

What Happens When You Cannot Tell Apples From Oranges? The Impact of Murky Definitions on Trade Secrets and Noncompetition Agreements

By Daniel D. Quick

Introduction

It has been 18 years since the Michigan legislature adopted the Uniform Trade Secrets Act, MCL 445.1901 et seq ("MUTSA"). Before the adoption of MUTSA, Michigan courts looked to the common law, as reflected in the Restatement and Michigan precedent, to define trade secrets and to distinguish information that may be protected from misuse, whether under an agreement or through a tort action, from "general knowledge" that is owned by an employee and is his or her property.

We are also approaching the 31st anniversary of MCL 445.774a, part of the Michigan Antitrust Reform Act (MARA), MCL 445.771 et seq., which clarified that noncompetition agreements entered into after March 29, 1985, are legal under certain circumstances. Since at least 1984, the law in Michigan has distinguished noncompetition agreements that seek to protect an employer's legitimate business interests from those that would unfairly impose on an employee's "general knowledge and skills."

The line between trade secrets, confidential information, legitimate business interests, and general knowledge and skills is of critical import to both of these areas of the law. Beyond the academic issue, they are also vitally important questions, on one hand, to businesses that seek certainty in their business dealings with employees and other recipients of (what they believe to be) confidential information, and, on the other hand, employees and other "recipients" of such information, who may find their rights to employment in their chosen field or to compete unexpectedly eliminated, limited, or restrained.

The reality, however, is that the line between these various legal categories is any-

thing but well-defined. This has been recognized throughout the country,¹ and the elusiveness of clear definitional boundaries has led courts and commentators to opine that each case turns on its own facts.² What is not often recognized is that the failure to establish bright lines and a default to a case-by-case fact-bound inquiry itself has a significant effect on the handling of these cases in the judicial system and on both the businesses and employees who are subject to this ill-defined area of the law.

This article will survey Michigan court opinions that have sought to define these overlapping legal categories and to review corresponding efforts outside of Michigan. This article will also raise questions about how the law is being applied and what its true impacts are on those subject to it.

The Genesis of Michigan's Definitions

The Michigan Supreme Court began taking up these issues in its infancy. As the court first struggled with the rights that existed at common law, its exploration into the roots of certain rights also served to provide early definitions for various doctrines.

In 1875, the Supreme Court was faced with the validity of a noncompetition agreement made as part of the sale of a business.³ In upholding the agreement, the court framed some of the objections to validity.

It is said, however, that the public is a third party in such cases, and that the public is concerned to prevent such contracts, because:

1. They tend to prevent competition, which the public interest favors; and
2. They deprive the state of the services of a citizen by binding him to idleness or emigration.⁴

Parsing largely English opinions, the Supreme Court upheld the covenant under a basic theory of respect for contract: "And it may well be asked, who in general are the best judges of these circumstances, the parties concerned, who have an interest in making them the subject of their contracts, or the courts, who can obtain of the circumstances only such partial and unsatisfactory views as conflicting and imperfect evidence can give them?"⁴

Later, it was recognized that the ability to impose restrictions upon employees arose both out of contract (whether express or implied) or out of a duty of loyalty.⁵ Both of these strands of thought can be seen in early Michigan jurisprudence in the trade secrets context.⁶

Here processes and machinery have been invented which the owners believe would be of great value to them if they could be used upon a large scale. To use them upon a large scale required the employment of a number of persons, to some of whom some of the secrets of the business and the machinery must be disclosed. If these secrets were disclosed to others, who might use them to establish a business of like character, they would cease to be valuable to the owner. Is there anything unreasonable in enforcing an agreement that such secrets shall not be disclosed by the employé? It has been repeatedly held that contracts for the exclusive use of a secret art are not in restraint of trade, for the public has no right to the secret. See *Taylor v. Blanchard*, 13 Allen, 372, and cases cited; *Cloth Co. v. Lonsont*, L. R. 9 Eq. 345. We cannot see how it can be against public interest to allow an employer to make such conditions of employment with his employés as will give him the fullest protection to his property right in his process or invention, and at the same time enable him to employ a great many employés in its production. To enable one to do this would be a benefit to the public in many ways. It would secure employment to more persons than would otherwise be employed, and a larger output would be made of a useful article. The evidence discloses that it does not require a man of special skill to do the work done by defendant when in the

