as a law enforcement action.

Actions to enjoin unfair competition also may be brought by any person acting for the interests of itself, its members, or the general public.
A private plaintiff who has suffered no injury at all may sue to obtain relief for others.

An individual bringing a cause of action as a private attorney general under the unfair competition law need not have any personal interest in the litigation, in contrast to requirements for a class action.

A private party has standing to pursue an action for violations of the unfair competition law even if he or she is not aggrieved by the violations.
Where an action under the unfair competition law is based on a contract, the representative plaintiff may seek to vindicate the rights of individual consumers who are parties to the contract.

However, an unfair competition law action based on a contract is not appropriate where the public in general is not harmed by the defendant's alleged unlawful practices.
The statute prohibiting unlawful, fraudulent, and unfair business acts and practices does not support claims by non-California residents, where none of the alleged misconduct or injuries occurred in California.

A nonprofit organization may maintain a suit for unfair competition to protect its trade name, and a fraternal organization may bring an action for unfair competition in its own name.
A person whose conduct contributes to unfair practices may be joined as defendant, and where corporate directors are notified that the corporation is making unauthorized use of trade secrets improperly transmitted to it by other directors but the corporation continues to use manufacturing processes that were trade secrets, the directors so notified are liable.
Sample Lawsuit for Unfair Competition

Plaintiff hereby alleges as follows:

THE PARTIES

1. Plaintiff is a California corporation.

2. Plaintiff is informed and believes, and on that basis alleges, that defendants are residents of Santa Clara County. Plaintiff is ignorant of the true names and capacities of the remaining defendants sued herein as Does 1 through 10, and Plaintiff therefore sues these defendants by their fictitious names.

3. Plaintiff will amend its complaint to allege the true names and capacities of these Doe defendants when they have been ascertained. Plaintiff is informed and believes, and on that basis alleges, that each of the defendants, including the Doe defendants, is related to or affiliated with the other Defendants.
4. Plaintiff is informed and believes, and on that basis alleges, that each of the defendants sued herein is, and at all times relevant herein was, an agent and/or employee of each of the other defendants; in doing the acts alleged herein, each of the defendants was acting within the course and scope of such agency or employment and with the permission and consent of the other defendants.

5. Plaintiff is further informed and believes that in doing the acts alleged herein, each of the defendants was acting in concert with each of the other defendants.
6. Plaintiff ABC is a company located in Milpitas, California.

7. ABC was founded in August 2008 by James Brown, defendant Ernie Bowman, Jeff Baxter, and Mike Franklin.

8. Brown owns 28% of the outstanding shares of ABC and at all relevant times was an officer, director, and full-time sales employee of ABC.
Brown had access to confidential and proprietary information concerning existing and prospective customers of ABC. After a salesperson receives an email or verbal go ahead from a customer for a job, the company's normal practice is for the salesperson to enter the prospective job into ABC’s "Job Book" along with the estimated gross profit from the job. Before any information is entered into the Job Book, the person entering the information is expected to be intimately familiar with the details of the job, ABC’s cost, its bid, and its expected profit. The Job Book enabled ABC to better budget its financial future and allocate its resources.
In December of 2010, Brown entered Job #1670E in ABC’s Job Book with gross revenues of $519,962 and a profit of $115,000. In April of 2011, Brown entered Job #1786E ABC’s Job Book. In May of 2011, Brown entered Job #1830E with gross revenues of $54,218 and a profit of $10,000, and Job #1831E with gross revenues of $54,214 and $30,000 profit in ABC’s Job Book. The total expected profit from these four jobs was $275,000.
10. In early 2011, differences arose between Brown and the other shareholders and directors of ABC concerning the business strategy that ABC should pursue. 'Unbeknownst to the other shareholders and directors of ABC, Brown began discussions with one of ABC’s principal competitors, the defendant Warren, about going to work for Warren.
11. On July 12, 2011, Brown resigned as an employee of ABC, but did not tender his resignation as a director. Brown kept a 2011 Dodge Ram Truck, a laptop computer, and computer software that were owned by ABC. Despite numerous demands by ABC to Brown to return such property, Brown has refused to return any of the items and continues to use and enjoy such property for his own personal benefit.
12. Shortly after submitting his resignation to ABC, Brown went to work for Warren. Since becoming an employee of Warren, all of the jobs described in paragraph 9 have gone to Warren.

