

November 2007 - Article Published in Lifestyles Magazine

## **When a Former Employee Becomes a Competitor**

by: Joette S. Doran, J.D.

In this competitive business climate, companies often go to great lengths to protect their customers from the competition. One area of special concern involves former company employees and former company officers who establish a competing business. An active subject of litigation, the state and federal courts have examined what a former employee or officer can legally do to establish their competing business before resignation. In examining this question, the courts first distinguish between the obligations of a former employee and former an officer. In that regard, the law provides that in the absence of a contractual restrictive covenant, the improper taking of a customer list, or fraud, former employees may compete with their former employer and solicit former customers so long as there was no demonstrable business activity by the former employee before the termination of employment. In general, employees may plan, form, and outfit a competing corporation while still working for the employer, but may not commence competition. Corporate officers, however, stand on different footing; they owe a fiduciary duty of loyalty to their corporate employer not to (1) actively exploit their positions within the corporation for their own personal benefit, or (2) hinder the ability of a corporation to continue the business for which it was developed.

In a frequently cited case, an employer filed suit against two former officers who made efforts to start a competing corporation prior to informing their employer of their resignation. The court found against the former officers for breach of fiduciary duty when before their resignation, the former officers solicited other employees to work for them and prepared a business plan that included a potential list of their former employers clients. The former officers also admitted having meetings with the potential clients before their resignation which resulted in the clients entering into contracts with the new company short after their resignation. As such, while employees may plan and form a competing corporation while still employed by their employer, officers may be liable for a breach of their fiduciary duty if they fail to notify the employer that they are forming a competing business while still employed. Prohibited actions include soliciting other employees to work for their competing business while still employed and soliciting business from their employer's customers prior to resignation. Accordingly, any employer or employee is well advised to carefully review all agreements which involve non-compete, non-solicitation and confidentiality and to carefully consider all actions taken before resignation. For further information, please visit our web site at [www.joettedoran.com](http://www.joettedoran.com).

*\*This article is not intended as legal advice. You should consult with an attorney for individual advice regarding your own situation.*

MS. DORAN IS LICENSED IN ILLINOIS, ALL ILLINOIS FEDERAL COURTS AND IS A MEMBER OF THE FEDERAL TRIAL BAR. SHE IS THE PAST CHAIRPERSON OF THE EMPLOYMENT LAW COMMITTEE FOR THE NORTHWEST SUBURBAN BAR ASSOCIATION, A PAST PRESIDENT OF BARRINGTON AREA PROFESSIONAL WOMEN AND A MEMBER OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION..