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# Non-Compete Agreements: Avoid Pitfalls From Departing Employees

**Matthew C. Jobe**, General Business, [mjobe@wehwlaw.com](mailto:mjobe@wehwlaw.com)



Matthew C. Jobe

Today's business climate is volatile, competitive, and uncertain. Tough times therefore call for strong measures especially when it

comes to protecting your business secrets, key employees, and overall market share. A well drafted, non-compete agreement (also known as "covenant not to compete") may be the critical factor in protecting your business from former employees and business partners.

Significant resources are usually devoted to training new business partners and key employees. In addition, such individuals are often privy to trade secrets, business processes, and customer information.

Too often, key employees transition from one business to another and partners depart with the idea of starting their own competitive business. To add insult to injury, such individuals often think that a good starting point for their employee and customer base is their former employer. What can be done?

Non-compete agreements are designed primarily to prevent employees (and business partners) from competing against their former employer following the employee's resignation or termination. Employees who are bound by a non-compete agreement are typically limited

from competing against their employer in a certain defined geographic area for some pre-defined period of time.

A well drafted, non-compete agreement can also provide other features which are less known but just as critical. Agreements can be designed with non-solicitation provisions which limit former employees from soliciting customers as well as the employees of the ex-employer for a given period of time. In addition, agreements can also provide for confidentiality clauses which contractually bind former employees for a defined period from disclosing important business information such as marketing strategies, business processes, and customers.

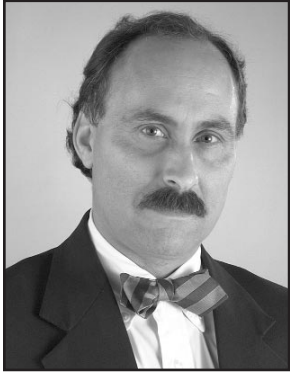
While non-compete agreements can be effective, they are not without controversy within the North Carolina judicial system. An effective non-compete agreement must provide adequate protection to the employer, but not cross the line whereby the Court would fail to uphold the agreement as an unfair restraint against trade or employment. Careful drafting is also required regarding specific geographic limitations and time limitations, and attention must be paid to the circumstances under which such an agreement is presented to the employee.

If you own your own business or are involved in the employment of key personnel, you should assess the potential risk from departing employees and business partners and consider the benefits of a non-compete agreement. For further information, contact Matt Jobe at 884-1000, Extension 248.



# Are You Covered?

**Stanley F. Hammer**, *Litigation*, [shammer@wehwlaw.com](mailto:shammer@wehwlaw.com)



Stanley F. Hammer

Anyone injured in an automobile accident is entitled to collect damages from the at-fault driver for pain and suffering, lost wages and

medical expenses. Unfortunately, we often meet clients who have been very seriously injured by a driver with only the bare minimum insurance coverage (\$30,000) or worse, no insurance. Unless you have underinsured and uninsured motorist coverage you will not be adequately compensated for yours or your family members' serious injuries. To protect against this all too common situation, you should closely examine

your automobile liability policy and make certain that both your "Underinsured Motorist" and "Uninsured Motorist" coverages are adequate.

We all purchase automobile liability insurance in the event we are "at fault" and someone is injured by us or a family member. But, when purchasing automobile insurance, it is equally important to ensure that your insurance is adequate to provide coverage in the event the "at-fault" driver has insufficient limits or no insurance coverage. With the rising costs of healthcare, \$100,000 of underinsured motorist coverage is simply inadequate to cover your losses in the event of serious injuries.

Many persons mistakenly believe that their "Umbrella" policies provide coverage in the event they are injured by an uninsured or underinsured driver. However, within the past three years, the North

Carolina appellate courts have specifically held that an "Umbrella" policy may not cover losses resulting from the acts of an underinsured or uninsured driver. In fact, most Umbrella policies issued in this state do not provide underinsured motorist coverage.

We therefore recommend that you review your automobile insurance policy as well as your Umbrella policy to determine how, in your situation, you can best increase your underinsured and uninsured motorist coverage. The cost of this coverage is slight when the benefits are considered. We strongly suggest you speak with your insurance agent about increasing your policy limits.