employ of the predecessors in business of the complainants. To restrain him from making use of what he has not discovered is not an injustice to him, and does not abridge his right to work along those lines which would not be harmful to those to whom he has sustained a position of confidence. It is to the advantage of both parties that such a contract should be allowed. By means of it the defendant secured employment which he could not have secured without it, and at the same time his employers were secured against competition which might be ruinous.⁷

But outside of the trade secret misappropriation context, a statute⁸ prohibiting restraints of trade blocked general enforcement of noncompetition agreements or injunctions accomplishing the same thing. In *Grand Union Tea Co v Doidds*⁹, the court upheld an injunction against a former employee's use of a misappropriated customer list, but, based on the statute, struck down the broader portion of the trial court's order that had restrained "defendant from soliciting any one to purchase his wares, notwithstanding he may remember that they were his patrons while he was employed by the complainant."¹⁰ In upholding that statute against constitutional challenge, the Supreme Court presaged the eventual evolution of Michigan law:

Originally, at the common law, all contracts in restraint of trade were held to be invalid as against public policy. But considerations of public policy vary with the times and the progress of civilization, and contracts in restraint of trade have been very much limited by decisions of the courts and by statutes, and 'A doctrine has been introduced in some of the later cases, both English and American, which may be called the doctrine of the reasonableness of the restraint.' 9 Cyc. 529. The history of the doctrine indicates that it has been, from the beginning, a proper subject for legislative consideration, and only in case of a clear violation of constitutional rights ought the courts to interfere with legislative discretion.¹¹

As for the definition of trade secrets, it evolved slowly and, arguably, consistently with the rate of actual "secrets" utilized in business. Trade secrets were originally defined in contradistinction to patents: "An inventor, desiring to secure to himself the

The line between trade secrets, confidential information, legitimate business interests, and general knowledge and skills is of critical import to both of these areas of the law.

As for the definition of trade secrets, it evolved slowly and, arguably, consistently with the rate of actual “secrets” utilized in business.

fruits of his invention, has two courses open to him: First, to patent the same, thus securing an absolute monopoly for a limited time; or, second, to keep his invention a secret, by which means he gets an imperfect monopoly [sic] for an indefinite period.”¹¹ But the definition of a trade secret remained very general: “A secret is something known only to one, or a few, and kept from others; anything hidden from general knowledge or observation; something not to be told.”¹² The law moved slowly from there. In *Glucol Mfg Co v Schulist*, the court provided this definition, which also distinguished more normal course “confidential” information:

The term “trade secret,” as usually understood, means a secret formula or process not patented, but known only to certain individuals using it in compounding some article of trade having a commercial value, and does not denote the mere privacy with which an ordinary commercial business is carried on.

It is a “plan or process, tool, mechanism, or compound known only to its owner and those of his employees to whom it is necessary to confide it.”¹³

In *Manos v Melton*, the Michigan Supreme Court set forth further guidelines:

[T]his Court has also recognized that the law does not provide protection for knowledge which is common property in the trade, or for an idea which is well-known or easily ascertainable.¹⁴

Eventually, the Restatement (First) of Torts, §757 gained wide recognition in Michigan.¹⁵ First published in 1939, the Restatement tracked the increase in so-called “confidential” business information and drew a relatively bright line between “trade secrets” and “confidential information.” On one hand, there were trade secrets:

It differs from other secret information in a business (see § 759) in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the

production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.¹⁶

On the other hand, the Restatement also provided in §759 that “[o]ne who, for the purpose of advancing a rival business interest, procures by improper means information about another’s business is liable to the other for the harm caused by his possession, disclosure or use of the information.”

