

**ASSESSING THE RISK OF PAYING YOUR OPPONENT'S
ATTORNEYS' FEES IN NON-COMPETE CASES**

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After 10 years practicing law, I find that most business clients appreciate the services I have to offer and are willing to pay a fair fee for them.

But I have yet to meet a client who feels at all inclined to pay the legal bill of a competitor who has just sued. That's like being 13 and kissing your sister.

Yet when corporations sue each other over the alleged theft of a valuable employee, the dispute can quickly become a fight over attorneys' fees.

Any time you hire a competitor's current or former employee (or independent contractor), you face the risk of a lawsuit from the competitor alleging improper interference with a contract, or some other form of unfair competition. If the employee had a written agreement not to compete with the former employer, the risk of such a suit is all the greater.

Risk assessment needs to be part of the hiring decision so you can decide whether the potential employee's attributes justify the risk. In performing that assessment, you have to consider the possibility of paying not only damages but also the cost of your own – and even your competitor's – legal fees.

If the competitor goes to the trouble of suing you, it will probably bring every plausible claim available against you. In non-compete cases, that often means a claim that the employee and you have conspired to steal the competitor's trade secrets and proprietary information. In most lawsuits between business competitors, each side pays its own legal expenses – win, lose or draw.

Unique Michigan Trade Secret Law.

But under Michigan's version of the Uniform Trade Secrets Act, a prevailing plaintiff can recover attorneys' fees if it shows that the defendant willfully and maliciously stole a trade secret.

Just as I have never met a client anxious to pay a competitor's lawyer, I have also never met a client (whether a corporation or an individual business person) who believes he acted maliciously in his business dealings.

Unfortunately, there are no reported cases in Michigan clearly defining willful and malicious conduct under the Uniform Trade Secrets Act. As a result, in virtually every non-compete case brought naming you as a defendant, you will face the argument – and the risk – that you *did* act maliciously.

Most non-compete cases start with a request for an immediate injunction to stop the alleged unfair competition. This requires the judge to conduct a hearing that resembles a mini-trial at the outset of the lawsuit.

The judge's decision whether to grant the injunction will be widely viewed as a barometer of the ultimate merits of the case. Consequently, many cases settle once the judge grants or denies the injunction requested, if not before. In the meantime, the parties – and the suing party in particular



– will have incurred substantial legal bills in a short amount of time. (In one case I defended, the opponent racked up about \$60,000 in fees in the one month between the filing and settling the case).

With the judge's decision on the injunction having effectively resolved the merits of the claim, the parties are left to fight over who should foot the bill for having brought the matter to court.

Obviously, the judge's decision on the injunction will either strengthen or weaken the suing party's claim that you acted maliciously. Either way, both sides will need to consider carefully how much more legal expense they are willing to incur solely to fight over who should pay the fees to date.

If the case appears ready for settlement even before the judge rules on the request for an injunction, you still may face a fight over attorney fees. I have seen plaintiffs with no real damages become all the more insistent that they recover attorney fees as a matter of principle to ensure that the perceived misconduct does not go unpunished.

If you are defending, do you buckle and pay some portion of the other side's fees, or do you hold ground as a matter of principle? If you hold fast, you may end up paying far more money in the long run, albeit to your own attorney rather than to your competitor's. As a colleague once told me, "It is perfectly appropriate to stand on principle, once you have acknowledged that principle is expensive."

Avoiding Paying Your Opponent's Attorneys' Fees.

How do you avoid the distasteful dilemma of paying some portion of a competitor's attorney fees? While no answer is fool proof, there are steps you can take to minimize the risk.

Fully assess the risk going in. When interviewing potential employees, have them confirm *in writing* as part of the interview process whether they have obligations under an existing non-compete agreement.

If they answer "no," it will be harder for a competitor to show you acted willfully and maliciously in the hiring process. If the answer is "yes," then you know you face a greater threat of a lawsuit and, consequently, may not want to hire the individual. (One caveat: if you *do* hire the individual notwithstanding his written admission of an existing non-compete, you may *strengthen* the argument that you have acted with malicious motives.)

Avoid trade secrets. If you do hire a competitor's current or former employee, be extremely vigilant in instructing the new employee and all who work with him that you will not condone *any* using or sharing of the competitor's proprietary information and trade secrets. Monitor the situation for compliance. This will make it harder for your competitor to seek fees under the Uniform Trade Secrets Act.

Assess your risks again. If you do find yourself in a lawsuit, make sure your initial assessment of your potential liability includes a proper allowance for attorney fees. It rarely makes sense to hold fast to an unreasonably low settlement position, only to spend far more in defense than what you could have resolved the case for early on.

By their nature, non-compete cases force the parties to spend considerable legal fees early in the process, often before either side has a solid understanding of the damages suffered. Many times, the actual damages a suing competitor is able to prove will be far smaller than the fees incurred.



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Given the attorney fee award provisions under the Uniform Trade Secrets Act, you could find yourself fighting to avoid a fee award against you, even in a case where you have caused no measurable harm to your competitor. Try your best to understand your risks before making the hire. That doesn't mean you won't make the hire if the employee is worth the risk. After all, most 13-year-olds *would* kiss their sister – for the right price.

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