Please contact Stanley Hammer at 884-1000, Extension 233 for answers to your insurance or personal injury questions.



# Oral Wills: Virtually Worthless

**William E. Wheeler**, *Litigation*, [bwheeler@wehwlaw.com](mailto:bwheeler@wehwlaw.com)



William E. Wheeler

North Carolina General Statute 31-3.5 authorizes a person to dispose of his personal property by oral will. Real estate

may not be devised by oral will in North Carolina. A recent case in the North Carolina Court of Appeals approved the validity of an oral will provided it is made pursuant to the strict requirements of North Carolina statutory law. In the Matter of the Will of Krantz, 135 N.C. App.354, 520 S.E.2d 96 (1999).

Oral wills have been allowed in North Carolina since before there was either a United States or a North Carolina. Until amended in 1953, the North Carolina statute authorizing oral wills was a nearly identical copy of a statute enacted by Parliament in 1676 when Charles II was King of England. Certain additional

requirements were added by the North Carolina Legislature in 1953, but for the most part, the basic provisions of the oral will statute remain as originally enacted by the English Parliament in the 17th century.

The basic requirements for a valid oral will are that it be dictated to two competent witnesses, simultaneously present, while the testator, i.e. the person making the oral will, has the specific intent to make a will and while he/she is in either his/her last illness or in imminent peril of death and further that he/she not survive that last illness or imminent peril of death. Additional procedural requirements are imposed by statute for making and filing a written memorandum of the contents of the oral will by the witnesses thereto and public notice published in a local newspaper, among other requirements.

It should come as no surprise that oral wills are an oddity to be avoided rather than a customary practice in which to engage. To paraphrase Abraham Lincoln, oral wills are little known, nor long

remembered. Before the Krantz case, the most recently reported case of an oral will in the North Carolina appellate courts was in 1912. All together, less than a dozen oral will cases have found their way into the reported cases in North Carolina since it became a state. Many states do not allow oral wills for fear of fraud, and those that do, don't encourage them for the same reason.

The kindest thing a lawyer or relative can say to a person contemplating disposition of his earthly possessions by oral will is: "Don't do it; see a lawyer!"

Competent counsel can guide individuals and families through the legal labyrinth of law of wills and probate far more easily and inexpensively than the know-it-all neighbor or the TV huckster hawkling "will-kits." It should not be forgotten that the person who sets out to be his own lawyer usually has a fool for a client.

For further information regarding the validity of a will, please contact Bill Wheeler at 884-1000, Extension 232.



# E-commerce Today: What's Legal?

**Christopher M. Kroger**, General Business, [ckroger@wehwlaw.com](mailto:ckroger@wehwlaw.com)



Christopher M. Kroger

Over the last few years, there have been several important laws implemented by the Federal government and the State of North Carolina which recognize that technology is changing the way we do business. The purpose of the new legislation is to encourage e-commerce, thereby permitting businesses to operate with greater speed, efficiency, and economy.

For instance, The Uniform Electronic Transactions Act (UETA), which became effective in North Carolina on October 1, 2000, provides that a contract, record or signature "may not be denied legal effect or enforceability solely because it is in electronic form." N.C.G.S. – 66-317. However, for electronic signatures and records to be enforceable, the parties to the transaction must agree to their use and the records must be able to be maintained and reproduced accurately. UETA defines an electronic signature as any "electronic sound, symbol, or process attached to, or logically associated with, a record and executed or adopted by a person with the intent

to sign the record." In July 2001, UETA was amended to extend its potential applicability to consumer transactions, except for specifically excluded transactions such as notices of default or notices of termination of insurance coverage. However, the consumer's consent must be obtained prior to conduction of the transaction by electronic means and consent will be found only if certain conditions set forth in the statute are satisfied.

UETA is a uniform act that has been adopted by the majority of the states in some form or another. Also, there are some statutory exceptions to UETA's coverage, including a transaction governed by the law governing the creation and execution of wills, codicils, or testamentary trusts. N.C.G.S. – 66-313.

