

TO DITCH OR NOT TO DITCH

General Information

In an initial interview session, Dale Doran conveyed the following information to his/her prospective attorney:

Dale Doran is a top salesperson at Design Display, Inc. a small company that designs and constructs museums and trade exhibition displays. When he was hired, Dale signed a non-compete agreement prohibiting him from soliciting Design Display customers or competing for new business within a 100 mile radius for two years after leaving voluntarily or termination for cause. Design Display has been financially troubled since the recession. Commissions have dropped dramatically. Dale believes the company is unlikely to survive. Dale began talking with a friend, the Sales VP at Upscale Display, a similar company catering only to the "high end." They have been meeting for breakfast brainstorming about the challenges of more expensive installations. Dale confided with the Upscale VP regarding Design Display's financial troubles. Last week, Upscale offered Dale a job at 40% commission (Design Display pays 30%).

Dale wants to go now, while the Upscale job is open. He thinks it would be unfair to enforce the non-compete. Dale never trusted the way his bonuses were awarded (when they had profits and bonuses). Also, when Design Display's CEO (also the founder and majority shareholder) gets leads on potential clients, he diverts them all to his designer daughter. Dale gets the "long shots." Dale attributes the business's financial troubles to the CEO's waste and poor judgment.

After the Initial Interview

Dale decided to retain the attorney, signed an engagement letter, and provided the documentation the attorney requested. This included a copy of his employment agreement containing the non-compete provision, and reference to an award of 5% of the stock in the company, after 5 years of employment. The non-compete provision applies only if Dale voluntarily terminates his employment, NOT if he is terminated by the company, unless the termination is for fraud or a criminal act. The agreement states that it will be automatically renewed from year to year, unless terminated in writing by either party. It specifically states that the non-competition obligation continues for the full two years after contract termination. The first paragraphs of the agreement state that Dale is to be employed as a commission salesperson, earning 30% of the gross sales generated, after deduction of his direct expenses. Dale is to be paid a semi-monthly advance on commissions, based upon a calculation of 80% of his previous year's totals, allocated over 26 pay periods. The difference between his advance and the commissions earned is to be paid quarterly, with final adjustments after the end of the calendar year. It states that Dale is to use his best efforts to sell the company's product and services and that the company is to provide administrative and business support for sales efforts.

In a subsequent meeting with the attorney, Dale confirmed that he received 5% of the company stock, but he knows it has little value. He has never known the company to have a shareholder's

meeting. No profits have been distributed for the past 5 years. He suspects that the CEO and his daughter sometimes use company funds for themselves. When the company's parking lot was paved, Dale believes the paving company moved on to the CEO's and daughter's home driveways, on the company tab. Dale does not know if more of this sort of thing has gone on.

Dale told his attorney that during the recession, the company decided to reduce the salary draws to 60% instead of 80% of the previous year's totals, anticipating lower revenues. He also detailed several instances in which he had identified a business lead, but the company's president steered the customer to his daughter. Within the past year, the company's president decided that Dale should split his commissions on two significant accounts with another sales person who claimed that she had helped to originate and service the accounts. Since then, they've started nickel and diming him on expenses, seeking to deduct certain administrative costs from his gross - costs they have covered in the past.

Dale has explained that while he wants to leave Design Display, he has to be able to work. He believes that Design Display has not lived up to its end of the bargain. At this point, he services more than 50 loyal customer accounts, many of them for a decade. While perhaps half of the accounts are within the 100 mile radius, others are all over the country. He feels responsible to his customers and believes they are entitled to quality service and product. He is confident that many of his customers would follow him to Upscale Display, if that were possible. Dale is angry and frustrated with the people at Design Display.

Dale's spouse is a marketing manager at a pharmaceutical company and earns 110,000 per year. Dale's earnings were \$200,000 per year at peak, but have been in the \$100,000 - \$125,000 range since the recession. They have three children, between the ages of 8 and 15. While they could manage on the spouse's salary, money would be tight. They would be fine if Dale could earn \$90,000 - \$100,000 or close to that. They carry a substantial mortgage; the three children are in private school. Dale is 48 years old.

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Instructions for Dale Doran (1)

Since you last met with your attorney, the situation at Design Display has deteriorated dramatically. You suspect that the CEO is heading for a nervous breakdown. He is paranoid, angry, bitter. He makes shortsighted decisions, such as ordering cuts in marketing expenses and charging customers for administrative overhead. You have lost one customer over this policy.

The CEO has made it increasingly unpleasant for you at work. He has declared that no one will get more than their salary until things turn around, no matter what their gross revenues. He insisted that you pay for the cost of overtime support for an upcoming presentation. He stops by your desk and hurls insults, saying you're "sitting on your duff" or "too lazy to pound the pavement." He has commented in sales staff meetings that "Dale is the anti-role model...an old dog with old customers and no new tricks." He has threatened to "redistribute" your customers among the rest of the sales staff, to "incentivize" you to bring in new accounts, even if it means cold-calling. There is no love lost between you and the rest of the sales staff (including the CEO's daughter), all of whom are newer and jealous of your higher customer and revenue base.

Late one afternoon, after the CEO walked by your desk and yelled: "You're wearing a hole in your chair." You followed him to his office and broached the idea of your leaving. "Maybe I should just go somewhere else, if you are so displeased with me." The CEO began to yell: "You can go all right but you're not sucking the company's blood out with you. You'd better not lay a hand or a phone call on the company's customers. You're stuck here and you can go down with us, or you can sit out on the sidelines."

You realize that the CEO is afraid of exactly what you'd like to do: leave and take your customers with you. He is afraid that will be the end of his business. He is never going to say yes voluntarily, not unless you have some leverage.

You are indeed loyal to your old customers. You feel obligated to spend much of your time at Design Display facilitating their project work, in order to retain their business. However you are completely confident of your ability to sell to entirely new customers, particularly if you were selling Upscale Display's products and services. You would anticipate a lag in commission revenues, as it would take at least 3 years to replicate your client base. But, you believe you could generate at least \$100,000 in commissions in your second year at Upscale, on new customers and perhaps \$50,000 or more in the first year. Your total commissions would be much higher with some of your Design Display customers.

Design Display is the bad guy here. You have been treated terribly. If it gets to court, you are sure you could convince a judge or jury of that and that they wouldn't enforce the non compete because it is so unfair.

If you have to, you and your wife could pay the attorneys' fees needed for legal action here.