TRADE SECRETS:
YOU MAY THINK YOU HAVE ONE, BUT THE LAW MAY DISAGREE WITH YOU.

By H. Troy Romero

Many times over the past few decades clients have come to us complaining that someone has "stolen our trade secrets." This seems to becoming, at least for our clients, a more acute problem — perhaps because most trade secrets are now kept in an electronic format that can be "taken" without anyone ever knowing about it. Neither time nor space will allow a comprehensive article on the topic. Rather, this short article is designed to give you some pointers on how to protect your trade secrets (this article will also not delve into what is or is not a trade secret, since that issue alone could take several pages to explore — if you have any specific questions about what does or does not constitute a trade secret, give us a call).

Keep them confidential.
Nothing is more detrimental to a trade secret claim than evidence that the trade secret has been shared with various parties. Clients often justify these disclosures by saying they are business partners, prospects, etc. Regrettably the law does not really care who you disclosed the trade secrets to — it mainly cares about whether the person(s) to whom you disclosed the trade secrets had any obligations of confidentiality or whether they could put them into the public domain. If you give your trade secrets to any third party, with no confidentiality requirements, it is likely that your trade secrets will no longer be considered as such by a court of law.

You can guard against this by having each recipient of trade secrets sign a non-disclosure agreement, confidentiality agreement or some other document that keeps the trade secrets confidential. If you need help with this, let us know.

Use your best efforts to "guard" your trade secrets.
Some companies lose their trade secrets by not taking reasonable steps to protect them from disclosure to the public. When the trade secret is in "hard copy," this is easy to do — keep it in a locked file with limited access. However, the challenge lies when the trade secret is in electronic format or worse yet, available on the internet. If on electronic format, try to have it password protected. If on the internet, put in security procedures to protect it from being viewed by the public. The more steps you take to try to guard your trade secrets, the better off you are at proving they are trade secrets and saving them from falling into the public domain.

When disclosing them, try to get the recipient to acknowledge they are trade secrets.
Oftentimes the party trying to unfairly use your trade secret is someone you gave access to, who claims that the trade secret isn't actually one — it got it from another source and/or they obtained it from the public domain (the most common defenses to a trade secret claim). When you disclose something that you think is a trade secret to someone else, have them sign a document (define it in your non-disclosure agreement if you can) stating that the item(s) is a trade secret, that they have not procured it from another source, and that they will never challenge it as not being a trade secret. If you can get each recipient to sign such an agreement you will go a long way to successfully protecting your trade secrets from disclosure to third parties not of your choosing.

When you see infringement, take immediate action!
When you first learn that someone might have infringed on your trade secrets, take immediate action by putting them on notice of the infringement and demanding that they immediately return the trade secret to you and never do it again. Regrettably if you sleep on your rights, and allow parties to use your trade secrets with your knowledge and without consequence, you will likely lose them. The key in trade secret litigation is to show that the trade secret is "guarded like a hawk" and is "top secret." When the trade secret is out for everyone to see, including you, and you do not do anything to prevent its improper disclosure, it is likely a court will conclude that it really was not a trade secret and/or you have lost your trade secret rights.

We hope these few tips will help you in protecting your trade secrets. If you have any specific trade secret questions or concerns, please give us a call.

MICHAEL WIGGINS JOINS THE FORCE!