Like UETA, The Electronic Signatures in Global and National Commerce Act, commonly referred to as E-Sign, became effective October 1, 2000. E-Sign also gives the electronic medium the same effect as paper. The federal law is similar in many aspects to UETA but permits UETA to preempt the effect of the federal law if the subject state chooses to do so.

In a nutshell, the federal and North Carolina state law, subject to limited exceptions, provide that:

- where a signature is required by law, an electronic signature will satisfy the law;
- where the law requires a written record, an electronic record will satisfy the law;
- no record and no signature will be denied legal effect solely because it is in electronic form.

Finally, when transacting business electronically, you should ask yourself three fundamental questions:

1) Is the transaction legal? – As stated above, the limited exceptions, both federal and North Carolina state law make it permissible to enter into a contract or transaction by means of electronic communications and records. However, care must be taken to obtain the agreement of all parties to the use of electronic communications and records. Also, if one of the parties is not located in North Carolina, then the laws of the other state should also be considered.

2) Can the message be trusted? Recipients of electronic messages must be able to rely upon the messages received, so that they can act upon the messages promptly and automatically. In order to do this, the message and the signature of the sender must be considered to be foolproof. To define the characteristics of a secure or trustworthy electronic signature, we must look to the laws for guidance.

3) What rules apply? While the terms of the contract are determined by the substantive law applicable to it, the rules of conduct to be employed in specific situations increase, the body of law surrounding it will most likely also increase.

Should you like to discuss these questions or any other issues pertaining to electronic commerce, you can send me, Chris Kroger, an electronic message at [ckroger@wehwlaw.com](mailto:ckroger@wehwlaw.com). Or call me at 884-1000, Extension 249.



## Legislative Update: Claims of Lien

Effective January 1, 2002, the clerk of superior court is prohibited from recording a claim of lien, e.g. mechanic's lien, unless the document presented for filing contains all the

information required under the statute authorizing the lien. Additionally, it is now a criminal offense to file an unauthorized statutory claim of lien. If you have any questions regarding

mechanic's or materialmen liens, please contact Rick Sawyer or Marc Tyrey at 884-4444.



# The Firm Speaks Out

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In addition to providing sound counsel and representation for our clients regarding their varied legal needs, members of our firm routinely teach classes at area law schools and present continuing legal education seminars to other lawyers. For example **John Bryson** and **Stanley Hammer** recently presented a criminal law practice seminar at Wake Forest University School of Law. In addition, Bryson also lectured at a general practice seminar in November.

In addition to serving this year as President of the N.C. Chapter of the American Academy of Matrimonial Lawyers, **Doyle Early** presented a lecture at the N.C. Bar Foundation's "Intensive Family Law Seminar" this past November. Early is also scheduled to present another lecture titled "Divisible Property: Active and Passive

Appreciation" later this month. The Family Law Forum recently published an article written by Early titled "Consideration of Built-in Taxes and Other Tax Consequences in Equitable Distribution."

Other members of the firm have presented seminars and lectures on estate planning, trial techniques, employment law issues, collections, bankruptcy and various business and real estate topics to both other lawyers and various civic groups throughout the past year. Please let us know if we can assist you, or a group with which you are associated, by providing a speaker on a relevant legal topic. For further assistance, please contact Jim Hundley at 884-4444.



# Don't Forget!

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- Prepare and file your Annual Report each year with your tax return.
- Prepare minutes each year for your annual meeting of shareholders and directors.
- Keep your Registered Office and Registered Agent information current with the North Carolina Secretary of State.



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For assistance with all of your business and corporate legal needs, please call one of our business attorneys at 884-4444:

David B. Ashcraft • William P. Harris  
• Charles A. Alt • Christopher M. Kroger • Matthew C. Jobe

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*In Brief* is published quarterly by Wyatt Early Harris Wheeler LLP. The purpose of this newsletter is to provide general information about legal developments. As the information presented is not a comprehensive treatment of the subject matters covered, readers are encouraged to seek specific legal advice before taking any action.

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