

Obligatory Joke

A property manager was taking his pregnant wife to the hospital when, despite his indisputable exercise of due care and prudent driving, he was rear-ended by another car driving faster than conditions permitted. The property manager and his wife were knocked unconscious. Fear not, his brother, a local defense attorney, was nearby and transported the couple to the hospital.

The property manager regained consciousness and saw his loyal attorney brother sitting by him in the waiting room. He asked his brother/attorney how his wife was doing and he said, "Don't worry, everybody is fine and you have a son and a daughter. But the hospital was in a real hurry to get the birth certificates filed and since both you and your wife were unconscious, I named them for you." (Assume proper power of attorney, duly signed, and witnessed and a HIPAA release)

The property manager thought to himself, "Oh no, what has he done?" and asked with some trepidation fearing how narrow minded and literal attorney's can be at times, "Well, counselor, what did you name them?" Whereupon, the brother replied, "I named the little girl Danise." The property manager, feeling relieved, said, "That's a lovely name! And what did you come up with for my son?" The attorney proudly replied, "Da'nephew."

Flowery Design, Bells and Whistles



Slaying Goliath

- Goliath
Six cubits and a span tall

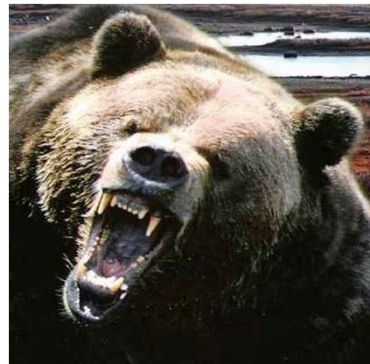
According to the some
Measurements:
About 9 ft 6 inches .



Brown Bears: Nature's Goliath



- Fun Facts:
 - Height: up to 10 ft
 - Top Speed: 35 mph
 - Usain Bolt: about 22 mph
 - Weight: 500 to 1700 lbs.
 - Smell: Some say up to 18 miles
 - Diet: Summer, up to 80 lbs a day
 - Omnivore—Anything, including humans.



Sitka Alaska



Sitka, Alaska



Big Brown Bear



Two Big Brown Bears



Three Amigos



Four's Company!



4 Goliath Bears: Avoid the Mauling

- Bear # 1: Indemnity Agreements
- Bear # 2: Construction Defect
- Bear # 3: Non-Competition Covenants
- Bear # 4: Litigation Pitfalls and Pointers

Indemnity Agreements

- Indemnity
 - An obligation resting on a party to make good any loss another has incurred while acting at his request or for his benefit
 - A right which inures to a person who has fulfilled an obligation owed by him but which as between himself and another person should have been discharged by the other.

Sample Indemnity Clauses

- **One-Way (Narrow):** The Association shall defend, indemnify and hold Manager harmless from all claims, actions, damages, costs, and attorneys' fees incurred arising from the Association's performance of its duties under this agreement, including, but not limited to, claims, actions, damages, costs, and attorneys' fees for, among other things, personal injury, bodily damage, or property damage.
 - THIS APPROACH PROTECTS YOU WHEN YOU ARE SUED BY A THIRD PERSON BASED ON THE CONDUCT OF THE ASSOCIATION.
 - How often is that going to happen?

More Indemnity Samples

- **Reciprocity Language:** Manager shall defend, indemnify and hold the Association harmless from all claims, actions, damages, costs, and attorneys' fees incurred arising from the Manager's performance of its duties under this Agreement, including, but not limited to, claims, actions, damages, costs, and attorneys' fees for personal injury, bodily damage, or property damage.
 - THIS PROTECTS THE ASSOCIATION WHEN IT IS SUED BY THIRD PARTIES FOR THE MANAGER'S CONDUCT

And More...

- **One-Way (Broad):** Association shall defend, indemnify, and hold Manager harmless from all claims, actions, damages, costs, and attorney's fees relating in any way to the management of the Association property, including but not limited to, claims, actions, damages, costs and attorney's fees for, among other things, personal injury, bodily damage or property damage, which may be suffered by any employee, tenant, Association member, or guest upon Association property, except to the extent that such claims, actions, damages, etc. result from the gross negligence, willful misconduct, fraud, or malfeasance of the Manager. [Possible Additional Language: The parties acknowledge that the Association shall comply with such hold harmless by obtaining liability insurance in a commercially reasonable amount, naming both the Association and Manager as an insured thereunder.]
 - PROTECTS YOU WHEN YOU ARE SUED BY THIRD PARTIES FOR LOSSES ARISING OUT OF THE MANAGEMENT OF THE PROPERTY