When not tending to his full time duties as a shareholder and director of marketing for Romero Park & Wiggins, Michael Wiggins will be volunteering his time as a Reserve Police Officer with the Des Moines, Washington Police Department. On May 12, 2006, Michael was commissioned as a Washington State law enforcement officer following a 5-month academy, which was held every Tuesday and Thursday night from 5 to 10 p.m. and every Saturday from 7 a.m. to 6 p.m. Sworn in as a Patrol Officer with Des Moines, Michael will be volunteering at least 24 hours of his time each month working as a patrol officer and filling in on special assignments as necessary. Commenting on why he opted to undergo such time-consuming and rigorous training, Michael said, "I've always had a strong sense of service and sacrifice for my community and my country, and this seemed like a perfect opportunity to volunteer my time and my talents." When asked what he hopes to accomplish as a reserve officer, he added "if I can keep one person or one family safe from crime, I will consider my volunteer time well spent. The safety and security of my family is one of my biggest priorities, and I am honored to be part of a group of people who work around the clock to make our communities safer for all our families." We wish Michael the best of luck in his new volunteer opportunity. As always, you can to reach Michael regarding your estate planning or real estate needs by calling him at 425-450-5000 or, starting July 1, 2006, by e-mailing him at mwiggins@rpwfirm.com.

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RP&W ROMERO PARK & WIGGINS P.S.

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ROMERO MONTAGUE TO BECOME ROMERO PARK & WIGGINS

We are pleased to announce that as of July 2006, Romero Montague P.S. will officially become Romero Park & Wiggins P.S. This name change reflects our recent additions of Justin Park and Michael Wiggins as shareholders of the firm, both of whom who have been with Romero Montague for over 4 years. For further details about this change, please read the open letter from the firm's managing partner, H. Troy Romero, inserted into this newsletter. Also, please note that the firm's e-mail address has changed consistent with the name change. From now on the firm's e-mail address will be rpwfirm.com instead of romeromontague.com. So, for instance, if you would like to contact Troy Romero by e-mail, you should now use the address tromero@rpwfirm.com. In order to provide our current and future clients with enough time to adjust to the firm's name change, the firm has retained the romeromontague.com address for approximately a year. Within that time, Romero Park & Wiggins attorneys and employees will be able to receive e-mails sent to that old address. We appreciate your patience as we undergo this change, and you can be assured that we will continue to provide the same quality legal services you have come to expect during this change.

JUSTIN PARK ADMITTED TO THE UTAH STATE BAR

In our continuing efforts to provide quality legal services to our existing and future clients outside of Washington, Romero Park & Wiggins is pleased to announce that Justin Park was sworn in as a member of the Utah State Bar by the Honorable Sharon Armstrong on June 14, 2006. When asked to comment on the firm's presence in Utah "We will always be a West Coast firm, but many of our clients have interests in Utah and they need our assistance in representing those interests. Becoming licensed in Utah enables us to expand the services we provide for our clients, regardless of where they may reside." Justin's admission in Utah enables him to practice in all courts in Utah, both state and federal. With this addition, Romero Park & Wiggins is ready to serve its clients needs in Washington, California and Utah. As Michael Wiggins will soon be admitted to the Oregon State Bar, Romero Park & Wiggins looks forward to serving its clients in that state as well. If you would like to speak with Mr. Park about a legal issue or interest you have in Utah, please feel free to contact him at jpark@rpwfirm.com, or call him at (425) 450-5000.

ABOUT THIS NEWSLETTER: This is a publication for clients, prospective clients, and friends of attorneys and staff of Romero Park & Montague P.S. If you have received this Newsletter, you fall into one or more of these categories. Our hope is that you will find this publication both informative and useful. The format is to update you on firm news as well as to provide you with information to help you and/or your business. Please let us know if we have served these purposes. We highly value your feedback. You can reach us at 425-450-5000, info@rpwfirm.com, or www.rpwfirm.com.

TRUSTS: SHOULD YOU HAVE ONE IN YOUR ESTATE PLAN?

By Michael E. Wiggins

Many financial planners and estate planning attorneys are recommending that individuals set up trusts as part of their estate plans. So, as you plan your estate or write your will, you may be asking yourself if the use of a trust would be beneficial for you and you may have a few question in mind such as, what is a trust and what is its purpose? What are the different types of trusts and what are their benefits? Should I establish a trust and which one is best for my particular circumstances? The answers to these questions could have a large impact on you, your family, and your estate, which is why we are going to provide you with a brief overview to get you thinking about what is best for you and your family.