Examples of information, other than trade secrets, included in this Section are: the state of one’s accounts, the amount of his bid for a contract, his sources of supply, his plans for expansion or retrenchment, and the like.

There are no limitations as to the type of information included except that it relate to matters in his business. Generally, however, if the improper discovery of the information is to cause harm, the information must be of a secret or confidential character. Thus, if one freely gives full information about the state of his accounts to trade associations, credit agencies or others who request it, the possession, disclosure or use of the same information by one who procured it through improper means can hardly cause him harm. On the other hand, if one has a closely guarded trade secret, another’s discovery of it may reduce its sale value even before any other disclosure or use is made of the secret.¹⁷

The evolution—in just a few short decades—from defining “trade secrets” in only the most general terms to more elaborate definitions with a hierarchy of information and concomitant protections reflects and tracks the industrial revolution and the increased role of ideas and information in the economy. However, the reality remained that trade secret cases were fairly rare; the Supreme Court addressed the issue only four times between 1939 and 1984 (the plaintiff lost each time).¹⁸ And given that Michigan law prohibited noncompetition agreements, it was largely unnecessary for the courts to work to

better delineate “confidential information” from “trade secrets.”

From *Folmer/Hayes-Albion* to MUTSA

The Supreme Court’s opinions in *Folmer* and *Hayes-Albion*, delivered on December 28, 1984, summarized, modernized, and advanced Michigan law on these topics. At the same time, the loose definitions employed in these opinions set the table for much confusion moving forward, especially once noncompetes became legal and many hitherto “regular” jobs became drenched in information and data.

In *Hayes-Albion*, the Supreme Court addressed the definition of a “trade secret” and, while citing to the Restatement, immediately departed from it. Noting that the Restatement “provides useful guidelines that have been widely adopted,” the court also stated that earlier “guidelines” from the court remained “valid, and may be relied upon in appropriate circumstances.” The court went on to state (with its own emphasis) that, “If a secret process is involved, a plaintiff is entitled to the protection provided trade secrets....”²¹ This clearly corresponds to the Restatement’s distinction between a trade secret involving a process as opposed to “information as to single or ephemeral events.” Yet, the court went on to hold, in the very same paragraph, that “[s]pecific information regarding resolution of the problems of particular customers is a trade secret,” which does not sound very much like a “process” at all.

At the same time, in *Folmer*, the court established broad principles for protection of confidential information not quite amounting to a trade secret. The court’s key holding is contained in two sentences supported by five footnotes, but most of those citations are to authorities outside of Michigan, and it is not hyperbole to note that this formulation of Michigan law was imported almost *in toto*:

While an employee is entitled to the unrestricted use of general information acquired during the course of his employment or information generally known in the trade or readily ascertainable, confidential information, including information regarding customers, constitutes property of the employer and may be protected by contract. Even in the absence of a contract, an employee has a duty not to use or disclose confidential information

acquired in the course of his employment. Such information is often treated as a “trade secret”.²²

Shortly on the heels of these opinions, the legislature modified the law permitting reasonable noncompetition agreements, and that law was applied consistent with the precepts espoused in *Folmer*. While that legislative change resulted in an explosion in the use and litigation of noncompetes, the following 30 years have not brought any greater clarity to the definitional issues. *Folmer* set broad poles: on one hand, “general information acquired during the course of his employment or information generally known in the trade or readily ascertainable” is fair game, although no guidance is given on how to define terms like “general information.” At the same time, confidential information became defined by its value rather than by its inherent qualities: “An employee who possesses confidential information regarding a client is in a position to exploit that information for the purpose of obtaining the patronage of the client after leaving his employer’s service.”²³

In a world in which ideas and information more and more saturated the work place, increasingly the employee was a repository of some of that information in the course of his or her normal work day, and, as a result, employers perceived their employees, even lower level ones, as essentially vessels of company information, forever ready to walk out the door and threaten the business. The balance irrevocably had shifted from a workplace dominated by labor to a workplace dominated by information. While the demarcation between trade secrets and confidential information became less relevant (and less distinct, as discussed below), the line between confidential information and general knowledge and skills should have become more important.