Negotiations Points

Scope of Indemnity

- Negligence
 - (conduct below the standard of care)
- Sole Negligence
 - (if only your negligence, completely your fault, if you are indemnifying the HOA)
- **Gross Negligence**
 - (a callous indifference or a thoughtless disregard for the consequences of one's act or failure to act)
- **Willful and Wanton Conduct**
 - (a course of action which shows an actual or deliberate intention to injure or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others)
- Lawful in Your State?
- Indemnify or Insure

Insurance: Additional Insured

- **Sample Additional Insured Language:** Manager will obtain quotes for and secure general liability insurance for the Association and its Board in amounts upon commercially reasonable terms suitable for the Property and the Association. The insurance premiums shall be included in the Annual Budget and will name Manager (including its officers, members, managers, and employees) as an additional insured. If the Board obtains excess (umbrella) insurance, then the Manager will be listed as an additional insured on that policy as well. The policy must include coverage for claims and/or losses arising from the negligence of the Manager (including its officers, members, managers, and employees), for contractually assumed liability, and for completed operations. Such insurance must specify that its coverage is primary and noncontributory. The Association and the Board waive the right of subrogation. Such insurance may be obtained through a state approved "captive insurance company," as approved by the Board. Manager shall carry a Commercial General Liability Policy (listing the Association as a co-insured), Workers Compensation Insurance, and will obtain suitable insurance for all of the Manager's vehicles used in the maintenance and operation of the Property. The cost of the Manager's insurance premium shall not be a direct charge to the Association.

Indemnity Issues

- Certificate of Insurance
- Contractual Obligation to Maintain Insurance
 - Who Pays the Premiums
- Adequate Policy Limits
- Type of Coverage: CGL and/or E&O

Construction Defects

- WHY: \$\$\$-- 3 Rules from Plaintiff's POV
 - Good Damages
 - Good Witness(es)
 - Good Insurance
- Preschool Who Did It Exercise
- Theory: Property managers hired by the board to carry out financial and operational assignments.
- Licensed Managers: Board can argue that conduct fell below the industry standard of care.

Negligence: Conduct Below Standard of Care

- Examples
 - Failure to recognize common area defects
 - Failure to recommend to the Board remedies to defects in the common area
 - Tell-tale signs of construction defects
 - Water intrusion—windows, doors, roofs
 - Exterior surfaces
 - Abnormal settling
 - Aware of Statutes of Limitations and Repose

Covenant Not to Compete

- CONSIDERATION
 - Continued At-Will Employment
 - Lump Sum
 - Annuity Paid Out Over Time
- Bad Faith
 - Courts are concerned that Employers compel workers to sign non-competes only to terminate their employment immediately thereafter just to keep them out of the market (concern for restraint of trade)

Time and Geographic Scope

- Time Requirement: Reasonable in relation to the protection sought
 - Generally 1 to 2 years is upheld as reasonable
 - Don't be afraid to self-limit at trial to remove issues
- Geography: Related to the economic footprint of the company
 - Neighborhoods, cities, counties, etc.

Non-Competes Cont.

- Who: The Bigger the Better
 - Generally, employees whose skills and talents are unique and specialized
 - Fear of preventing common laborer from working for a living
 - Was the employee a source of good will for the company
 - Face of the Company: T-Mobile Girl in Pink Dress
 - Fear that the company is simply trying to restrain trade and competition
 - Who taught or trained the employee?

Non-Competes

- Representations by the Employee
- Specifically Initial the Non-Compete
- **CONFIRMED READ, UNDERSTOOD, TIME TO CONSIDER, CONFER WITH COUNSEL**
- No Sign Nows!– Compulsion and Duress
- Keep Drafts if Allowing them to Red-Line (scan it).

Non-Competes

- What does your Non-Compete Say:
 - Employee will not for a period of 12 months following the voluntary termination of Employee's employment by Employee, compete directly or indirectly for any services competitive of those of the Employer to any customer located in Employer's territory.
 - The word "compete" shall also mean while acting as a consultant, officer, director, independent contractor, partner, co-partner, agent, stockholder, member, investor or Employee of an entity in competition with Employer in the territory; Employee shall not communicate to such entity the names or addresses or any business information concerning any person who was a customer of Employer.

Read it through their eyes...

- The word "compete" shall also mean **while** acting as a consultant, officer, director, independent contractor, partner, co-partner, agent, stockholder, member, investor or Employee of an entity in competition with Employer in the territory ; Employee shall not communicate to such entity the names or addresses or any business information concerning any person who was a customer of Employer.