What is a trust and what is its purpose?

"A trust is an agreement under which money or other assets are held and managed by one person for the benefit of another." A trust can provide a way to manage and hold property and can be customized to meet specific objectives. A trust is comprised of three elements: property, a trustee, and beneficiaries, with the trustor or grantor providing the property and creating the trust. Generally, a trust is established to allow a specified individual (trustee) to manage the property on behalf of the trustor's named beneficiaries. The trustee can be an individual, institution, or organization and holds the legal title to the property in the trust, while the beneficiary receives the benefits of the trust, which is usually income.

A trust may hold various types of assets including cash, personal property, or real estate, depending on the trustor's specific intentions and situation. The purpose of setting up a trust may also vary depending on what an individual's objectives are, whether it is to protect their assets, provide for their child's education after their death, or ensure that their money is given to a specified charity upon their death. A trust is an effective way to allow you to control how your money, property, and other assets are administered in the event of your death, achieve other commercial or social goals, and postpone or even avoid certain taxes.

What are the different types of trusts and what are their benefits?

Various types of trusts are available, although they can generally be classified as either a "Living Trust" ("Inter-Vivos Trusts") or "Testamentary Trust", each with their own advantages and purposes.

A Living Trust is set up during the trustor's lifetime and can continue after death. The primary purposes of a living trust are to: (1) avoid probate; (2) avoid losing money from estate taxes; (3) choose a trustee to take care of your estate and financial well-being in the case of your incapacity; and/or (4) make sure your assets are distributed the way you choose among your heirs after death. A Living Trust, like a will, allows you to distribute your assets as you chose, but unlike a will, it can provide you with a vehicle to manage your assets during your life as well. Because the property in a trust is generally not subject to probate, confidentiality of financial matters and asset distribution is maintained. Living Trusts can be used for various reasons, whether it is to protect assets from creditors, provide for a special needs child, avoid taxation of life insurance proceeds, or pass property or assets to children or grandchildren.

A Living Trust can be revocable or irrevocable; a revocable trust can be changeable by the trustor while the irrevocable one remains unchangeable once the trust has been established. A revocable living trust can be effective in protecting certain assets for a specified period of time because it allows the trustor to alter the terms or administration of the trust. It also provides the trustor the freedom to withdraw assets from the trust or make the trust irrevocable at any time. The benefit of a revocable living trust is that the assets are not included in the estate when it is probated, the process by which a court supervises and administers an estate, which can become expensive considering the probate and other fees that accumulate. However, the assets in a revocable living trust are still part of the taxable estate during the life of the trustor. The two benefits of a revocable living trust are that the income is not taxable to the trustor and assets in the trust may not be subject to death tax, but it also does not allow for the flexibility that a revocable living trust does.

A Testamentary Trust is established as part of a will and becomes effective in the event of death. This type of trust is used to distribute or transfer wealth and assets in accordance with the provisions of the trust. This gives the trustor control over the distribution of the estate after death and can be tailored to the Trustor's exact direction as to how the money will be spent. For example, a deceased person can assure that a child is allowed access to money for only certain purposes or at a specified age by including specific trust provisions in her will. The primary purpose of a Testamentary Trust is to reduce estate taxes and provide for a surviving spouse and/or children, although probate fees and estate taxes are still incurred.

Should I establish a trust and which one is best for my particular circumstances?

Trusts, despite common belief, are not only for the wealthy. They are being used by people with limited assets as well. For example, many young parents are utilizing trusts to ensure that their assets are safeguarded for their children if both parents die before the children are at a mature enough age to manage property, money, and other assets. Trusts can be a useful tool in achieving a number of goals and there are various kinds of trusts available to do so. Romero Park & Wiggins P.S. can assist you in deciding which trust would best fit with your individual circumstances. In planning a trust specific to your needs, keep in mind the following:

- Your personal situation
- Your family's situation, children's age, financial obligations, and financial circumstances
- Who your beneficiaries are and their individual needs
- Your objectives in establishing a trust, what the duration would be, and what assets you want to be included
- Your assets and how you want them distributed

Several matters of consequence will need to be taken into consideration as you plan your will and estate. Please contact Romero Park & Wiggins P.S. with any questions and we will be happy to provide you with the proper legal assistance in this area as you plan for your future and the futures of your loved ones.