The breadth of what the court did in *Folmer* deserves appreciation. It took an incredibly broad swath of information and authorized companies to sue employees to prohibit their use of it following their employment or to enforce noncompetition agreements. The combination of the breadth of *Folmer* and the modification of the Michigan statute exponentially expanded the ability of employers to limit what their ex-employees did in the marketplace. At the same time, the fuzzy definitions inevitably led to fact-bound inquiries, with the employer claiming nearly anything of value in the business constituted protect-

The combination of the breadth of *Folmer* and the modification of the Michigan statute exponentially expanded the ability of employers to limit what their ex-employees did in the marketplace.

The main issue is the ascendancy of “information” as saturating the employment environment and thus giving rise to constant claims of ownership by the employer.

able information while the employee argued just the opposite. If one then factors in the well-documented procedural aspects of the judicial process—namely, its expense—the vicissitudes in Michigan law would appear, at first blush at least, to favor the employer/business.

Various developments since 1984 have not much moved the needle in terms of greater clarity. MUTSA was adopted in 1998 and defined trade secrets as:

“Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following:

(i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.²¹

Noticeably missing from this formulation was the original line drawn in the Restatement between a “process” and “single” information. Courts in other UTSA states have held that the UTSA purposively altered this restrictive requirement.²²

Another noticeable aspect of MUTSA is section 7, which purports to displace any conflicting common law causes of action. The majority of jurisdictions have held that, therefore, there is no common law protection provided to “confidential information” not rising to the level of a trade secret (although confidential information may be protected by contract).²³ While one federal court opinion applying Michigan law ruled this way,²⁴ other recent decisions from both federal district courts in Michigan indicate that this rationale may not be followed.²⁵

The latest effort to draw these lines is the Restatement (Third) of Unfair Competition (RUC), first published in 1995, and recently adopted by the Sixth Circuit Court of Appeals (albeit in a case applying Texas law, but nevertheless telling, perhaps, of future consideration in Michigan cases as well).²⁶ The RUC purports to define trade secrets in line with the UTSA²⁷ and recognizes the abandonment of the “continuous use” requirement of the prior Restatement formulation, but notes that Restatement (Second)

of Agency § 396 “protects both trade secrets and ‘other similar confidential matters’ from unauthorized use or disclosure following the termination of an agency relationship.”²⁸ The RUC continues the fact-bound paradigm for distinguishing trade secrets from general skills and knowledge: “Whether particular information is properly regarded as a trade secret of the former employer or as part of the general skill, knowledge, training, and experience of the former employee depends on the facts and circumstances of the particular case.”²⁹

This standard was applied by the Sixth Circuit to three sets of information taken by a sales employee to his new employer that was also a competitor: (1) an account-by-account breakdown of his sales at the former employer; (2) 46 orders made on behalf of his former employer but then converted to his new employer; and (3) “his knowledge of his former customers’ prescribing habits, schedules, and contact information” to introduce new employer’s representative to these customers. For this last category, the court found it probative that the employee admitted it could take six months for a sales person “to acquire his level of detailed knowledge about a surgeon.” For all three categories, the Court of Appeals reversed the trial court, which had conducted a bench trial, and had entered judgment for plaintiff. None of these three categories of information is crystal clear; for example, the first and third categories are arguably equally available from the actual customer and thus not truly confidential information. Yet, it took a case to go to a full trial, and through an appeal, for the courts to get the facts into the right legal box. And the underlying facts demonstrate that while employees are regularly required to sign broad confidentiality agreements without any real ability to bargain over the language, the courts will heavily defer to the contract rather than make hard calls as to what is, in fact, confidential information.