Non-Competes

- EMPLOYEE ACKNOWLEDGES THAT THROUGH HIS EMPLOYMENT HE WILL HAVE ACCESS TO CONFIDENTIAL AND PROPRIETARY INFORMATION, WHETHER MARKED AS SUCH OR NOT, AND THAT HE WILL DEVELOP AND MAINTAIN RELATIONSHIPS WITH CURRENT AND PROSPECTIVE CUSTOMERS. EMPLOYEE FURTHER ACKNOWLEDGES THAT THE CONFIDENTIAL AND PROPRIETARY INFORMATION AND THE CUSTOMER RELATIONSHIPS ARE OF KEY IMPORTANCE AND VALUE TO THE COMPANY. THE EMPLOYEE HEREBY AGREES THAT HE WILL NOT, DURING HIS EMPLOYMENT AND FOR A PERIOD OF TWO (2) YEARS FROM THE DATE ON WHICH HIS EMPLOYMENT WITH THE COMPANY TERMINATES; DIRECTLY OR INDIRECTLY BE EMPLOYED BY, OWN, MANAGE, OPERATE, JOIN, CONTROL OR PARTICIPATE IN THE OWNERSHIP, MANAGEMENT, OPERATION OR CONTROL OF OR BE CONNECTED WITH IN ANY MANNER WITH ANY BUSINESS WHOSE SERVICES ARE IN COMPETITION WITH THE SERVICES OFFERED BY THE COMPANY, WITHIN THE AREA SERVICED BY COMPANY AT THE TIME OF EMPLOYMENT, UNLESS RELEASED FROM SUCH OBLIGATION IN WRITING BY THE PRESIDENT OF THE COMPANY. EMPLOYEE SPECIFICALLY ACKNOWLEDGES AND AGREES THAT THE TIME PERIOD (2 YEARS) AND GEOGRAPHICAL AREA (AREA SERVICED BY COMPANY) ARE REASONABLE GIVEN THE INTERESTS OF THE COMPANY AND THE ACTIVITIES OF THE EMPLOYEE. THE EMPLOYEE SHALL BE DEEMED TO BE CONNECTED WITH SUCH BUSINESS IF SUCH BUSINESS IS CARRIED ON BY A PARTNERSHIP IN WHICH HE IS A GENERAL OR LIMITED PARTNER OR EMPLOYEE; A CORPORATION, LIMITED LIABILITY COMPANY, OR ASSOCIATION OF WHICH HE IS A SHAREHOLDER, MEMBER, OFFICER, MANAGER, OR DIRECTOR; OR A PARTNERSHIP, LIMITED LIABILITY COMPANY, CORPORATION OR ASSOCIATION OF WHICH HE IS AN EMPLOYEE, MEMBER, CONSULTANT OR AGENT; PROVIDED, HOWEVER, THAT NOTHING HEREIN SHALL PREVENT THE PURCHASE OR OWNERSHIP BY EMPLOYEE OF SHARES WHICH CONSTITUTE LESS THAN FIVE PERCENT OF THE OUTSTANDING EQUITY SECURITIES OF A PUBLICLY OR PRIVATELY HELD CORPORATION.

More Non-Compete Language

- Employee agrees that upon the termination of employment, however such termination is effected, whether by Employee or Employer, with or without cause, and for a period of ____ (__) years following the last day of employment, Employee will not, directly or indirectly, compete with Employer within a _____ (__) mile radius of each facility in which Employer is offering services at the time of termination or has offered services within one (1) year prior to said termination.
- It is the specific intent of the parties that Employee shall be restricted from competing directly or indirectly with any segment of Employer's business in which Employee engaged prior to the termination of employment and from any segment of Employer's business about which Employee acquired proprietary or confidential information during the course of employment.
- Employee agrees that competition shall include, but not be limited to, engaging in competitive activity, either as an individual, as a partner, as a joint venturer with any other person or entity, or as an employee, agent, or representative of any other person or entity, or otherwise being associated in a competitive capacity with any business entity which directly or indirectly competes with Employer.

Non-Disclosure and Non-Solicitation Clauses

- Non-Disclosure: Prevents EE from disclosing trade secrets and proprietary information to any third party
 - Pricing lists
 - Customer retention
 - Marketing Strategies
- Non-Solicitation: Prevents EE from soliciting employees and/or customers

Non-Disclosure

- Employee understands and agrees that any information about Employer or Employer's customers and source of customers is the property of Employer and is essential to the protection of Employer's goodwill and to the maintenance of Employer's competitive position and accordingly must be kept secret, whether or not such information is marked confidential or trade secrets. In addition, subject to applicable law and ethical obligations, Employee shall not at any time during the term hereof or thereafter, copy, reproduce, disclose or divulge to any third party, use or permit others to use any confidential information of Employer's professional services hereunder (including, without limitation, customer lists, marketing, pricing, demographic customer information, sources of supplies and materials, prospective and existing expansion programs, joint ventures and affiliate agreements, business systems and marketing methods and all intraoffice business affairs).