ELECTRONIC DISCOVERY

By Justin D. Park

With the increasing prevalence of computer technology, it has become rare that any litigated case does not involve the production of electronic files. In some cases, this can be accomplished by simply printing out the necessary files and providing the paper copies. However, as lawyers and litigants become more and more technologically adept, discovery of the actual electronic file, together with its metadata (indicators within the file that show accurate records of critical information, including dates and times of all edits and changes) have become more prevalent.

The problem with discovery of electronic files (or "e-discovery") is that not only do most businesses have a regular schedule under which electronic data is backed up and/or deleted, but it is relatively simple to delete files, and respond to discovery with a "no files exist" response.

The Federal Courts have taken the lead in creating policies about the proper maintenance, storage and deletion of electronic files that may become relevant in litigation. They have also imposed some fairly harsh penalties on parties that have been found to act inappropriately. In reviewing this information, we have come up with a few basic rules that all businesses should keep in mind.

1. Understand the breadth of discovery.

In order to make discovery in lawsuits useful, the Federal Rules of Civil Procedure and most states, have set very broad limits as to what is discoverable. The Federal Rule allows discovery of any item that "appears reasonably calculated to lead to the discovery of admissible evidence."[1] This means that items requested in discovery do not necessarily need to be admissible at trial, nor even precisely applicable to your case. The scope is very broad in order to avoid loopholes in disclosure.

2. Have a policy for maintenance of e-files, and follow it to the letter.

When a party involved in litigation responds to discovery requests by saying "I deleted it," the question is whether or not it was deleted in the normal course of dealing with such material. To be able to adequately answer this question, you must have a standardized way of dealing with electronic files. If you do, and your people have followed it to the letter, then you will have an honest explanation when you use "I deleted it" as a discovery response.

3. Know when to ignore your policy.

The Federal Courts describe this rule as follows: "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."[2] In other words, if you have an idea that litigation is possible, and you proceed to delete relevant or discoverable documents, you run the risk that the Court will punish you. This policy can also work in your favor, however, if you save the favorable documents along with the unfavorable to help you end up with a well-documented case.

Unfortunately, there is no hard and fast rule as to when the "litigation hold" must be put in place. Therefore, we recommend that in any transaction or other event, you maintain your records, including correspondence and e-mail, at least for the duration of the transaction. This rule is not perfect, as the statute of limitations in many matters, especially written contracts, can be as long as six years. But at the least, we recommend you keep all electronic files until you have some assurance that both parties are satisfied with the result and for a healthy time thereafter to be sure litigation is not going to result.

Note that the Courts have specifically exempted from this policy inaccessible backup tapes maintained solely for disaster recovery. Therefore, while you need to save documents, you do not need to suspend your normal backup procedures, as long as some copy is maintained and is available.

4. Saving files is generally a good idea.

While most of the rules seem to be examining the situation where a party has deleted files, the rules also encourage the saving of important files. This is always a good idea, as the party in a lawsuit who has the control over the largest share of information can be in a position of marked superiority, as their version of events will usually be the one borne out by the documents. So rather than see the rules as a burden designed to force you to save unwanted documents, we should all see it as a confirmation that good records maintenance is an important business practice.

As always, we welcome your questions and comments in this area. We would love to meet with you and discuss your records maintenance policies to make certain you are ready to comply with Court Rules in the event of litigation. These Rules are just one more way we see our world changing as a result of technology.

[1] FRCP 26(b)(1).
[2] Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).