Do Definitions Matter?

The definitional issue is of interest on various levels. The main issue is the ascendancy of “information” as saturating the employment environment and thus giving rise to constant claims of ownership by the employer. Clearly it is easier to distinguish between the general skills and knowledge of a blacksmith and a discrete formula for an alloy than it is to distinguish between the general skills and

knowledge of an engineer who has spent her entire career in the design of transmissions, from information belonging to her employer—in such a case, given the abundance of inchoate ideas and information, one cannot readily distinguish between “general skills” and “confidential information.”¹¹ Thus, while courts initially showed some hesitation to recognize claims by employers to information that cannot be easily segregated from the general skill and knowledge of former employees,¹² the explosion in “information” in the workplace has shifted the balance toward the employer. The fact that many jobs have become more specialized over time in our technology-focused culture only exacerbates the problem.

This has led to two results. First, courts have leaned over time to include more and more information under the tent of protectable information. Thus, the amount of information known by our transmission engineer is more and more characterized as property belonging to the employer rather than the general skills of the employee, resulting in a situation where the employee can be easily barred under a noncompete agreement from pursuing her life-long professional career for a competitor. Second, even in the absence of a noncompete, employers use the court system to sue first and prove misappropriation later, and, in the process, shift the de facto burden to the employee, who must engage in expensive and prolonged litigation without an easy path to early resolution or a narrowing of the issues.

Another issue implicated by this area of the law is the role of the court as policy maker. Although our Supreme Court often speaks against perceived judicial activism,¹³ the evolution of Michigan law discussed briefly herein makes clear that how courts handle these issues—both in terms of establishing substantive principles but equally in terms of the process for adjudicating claims—can make a tremendous difference in the shifting of rights and burdens among constituent groups. And clearly there is room for debate as to whether some of the basic principles that allow for relatively easy lawsuits and enforcement of noncompetes continue to be good policy. For example,

It has been contended...that the Silicon Valley phenomenon of high labor mobility and rapid diffusion of new technology occurred in California, rather than elsewhere, for two reasons.

First, California’s restrictive law of trade secrets was not enforced as it is written. Second, California’s flat prohibition on post-employment restrictive covenants was enforced exactly as written.¹⁴

This broad question—do non-competes and loose definitions of confidential information help or hurt our overall economy?—is not one easily answered. Recent media attention to noncompetes being used for sandwich makers¹⁵ has led some to recognize that the agreements may be over-used, and a recent study suggested that noncompetes hurt Michigan’s economy.¹⁶ While the courts do not make (most of) the law in this area given statutes, they do greatly dictate how the balance swings between employers and employees in these cases, and they have room to define undefined terms since judges are not impervious to recognizing the forces going on around them in the economy.

It is beyond the scope of this article to deliver a panacea for these issues. But recognition of the facts on the ground must reckon with the fact that the combined effect of indefinite rules and an expensive judicial process greatly favor those with the means to engage in time-consuming litigation. Such a process is clearly not only a detriment to the traditional employee, who is disadvantaged in such a contest, but also business. Businesses seek and desire certainty in the rules of commerce, and the law itself benefits from clarity. As noted by Justice Scalia:

[A]nother obvious advantage of establishing as soon as possible [clear and definite rules]: predictability. Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes. [...] As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean. Predictability, or as Llewellyn put it, “reckonability,” is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all.¹⁷

This lack of definition and recognition of expense has led some courts to consider bifurcating cases in various ways, including re-

Another issue implicated by this area of the law is the role of the court as policy maker.

quirements that plaintiff first specify in some detail its purportedly misappropriated trade secrets.

As noted by another court, "Trade secret cases present unique and difficult problems with respect to the timing and scope of discovery." Much of this difficulty arises from the competing policies found in trade secret cases. To deal with these difficulties courts have adopted a number of different approaches. For example, some courts have bifurcated discovery so that discovery of non-confidential information takes place first, followed by the discovery of the confidential information that forms the basis for a plaintiff's trade secret claim. In contrast, other courts have ordered simultaneous discovery of trade secret information. What is apparent from the various approaches is the fact that what may be the proper approach in one case is not the proper approach in another. "Unfortunately, there is no talismanic procedure the Court may apply in order to obtain the best result in any given case."⁴⁰

The practical problem remains that taking up these issues, and determining the correct approach on a case-by-case basis, requires significant resources of the parties and rolled up sleeves by judges facing significant case administration demands. In this vein, it is possible that, at least in the federal courts, the recent changes to the Federal Rules of Civil Procedure with the focus on "proportionality" of discovery will lead to continued active case management, but that is hardly a complete answer and of no help at all to state courts burdened with (typically) higher case-loads and less staff support. Perhaps brighter lines drawn by the courts, tighter discovery, and early evidentiary hearings, rather than relying on yesteryear's paradigm of letting each case turn on its own facts, would assist the courts and allow all litigants to realize significant benefits.

NOTES

1. See, e.g., *Ingersoll-Rand Co v Clevatta*, 110 NJ 609, 638, 542 A2d 879 (1988).

2. For example, "Whether particular information is properly regarded as a trade secret of the former employer or as part of the general skill, knowledge, training, and experience of the former employee depends on the facts and circumstances of the particular case" Restatement (Third) of Unfair Competition § 42 (1995)

3. *Beal v Chase*, 31 Mich 490 (1875).

4. *Id.* at 521.

5. *Id.* at 522.

6. *Follmer, Rudzewicz & Co, PC v Kosovo*, 420 Mich 394, 404 n6, 362 NW2d 676 (1984).

7. See, e.g., *O & W Thum Co v Tloczynski*, 114 Mich 149, 158, 72 NW 140 (1897).

8. *Id.* at 158.

9. Section 1 of Act No. 329 of the Public Acts of 1905.

10. *Grand Union Tea Co v Dodds*, 164 Mich 50, 128 NW 1090 (1910).

11. *Id.* at 54-5.

12. *Grand Union Tea Co v Lewitsky*, 153 Mich 244, 252-53, 116 NW 1090 (1908).

13. *Dow Chem Co v American Bromine Co*, 210 Mich 262, 288, 177 NW 996 (1920).

14. *Id.* (citation omitted).

15. 239 Mich 70, 75, 214 NW 152, 153 (1927).

16. 358 Mich 500, 508, 100 NW2d 235 (1960), citing *Russell v Wall Wire Prods Co*, 346 Mich 581, 78 NW2d 149 (1956); *Insealator, Inc v Wallace*, 357 Mich 233, 98 NW2d 643 (1959).

17. Although cited as early as 1956 in *Russell v Wall Wire Prods Co*, 346 Mich 581, 585, 78 NW2d 149 (1956), it came into broader use much later, as reflected in *Kubik, Inc v Hull*, 56 Mich App 335, 346, 224 NW2d 80 (1974), and, a decade later, *Hayes-Albion v Kuberski*, 421 Mich 170, 184, 364 NW2d 609 (1984).

18. Restatement (First) of Torts § 757 (1939) (comment b)

19. Restatement (First) of Torts § 759 (1939) (comment b)

20. *Russell, supra; Manos, supra; Insealator, Inc v Wallace, supra; Dutch Cookie Mach Co v Vande Rede*, 289 Mich 272, 286 NW 612 (1939)

21. *Hayes-Albion*, 421 Mich at 184.

22. *Folmer*, 420 Mich at 402-404.

23. *Id.* at 406.