FIRST CAUSE OF ACTION

(Unfair Competition and Misappropriation of Trade Secrets - Violation of California Civil Code Section 3426, et. seq. Against All Defendants)

13. Plaintiff incorporates by reference in this cause of action all of the allegations set forth in paragraphs 1 through 12.
ABC has developed secret, confidential and proprietary information concerning its customers, products and services ("Confidential Information"). The Confidential Information includes the following: (1) the identity of the type of product preferred by various customers; (2) the maintenance requirements of such products; (3) the identity of plaintiffs customers, including buyers and their buying habits; (4) the sources of supply for the products offered by plaintiff and,
(5) the specific requirements for jobs, the cost to perform proposed jobs, plaintiff's bids for jobs; and plaintiffs projected gross profit on such jobs. The Confidential Information was carefully developed by plaintiff at a considerable expenditure of time and money. Brown participated in the creation and development of the Confidential Information and knew that the Confidential Information was confidential, proprietary and constituted a valuable trade secret of plaintiff as defined under California Civil Code Section 3426, et seq.
15. During Brown’s employment with plaintiff, he had access to the Confidential Information and agreed to maintain the confidentiality and secrecy of the Confidential Information and not to disclose any Confidential Information to third persons without the prior approval of plaintiff. As an officer and director, Brown had a fiduciary duty to maintain the secrecy of such trade secrets.
16. Plaintiff is informed and believes, and on that basis alleges, that Brown has breached his duty to maintain the secrecy of plaintiffs Confidential Information by disclosing information concerning the jobs described in paragraph 9 to Warren. In particular, Brown knew the amount of ABC’s bids for those jobs and was able to re-bid the jobs for Warren for the same or a lower price. The defendants contacted the key people for those jobs to induce them to refuse to permit ABC to re-bid any changes to the jobs or to enter into contracts for such jobs with ABC. By misappropriating plaintiff’s Confidential Information, the defendants were able to obtain the contacts for such jobs with Warren.
17. Plaintiff is informed and believes, and on that basis alleges, that defendants' acts were made pursuant to an intentional plan to appropriate and use of the Confidential Information for their own benefit and financial gain, which has unjustly enriched them.

18. As a direct and proximate result of the aforementioned conduct of defendants, plaintiff has suffered damages in an amount of at least $275,000.

19. Defendants' conduct in performing the actions herein alleged was despicable, oppressive and malicious, and plaintiff is entitled to an award of punitive damages.
SECOND CAUSE OF ACTION
(Intentional interference with Prospective Economic Advantage Against All Defendants)

20. Plaintiff incorporates by reference in this cause of action all of the allegations set forth in paragraphs 1 through 19.

21. Plaintiff has been and continues to be engaged in extensive efforts to obtain contracts for the installation of products.
22. Defendants have knowledge of plaintiffs efforts to negotiate and enter into such agreements with various customers and, with the intent to disrupt plaintiffs business relationships with its customers and to cause such customers to discontinue doing business with plaintiff, defendants have engaged and continue to engage in unjustified and wrongful conduct. Plaintiff is informed and believes and alleges thereon that defendants have dissuaded ABC’s customers from (i) entering into agreements with plaintiff for plaintiffs goods and services, and
(ii) from continuing to honor the commitments already entered into between such customers and plaintiff. In addition, Brown repeatedly attempted to induce ABC’s superintendent and ABC's best installation professionals to leave ABC and to work for Warren.

23. As a direct and proximate result of the aforementioned conduct of defendants, plaintiff has suffered damages in an amount of at least $275,000.
24. Defendants' conduct in performing the actions herein alleged was despicable, oppressive and malicious, and plaintiff is entitled to an award of punitive damages.

THIRD CAUSE OF ACTION
(Conspiracy Against All Defendants)

25. Plaintiff incorporates by reference in this cause of action all of the allegations set forth in paragraphs 1 through 24.
26. Brown, Warren, and Does 1 through 10 agreed and conspired among themselves to interfere with and disrupt ABC's prospective economic advantage with the jobs described in paragraph 9 above.