Non-Solicitation

- Non-Solicitation of Employees. Employee agrees that during Employee's employment with Employer and for ___ year(s) following termination of Employee's employment, however such termination is effected, whether by Employee or Employer, with or without cause, Employee shall not, directly or indirectly, solicit or induce, or attempt to solicit or induce, any employee of Employer to leave Employer for any reason whatsoever or hire any individual employed by Employer.

Non-Competes– General Matters

- Provisions in the Agreement
 - Injunctive Relief Upon Showing of Breach
 - No need to meet Rule 65 standards
 - Fees and Costs to Prevailing Party
 - What does it mean to prevail
 - Blue Line/Severability
 - Can earn living if agreement enforced

Injunctive Relief

- Employee acknowledges that the remedies at law for any breach by Employee of any restrictive covenant contained in this Agreement will be inadequate and that Employer shall be entitled to injunctive relief against Employee in addition to any other remedy and damages available.
- Employee acknowledges that the restrictions contained herein are reasonable, but agrees that if any court of competent jurisdiction shall hold such restrictions unreasonable as to time, geographic area, activities, or otherwise, such restrictions shall be deemed to be reduced to the extent necessary in the opinion of such court to make them reasonable.

More Injunction Language: Gloria Gaynor, I Will Survive Clause

- Employer and Employee have examined in detail this Covenant Not to Compete and agree that the restraint imposed upon Employee is reasonable in light of the legitimate interests of Employer, and it is not unduly harsh upon Employee's ability to earn a livelihood.

Fees and Costs

- Prevailing Party Fees: E.g., if Employer successfully enforces any provision of the Agreement, ER deemed the prevailing party and entitled to all fees and costs incurred by it.
 - Reciprocity Issues
 - Public Policy

Attorney's Fees: Fees for Defaulting

- Attorney's Fees and Costs. If either party ("Defaulting Party") breaches any provision of this Agreement (whether relating to Employee's or Employer's performance or obligations during the term of employment hereunder or after such term), the Defaulting Party shall indemnify and save the other party harmless against all costs and expenses (including, without limitation, reasonable attorney's fees) incurred by such other party with respect to the enforcement of Employee's or its rights hereunder.

Review and Accept: I know what I'm doing clause

- Review by Counsel. Employee understands the nature of the burdens imposed by the restrictive covenants contained in this Agreement. Employee acknowledges that Employee is entering into this Agreement on Employee's own volition, and that Employee has been given the opportunity to have this Agreement, including the restrictive covenants clause, reviewed by Employee's legal counsel. Employee represents that upon careful review, Employee knows of no reason why any restrictive covenant contained in this Agreement is not reasonable and enforceable.

Essence of the Agreement

- Restrictive Covenants of the Essence. The restrictive covenants of the Employee set forth herein are of the essence of this Agreement; they shall be construed as independent of any other provision in this Agreement; and the existence of any claim or cause of action of the Employee against Employer, whether predicated on this Agreement or not, shall not constitute a defense to the enforcement by Employer of the restrictive covenants contained herein. Employer shall at all times maintain the right to seek enforcement of these provisions whether or not Employer has previously refrained from seeking enforcement of any such provision as to Employee or any other individual who has signed an agreement with similar provisions.

Non-Competes

- Practical Considerations
 - Prove to them you'll do it
 - Word travels fast in the ranks
 - Cost of litigating a non-compete
 - Expensive and hurried
 - What if you lose
 - Impact on remaining Ees
 - Rewrite the agreements to fix the problems

General Litigation Issues

- Record the Scene
 - Photos
 - Videos
 - Drawings
- Products/Equipment
 - Lost, destroyed, etc.
- Video Surveillance
 - Entire footage, not just the relevant part

Notes/Logs/Diaries

- Prepare Your Notes with the Assumption that the Reader Does Not have the Whole Story
 - Claims Adjuster: “Called plaintiff’s attorney back regarding settlement”
 - Adjuster quit, couldn’t be found, not determine whether she accepted or rejected the settlement offer. Can you imagine what plaintiff’s counsel alleged?
 - Clear What Said and **Not Said**
 - When the Conversation or Event Happened
 - To Whom did you speak?
 - Any witnesses to the conversation
 - Follow up with e-mail or letter to memorialize

