

AIPLA Conference on Trade Secret Litigation Recap: Part 1

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At the recent [AIPLA Trade Secret Summit](#), one of the nation's premier conferences on trade secret law, critical issues surrounding the protection of confidential business information took center stage. The discussions reinforced the importance of safeguarding trade secrets and proprietary data against theft, liability, and employee mismanagement—particularly during key employment transitions such as hiring, active employment, and separation. These considerations are essential for companies striving to maintain their competitive edge while navigating complex legal and ethical challenges.

Hearing firsthand how companies handle these issues reinforced just how vital it is to stay proactive and ahead of the curve. Our team has put together a series of key take aways from the event that may help companies to guard against unfair competition and trade secret theft. Our first topic for consideration is joint representation.

Joint Representation

Representing an onboarding employee and the company concerning the hiring of the individual can be a tricky proposition. There are good reasons for engaging in a joint representation with proper warnings and there are definite pitfalls.

One of those pitfalls is the appearance that the new employee and the new employer are joined at the hip relating to the conduct of the employee exiting a former employer (especially if the former employer is a direct competitor). When this situation occurs, the first step is to review the representation from an ethical standpoint under existing Ethics and Professionalism rules.

It is considered ethical to simultaneously represent multiple clients whose interests may not ultimately be aligned if the law does not prohibit the representation and if no client asserts a claim against any other client involved in the proceeding.

1. First things first—obtain an acknowledgement from the new employee that there is no restrictive covenant impeding the employment, the employee has exited his former company

without any trade secret/confidential/proprietary information, and the employee has not destroyed or spoliated any information that belongs to the former employer.

2. If these factors check out, proceed cautiously with the caveat that if it is learned that the acknowledgement is false, representation of the employee will end and representation of the company will continue. In this type of situation, informing each party of the risks of dual representation is key to continued representation of the company when bad facts present themselves. This is not to say that disqualification may still occur, particularly if privileged information obtained from the onboarding employee could assist the employer in defending any claims.

A key case to review before undertaking any dual representation is [Upjohn v U.S., 449 U.S. 383 \(1981\)](#).

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