24. MCL 445.1902(d).

25. See *State ex rel Besser v Ohio State Univ*, 89 Ohio St 3d 396, 400-401, 732 N.E.2d 373 (2000) ("The Commissioners on Uniform State Laws who drafted the Uniform Trade Secrets Act, as adopted in Ohio, noted "[t]hat the definition of "trade secret" [in the Uniform Act] contains a reasonable departure from the Restatement of Torts (First) definition which required that a trade secret be "continuously used in one's business." Uniform Trade Secrets Act, Sec. 1, Comment (1990), 14 U.L.A. 437, 439.").

26. Robert C. Denicola, *The New Law of Ideas*, 28 Harv J. L. & Tech 195, 217 (2014).

27. *Bliss Clearing Niagara, Inc v Midwest Brake Bond Co*, 270 F Supp 2d 943 (WD Mich 2003).

28. See *Appalachian Railcar Servs v Boatright Enters*, 602 F Supp 2d 829, 852-854 (WD Mich 2008) (finding that breach of fiduciary duty claims based on the sharing of potentially confidential information are not preempted by MUTSA); *McKesson Med Surgical, Inc v Micro Bio-Medics, Inc*, 266 F Supp 2d 590 (E.D. Mich 2003) (because breach of fiduciary action was based on misappropriation of confidential information, not trade secrets, cause of action not displaced by MUTSA).

29. *Orthofix, Inc v Hunter*, No. 15-3216, 2015 US App LEXIS 20111 at *1 (6th Cir Nov 17, 2015).

30. Restatement (Third) of Unfair Competition § 39 (1995)(comment b) ("principles of trade secret law described in this Restatement are applicable to actions under the Uniform Trade Secrets Act as well as to actions at common law.")

31. *Id.*, comment d. See also RUC §42, comment b. Restatement (Second) of Agency §396 simply pro-

vides that an employee, following employment, “has a duty to the principal not to use or to disclose to third persons, on his own account or on account of others, in competition with the principal or to his injury, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal’s use or acquired by the agent in violation of duty. The agent is entitled to use general information concerning the method of business of the principal and the names of the customers retained in his memory, if not acquired in violation of his duty as agent”; notably, the provision is short on definitions. This provision has been cited with authority several times by Michigan courts. See, e.g., *Follmer*, 420 Mich at 404 n4.

32. RUC §42, comment d.

33. An example from the commentary of the Restatement makes this point well: “Thus the skill with which an iron worker can determine the exact moment for pouring molten iron, and the skill of the glass moulder in handling his tools, although the result of the master’s directions, become part of the personality of the servant which he is entitled to use freely. Likewise the skill which comes from aptitude plus training in selling goods becomes the agent’s to use for himself, unless prevented by his agreement not to do so.” Restatement (Second) of Agency § 396 (1958)(comment c)

34. See, e.g., *AAP Inc v Fleischacker*, 823 F.2d 1199, 1202 (7th Cir Ill 1987).

35. E.g., *Mack v City of Detroit*, 467 Mich 186, 649 NW2d 47 (2002).

36. Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800-1920*, 52 *Hastings L.J.* 441, 447-48 (2001).

37. http://www.huffingtonpost.com/2015/04/10/jimmy-johns-noncompete-agreement_n_7042112.html

38. <http://michiganradio.org/post/non-compete-clauses-contribute-michigan-brain-drain-study-says#stream/0>. See also <http://www.wsj.com/articles/SB10001424127887323446404579011501388418552>.

39. Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 *U Chi L. Rev* 1175, 1179 (1989).

40. *Storagecraft Tech Corp v Symantec Corp*, No. 207 CV 856 CW, 2009 US Dist LEXIS 10608, at *2 (D Utah Feb 11, 2009)(citations omitted), see also *DeRubens v Witten Tech., Inc.*, 244 F.RD 676, 679 (ND Ca 2007)



Daniel D. Quick is a commercial litigation trial attorney with Dickinson Wright PLLC in Troy. He is the co-author of Michigan Business Torts (ICLE) and several articles on trade secrets, non-competes, and shareholder oppression.