Correspondence

- Internal
 - Privileged?: Seeking legal advice
 - May Be Discoverable
 - Text Messaging
 - E-mails
 - IM/Chat
- External
 - Will Be Discoverable
 - Remember: Read and reviewed by Judge or Jury

Integrity of the Systems

- Video Surveillance
 - Time and Date Stamps Incorrect
 - The Bank's date stamp was 1 day off– Because footage showed conditions contrary to allegations, it was challenged as to accuracy
- Internal Logs/Diaries
 - Are the Entries or Diaries, Accurate
 - Log showed entries very favorable to our client, discussed aggressively in deposition of disgruntled employee, but upon investigation, not written by the employee represented on the log, quit 2 weeks before, another employee logged on and made entries

Smoking Guns



- Evidence, Statements, Documents
 - Does it exist? What does it say? Who has it?
 - ***"I think the less said about asbestos, the better off we are, but at the same time, we do not lose track of the fact that there have been a number of articles about asbestos dust control and asbestosis in the British trade magazines. The magazine Asbestos is in the business to publish articles affecting the trade and they have been very decent about not re-printing the English articles..."*** (Letter dated October 1, 1935, from Sumner Simpson, President of Johns Manville Corporation, to attorney, Vandiver Brown, indicating a conspiracy to withhold important health information about asbestos from the public.)
 - ***"You may recall that we have written you on several occasions concerning the publishing of information, or discussion of, asbestosis and the work which has been, and is being done, to eliminate or at least reduce it. Always you have requested that for certain obvious reasons we publish nothing, and, naturally your wishes have been respected..."*** (Letter from the publisher of "Asbestos" magazine to Sumner Simpson, indicative of editorial involvement in the conspiracy of silence.)

Still Smoking

- Look in Dark Places.
 - A man passing by saw an inebriated soul obviously looking for something. The man was on his knees right under the light, looking here and there when the passer-by came along and asked him what he was looking for. Being told about the lost car keys, the man also got down on all fours under the light and joined in the search. After looking for sometime, the good Samaritan asked if he was sure that he had lost it in this very area. "Oh, no! I lost it away over there in the dark alley!" Shocked and surprised at that answer, the man asked him why he was looking for it here then? "Oh", he replied quickly, "because the light is better here under the street lamp".
 - Injury case– Injury causing agent was not investigated by the client, upon specific request we discovered documents showing possession of the very product that caused the injury.
- Better to discover now vs. Surprised in 30(b)(6) deposition or from disgruntled former employee, from other cases.

Spoliation

- Spoliation is defined as "[t]he intentional destruction, mutilation, alteration, or concealment of evidence."
 - Compare to intent for battery (intend the action, not necessarily the harm)
 - By First Party: Party (or attorney) to underlying the underlying tort
 - By Third Party: Non-Party to the underlying tort

Spoliation

- Non-Tort Remedies:
 - Adverse Inference: Evidence was unfavorable to spoliating party
 - Pay "the reasonable expenses incurred in obtaining the order [to produce the requested discovery], including attorney fees." See Utah R. Civ. P. 37(a)(4)(A).
 - Spoliators are also subject to criminal charges for tampering with evidence under Utah Code section 76-8-510.5(2) (2008)
 - Spoliators are subject to obstruction of justice under Utah Code section 76-8-306 (Supp. 2009).
 - Administrative remedies may be available when parties destroy evidence in violation of Utah Administrative Code Rule 614-1-5(C)(2)
 - Attorney Disciplinary Measures

Minor Details

- No. 4– Traveling from Nashville to Memphis:
7:07 AM departure from Union Station
- No. 1—Traveling from Memphis to Nashville:
7:10 scheduled arrival, 30 minutes late.
- No. 4 to wait at junction until No. 1 passed.
- Crew mistakenly believed that a switch engine passing by was the No.1, didn't look, just heard (operating instructions required visual conf.).
- Dutchman's Curve (10 miles of Single Track)

The Great Train Wreck of 1918



50/60 mph each, when collided
Heard from 2 miles away

Deadliest Rail Accident US History
101 Deaths, 171 Injuries

“It’s all ball bearings these days!”

Fletch, 1985



- The Little Things
 - Often times in litigation it is the seemingly little things that make your case a simple matter to defend, win or resolve OR a Goliath-size train wreck of a case that creates great stories for lawyers to talk about at dinner or at seminars...