27. As a proximate result of said defendants' wrongful acts, ABC has suffered monetary damages of at least $275,000.
WHEREFORE, Plaintiff prays for judgment as follows:

1. For damages against Brown, Warren and Does 1-10 in the amount of $275,000;

2. For damages against Brown in the amount of the value of the Dodge Truck, the laptop computer, and the computer software as of July 12, 2011, to be proven at trial:

3. For punitive damages against Brown, Warren and Does 1-10 according to proof;

4. For the costs of suit herein; and

5. For such other and further relief as the Court may deem proper.

Dated: December 21, 2011
Case Digests

Customer had standing as private attorney general to bring claim alleging that telephone company's alleged failure to adequately notify customers of its billing practices for its cellular service violated California Unfair Competition Law (UCL), even though company reimbursed customer for overage fees he had been charged, where company's position was that its practice of out-of-cycle billing was legal and adequately disclosed to its customers, customer subsequently suffered another overage charge, and, if disclosures were inadequate, then customer could show that he did not receive full benefit of his contract. West's Ann.Cal.Bus. & Prof.Code §§§ 17200, 17204. Lozano v. AT & T Wireless Services, Inc., 504 F.3d 718 (9th Cir. 2007).
Mere availability of bank-card payment system did not make credit card company liable, as aider and abettor under California unfair competition and false advertising laws, for images stolen by infringing Internet websites that accepted payment through system. West's Ann.Cal.Bus. & Prof.Code §§ 17200 et seq. Perfect 10, Inc. v. Visa Intern. Service Ass'n, 494 F.3d 788 (9th Cir. 2007).
Unfair Competition Law (UCL) provision granting standing to a private party only if the person "has suffered injury in fact and has lost money or property as a result of the unfair competition" does not authorize standing based upon the federal doctrine of associational standing, by an association that has not itself suffered actual injury but seeks to act on behalf of its injured members. West's Ann. Cal. Bus. & Prof. Code §§ 17203. Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court, 46 Cal. 4th 993, 95 Cal. Rptr. 3d 605, 209 P.3d 937 (2009).
All Unfair Competition Law (UCL) actions seeking relief on behalf of others, including those brought by representative or associational plaintiffs, must be brought as class actions. West's Ann.Cal.Bus. & Prof.Code §§ 17203. Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court, 46 Cal. 4th 993, 95 Cal. Rptr. 3d 605, 209 P.3d 937 (2009)
To meet the Unfair Competition Law (UCL) standing requirement of having "suffered injury in fact" and having "lost money or property as a result of" the defendant's unfair competition, in a UCL action based on a fraud theory involving false advertising and misrepresentations to consumers, a plaintiff must allege that the defendant's misrepresentations were an immediate cause of the injury-causing conduct, but the plaintiff is not required to allege that those misrepresentations were the sole or even the decisive cause of the injury-producing conduct. West's Ann. Cal. Bus. & Prof. Code §§§ 17203, 17204. In re Tobacco II Cases, 46 Cal. 4th 298, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009)
Charter schools, and the individuals, corporations, entities, or organizations that operated them, were "persons" subject to suit under the unfair competition law (UCL), and were not exempt from suit under UCL merely because such schools were deemed part of the public school system, for purposes of academics and state funding eligibility, under the Charter Schools Act (CSA); charter schools were operated, pursuant to the CSA, by nongovernmental entities that were largely independent of management and oversight by the public education bureaucracy, and thus imposition of UCL liability against charter schools would not undermine state's sovereign educational function. West's Ann.Cal.Bus. & Prof.Code §§ 17200 et seq.; West's Ann.Cal.Educ.Code §§ 47600 et seq. Wells v. One2One Learning Foundation, 48 Cal. Rptr. 3d 108, 141 P.3d 225 (Cal. 2006)
Uninjured private plaintiffs in pending cases under the unfair competition law and false advertising law, who lost their standing under Proposition 64, which limited standing to bring actions under the unfair competition law and false advertising law to governmental parties and injured private parties, may amend their complaint to substitute new plaintiffs who enjoy standing under current law, without disturbing policy objectives of Proposition 64. West's Ann.Cal.Bus. & Prof.Code § 17204, 17535. Branick v. Downey Sav. and Loan Ass'n, 46 Cal. Rptr. 3d 66, 138 P.3d 214 (Cal. 2006)
