

Secrets in the Funeral Home Business

Many facets of your business are confidential, including credit card and Social Security numbers of the deceased, the names of families served and all prearrangement business relationships.

Dear Dan,

The craziest thing has been happening. I own a 180-call business with two rooftops. I run one location and my manager of 10 years runs our second location 15 miles away. Two weeks ago, he tendered his resignation. He did not give me a reason for his departure and didn't answer any questions about what he was going to do or if he was leaving funeral service. Last week, I heard at a Rotary meeting that he bought a building and is working to open a funeral home. Yesterday, I started receiving calls from several of my preneed families that have received letters from him announcing his new venture. He also told them they can transfer their preneeds to his new business. Can he do this?

Signed, Et Tu Brute?

Dear Julius Caesar,

You ask one question, but there are two questions here. Can he do this? Well, he did, didn't he? The more direct question is "Can he legally do this?" The answer to that is an essay.

Julius, you don't say in your note if you had an employment agreement. The reason that is a factor in the resolution is that employment agreements usually have provisions that enunciate:

- What happens upon a termination of employment, regardless of whether it is by resignation or firing
- What happens if the former employee wants to be re-employed within the service area
- What property of the employer is deemed confidential.

Most states have passed a series of laws referred to generally as the "business unfair practices act." The terms and conditions are not uniform as state legislatures modified this as they saw fit. Typically, these laws help a business owner keep

matters that are important to the success of his or her business confidential. For example, the identification of patrons is a confidential matter.

Julius, I think your consumers – past, present and future – fall into this category of secrecy. Anyone who gains access to your preneed list through any means is essentially committing a theft of your goodwill. You should sue him. You can have your lawyer take very aggressive action and try for an injunction to stop this theft.

I was retained as an expert on a case in New Jersey in which a person opened a new funeral home 1.1 miles from his previous employer. He mailed 89 letters announcing his new business and encouraging recipients to transfer their preneed from the owner's former employer. I testified that 86 of the 89 people receiving this letter were preneed policyholders of the firm he left. The judge could not believe this and asked the new business owner, "How did you pick these 86 preneed policy holders to get this letter?" The former employee said, "Gee, your Honor, it must be a coincidence!"

There are many facets of your business that are confidential. Some deal with the information of the deceased. Credit card numbers, Social Security numbers and even dates of birth of the deceased or anyone within the arrangement must be protected. The names of the families you've previously served are also confidential. Furthermore, information on the families with which you are in a prearrangement business relationship is a critical confidential item.

In spring, Congress passed the Defend Trade Secrets Act of 2016, which has several key points to it. The law simply states, "An owner of a trade secret that is misappropriated may bring a civil action un-

der this subsection if the trade secret is related to a product or service used in or intended for use in interstate or foreign commerce." Now we must define "misappropriated" and "trade secret."

Several years ago, an upstart water bottle delivery company was trying to make a market impact against its competitor. To do this, the company had someone follow each truck on its route and record the addresses at which the truck stopped. The upstart now had the list of consumers using the established provider. The courts ruled that the list of competitors' customers, no matter how it was gained by the upstart, even if the actions were in the public eye, was theft of a trade secret.

Clearly trade secrets can be the blend of 17 spices a chicken fryer might add to its flour or the existing and prospective clients someone has the expectation of serving.

In another case, I was an expert to help explain to the courts the relationship of preneed accounts and the funeral home that wrote them. A new company was trying to convert the preneed families, having secured a list that had been left out on the owner's desk. Its defense was that if it was a trade secret, it would be under lock and key. I agreed that the list should have been securely stored in a filing cabinet or desk drawer, but that didn't diminish the expectation of service the funeral home had when it solicited these consumers. The court agreed with my point of view.

The parties benefiting from this theft could be the new employer or a partner of the thief. For example, if Tom steals my data and goes to work for Fred, Fred is not innocent if he acts on the stolen information given to him by Tom. Often, enforcement of the trade secret requires suing the new employer or enterprise in possession of the list.

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Not more than two weeks ago, a client stopped a new employee on his way home and found that the employee was carrying a copy of the list of preneed policyholders! The employee stated he wanted to memorize the list in case a death occurred so he could be more efficient in handling the first call. My client accepted the employee's resignation on the spot.

The identification of items deemed to be trade secrets is determined by the employer. Make a list of everything you deem a trade secret. List it in your employee

handbook. Have everyone sign the employee handbook before their hire. Have a training day for existing employees to discuss this list and present it to them. Have them sign for the receipt of the list. Save their signed acknowledgment in their employee file. This applies to both full-time and part-time employees.

What about contractors? The preneed salesperson you have now may want to work off of the existing list. They may want to add new products or services to some of the preneed consumers. That is a great idea. However, they should sign a

confidentiality agreement as part of their agreement as a contractor.

The last thing you want is a situation like the one in which a client in Florida found himself. My client hired a preneed salesperson. The salesperson wrote lots of business over two years and then his production slowed down. When the production slowed, the funeral home terminated their agreement. This preneed salesperson, however, was smarter than the average person – he kept a list of every sale. He then went to the other funeral home in town and offered to write business for them. He received a commission for every consumer he was able to swing over to the other funeral home, even if they were already funded for his first employer. After about 50 contracts had been switched over, my client finally figured it out. Lawsuits rained down.

The world is changing. Being a spy is not like the James Bond era, where you need a small camera. So much data are sent via email, and often multiple parties of an email get the same confidential information. All business owners should ask themselves what happens if this person who is copied on the email changes his or her allegiances. Will that person respect that they are in possession of your confidential information? The fact that you gave it to them or gave access to it does not negate the fact that it is your property and that it is confidential. My advice is to always err on the side of caution.

So, my dear Julius, take aggressive action. Use a litigation attorney, not a real estate lawyer. Move quickly, as the public doesn't want to get involved in your litigation.

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