Proposition 64, which limited standing to bring actions under the unfair competition law (UCL) to governmental parties and injured private parties, applied to pending actions and therefore eliminated nonprofit organization's standing to bring UCL action against retailer for alleged failure to comply with laws on access for those with disabilities; Proposition 64 did not change any substantive rules governing business and competitive conduct, did not eliminate any right to recover, and did not impair any significant rights or expectations. West's Ann.Cal.Bus. & Prof.Code § 17203, 17204. Californians For Disability Rights v. Mervyn's, LLC, 46 Cal. Rptr. 3d 57, 138 P.3d 207 (Cal. 2006)
Voter initiative imposing standing requirement on Unfair Competition Law (UCL) class representatives of having "suffered injury in fact" and having "lost money or property as a result of" the defendant's unfair competition did not enlarge the substantive rights or the remedies of the class. West's Ann. Cal. Bus. & Prof. Code §§ 17200 et seq. Pfizer Inc. v. Superior Court, 182 Cal. App. 4th 622, 2010 WL 660359 (2d Dist. 2010).
To have standing to bring a claim under either the Unfair Competition Law or the false advertising law, a plaintiff must show that he or she has suffered injury in fact and has lost money or property as a result of the unfair competition. West's Ann. Cal. Bus. & Prof. Code §§ 17204. Stewart v. Rolling Stone LLC, 181 Cal. App. 4th 664, 2010 WL 317016 (1st Dist. 2010).
City attorney had standing to sue a health care service plan under the unfair competition law (UCL) and the false advertising law (FAL) for violation of the Knox—Keene Health Care Service Plan Act of 1975's prohibition on postclaims underwriting; UCL and FAL expressly gave city attorney authority to sue unless otherwise provided to the contrary, and no other statute provided to the contrary. West's Ann.Cal.Bus. & Prof.Code §§ 17204, 17205, 17534.5, 17535; West's Ann.Cal.Health & Safety Code §§ 1389.3. Blue Cross of California, Inc. v. Superior Court, 2009 WL 4806191 (Cal. App. 2d Dist. 2009)
To have standing under the Unfair Competition Law (UCL), a person must allege injury in fact and lost money or property as a result of such unfair competition. West's Ann. Cal. Bus. & Prof. Code §§ 17200 et seq. Yabsley v. Cingular Wireless, LLC, 176 Cal. App. 4th 1156, 2009 WL 2517246 (2d Dist. 2009)
Insured suffered "injury in fact" as a result of insurer's violation of statutory requirement that an insurance policy provide a statement of the premium, thus supporting a finding of standing to sue insurer under Unfair Competition Law (UCL); insured's payment of money for service charges in addition to the premium stated in his policy was an invasion of a legally protected interest. West's Ann.Cal.Bus. & Prof.Code §§ 17204. Troyk v. Farmers Group, Inc., 171 Cal. App. 4th 1305, 2009 WL 597256 (4th Dist. 2009)
Manufacturer's alleged harm to its goodwill as a result of an undesirable retailer's resale of jeans made by manufacturer did not confer standing on manufacturer to pursue a cause of action for unfair competition, since such harm was not a loss which would entitle manufacturer to restitution. West's Ann. Cal. Bus. & Prof. Code §§ 17204. Citizens of Humanity, LLC v. Costco Wholesale Corp., 171 Cal. App. 4th 1, 2009 WL 323622 (2d Dist. 2009)
An owner or officer of a corporation may be individually liable under the unfair competition law (UCL) if he or she actively and directly participates in the unfair business practice. West's Ann. Cal. Bus. & Prof. Code §§ 17200 et seq. Bradstreet v. Wong, 161 Cal. App. 4th 1440, 75 Cal. Rptr. 3d 253 (1st Dist. 2008)
Insurer's reinstatement of insured's health insurance coverage and payment of medical bills did not automatically disqualify insured from representing class in suit under Unfair Competition Law (UCL) alleging failure to attach applications to or endorse them on policies when issued and postclaims underwriting by holding insureds to statements in those unattached and unendorsed applications as grounds for voiding or rescinding the policies. West's Ann.Cal.Bus. & Prof.Code §§ 17200; West's Ann.Cal.C.C.P. § 382; West's Ann.Cal.Ins.Code §§§ 10113, 10381.5, 10384. Ticconi v. Blue Shield of California Life & Health Ins. Co., 160 Cal. App. 4th 528, 72 Cal. Rptr. 3d 888 (2d Dist. 2008)
Customer did not allege he lost money or property as a result of book seller's alleged unfair competition in providing customer with free 21-day preview period but sending invoice for book before preview period ended, and thus lacked standing to bring unfair competition law claim; customer alleged that conduct was fraudulent or unfair because it caused the consumer to believe he or she did not have a free trial period and was obligated to keep and pay for the book upon receipt, but invoice did not cause customer to remit payment immediately on receiving the book, as customer remitted payment 10 months after receiving the book, and customer did not allege he did not want the book or that he was induced to keep book he otherwise would have returned during preview period. West's Ann Cal Bus. & Prof Code §§ 17204, 17206.
In order to establish standing, a plaintiff seeking to bring a representative lawsuit under the Unfair Competition Law (UCL) and the False Advertising Law (FAL) must show that (1) he or she has suffered actual injury in fact, and (2) such injury is a result of the defendant's alleged unfair competition or false advertising. West's Ann.Cal.Bus. & Prof.Code §§§ 17200 et seq., 17500 et seq. O'Brien v. Camisasca Automotive Mfg., Inc., 73 Cal. Rptr. 3d 911 (Cal. App. 2d Dist. 2008)
Restitution remedy under unfair competition law (UCL) was not limited to plaintiffs who made direct payments to defendants, and thus buyer of wireless computer products from retailer was entitled to pursue recovery of restitution from manufacturer for manufacturer's alleged deceptive marketing. West's Ann.Cal.Bus. & Prof.Code § 17200 et seq. Shersher v. Superior Court, 154 Cal. App. 4th 1491, 65 Cal. Rptr. 3d 634 (2d Dist. 2007).
Where an unfair competition action is based on contracts not involving either the public in general or individual consumers who are parties to the contract, a corporate plaintiff may not rely on the unfair competition statute for the relief it seeks. West's Ann.Cal.Bus. & Prof.Code §§ 17200 et seq. Linear Technology Corp. v. Applied Materials, Inc., 152 Cal. App. 4th 115, 61 Cal. Rptr. 3d 221 (6th Dist. 2007)
Internet consumer lacked standing to bring action asserting violations of unfair competition law against payment processing businesses offering online services that consumer did not actually use; the unfair competition law was amended following consumer's initial pleadings to limit private party standing in such actions to those parties that suffer injury in fact. West's Ann.Cal.Bus. & Prof.Code §§ 17204 (2003). Schulz v. Neovi Data Corp., 152 Cal. App. 4th 86, 60 Cal. Rptr. 3d 810 (4th Dist. 2007)
To determine the standing of a person who seeks to assert a claim under the Unfair Competition Law (UCL), the person must allege he or she (1) suffered injury in fact, and (2) lost money or property as a result of the alleged unfair competition. West's Ann. Cal. Bus. & Prof. Code § 17204. Meyer v. Sprint Spectrum L.P., 150 Cal. App. 4th 1136, 59 Cal. Rptr. 3d 309 (4th Dist. 2007).
Subscribers to cellular telephone service lacked standing to pursue unfair competition law (UCL) claim against service provider, inasmuch as subscribers failed to establish that they suffered any injury in fact from the allegedly unconscionable contract provisions; subscribers did not claim that any of the allegedly illegal or unconscionable contract provisions were ever asserted against them, they were not required to pay any money out of their own pockets other than the fees they paid for their cellular telephone service, they had not lost money or property, and they had not been denied any money that they could allege was rightfully theirs. §§ 17204. Meyer v. Sprint Spectrum L.P., 150 Cal. App. 4th 1136, 59 Cal. Rptr. 3d 309 (4th Dist. 2007)
Consumer group did not allege that it suffered injury in fact or lost money as a result of the alleged violation of unfair competition law (UCL), and, therefore, it did not have standing to pursue its UCL claims against hotels and retail establishments. West's Ann. Cal. Bus. & Prof. Code §§ 17200 et seq. Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America, 150 Cal. App. 4th 953, 58 Cal. Rptr. 3d 778 (2d Dist. 2007)
Distributors of product containing human growth hormone (HGH) were not adequate representatives of class consisting of all persons who purchased product in putative class action under unfair competition law (UCL) action against manufacturer which had illegally sold product without prescription; distributors had conflict with other class members as they profited from sale of product and thus were potential defendants, and distributors were not typical of class members as they were vulnerable to unique defenses that could become focus of litigation. West's Ann.Cal.C.C.P. § 382; West's Ann.Cal.Bus. & Prof.Code § 17200. Seastrom v. Neways, Inc., 149 Cal. App. 4th 1496, 57 Cal. Rptr. 3d 903 (4th Dist. 2007)
Uninjured plaintiff in pending case under unfair competition law, who lost its standing under Proposition 64, which as to private parties limited standing to bring actions under unfair competition law to injured parties, could not amend its complaint a second time to substitute new plaintiffs with standing under current law; plaintiff had already been given the opportunity by the trial court to amend its complaint to allege standing, but its amended complaint contained no allegations that it suffered injury, and plaintiff was not entitled to a second chance to amend. West's Ann.Cal.Bus. & Prof.Code §§ 17200 et seq. Cryoport Systems v. CNA Ins. Companies, 149 Cal. App. 4th 627, 57 Cal. Rptr. 3d 358 (4th Dist. 2007)
Provision of unfair competition law that was approved by voters and that stated that representative claims could be brought only if the injured claimant "complies with Section 382 of the Code of Civil Procedure," meant that private representative claims had to meet procedural requirements applicable to class action lawsuits. West's Ann.Cal.Bus. & Prof.Code § 17203; West's Ann.Cal.C.C.P. §§ 382. Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court, 148 Cal. App. 4th 39, 55 Cal. Rptr. 3d 585 (2d Dist. 2007), as modified on denial of reh'g,
Amendment to Unfair Competition Law (UCL) restricting standing to persons who suffered actual injury applied to then pending litigation, and thus plaintiff who concededly had not suffered actual injury lacked standing to bring UCL action against telecommunications companies based on allegations that they violated the False Claims Act (FCA) by failing to escheat balances on prepaid telephone cards to the state. West's Ann.Cal.Bus. & Prof.Code §§ 17203, 17204; West's Ann.Cal.Gov.Code §§ 12650 et seq. State ex rel. Grayson v. Pacific Bell Telephone Co., 142 Cal. App. 4th 741, 48 Cal. Rptr. 3d 427 (3d Dist. 2006), as modified, (Sept. 12, 2006)
Even assuming that secured lender of bankrupt almond processor was a production credit association, lender was a "person" rather than a public entity under the unfair competition law (UCL), and thus was subject to suit under UCL by almond growers, which were creditors of processor, based on allegations that processor, rather than fulfilling its statutory obligation to discharge growers' statutory "producers' lien" out of proceeds of sales of almond products, paid lender out of those funds to reduce its loan balance. Farm Credit Act of 1971, §§ 2.0, 12 U.S.C.A. §§ 2071; West's Ann.Cal.Bus. & Prof.Code §§ 17200 et seq.; West's Ann.Cal.Food & Agric.Code §§ 55633, 55638. Frazier Nuts, Inc. v. American AG Credit, 141 Cal. App. 4th 1263, 46 Cal. Rptr. 3d 869 (5th Dist. 2006)
City attorney of city with population over 750,000 had standing to bring unfair competition law action in name of People of State of California against owners and operators of motel, where prostitution was suspected of occurring. West's Ann. Cal. Bus. & Prof. Code §§ 17204, 17206. People v. Bhakta, 135 Cal. App. 4th 631, 37 Cal. Rptr. 3d 652 (2d Dist. 2006).
A private plaintiff may bring an unfair competition law (UCL) action even when the conduct alleged to constitute unfair competition violates a statute for the direct enforcement of which there is no private right of action. West's Ann. Cal. Bus. & Prof. Code § 17204. Smith v. Wells Fargo Bank, N.A., 38 Cal. Rptr. 3d 653 (Cal. App. 4th Dist. 2005), as modified on denial of reh'g, (Jan. 26, 2006).
Animal rights group could not sue the California Milk Producers Advisory Board (CMAB) under the Unfair Competition Law (UCL) for false and deceptive advertising in its "Happy Cows" advertising campaign, since the CMAB was not a "person" as defined in the UCL that was entitled to sue; UCL does not include any references to governmental agencies or political entities, and the CMAB, an administrative adjunct to a governmental body, could not be deemed encompassed by the statutory definition of "person" as included within "natural persons, corporations, firms, partnerships, joint stock companies, associations" or "other organizations of persons." West's Ann.Cal.Bus. & Prof.Code § 17200 et seq. People for the Ethical Treatment of Animals, Inc. v. California Milk Producers Advisory Bd., 22 Cal. Rptr. 3d 900 (Cal. App. 1st Dist. 2005).
Questions
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