

## Skate for Kids Comes Back for Sixth Season

Lace up your skates, because it's time for Mandrake's annual celebrity hockey fundraiser. This event, formerly known as the Skate for Heart, has changed slightly this time. This year, we've decided to put the money where our heart is, and that's with kids. In conjunction with St. Michael's College, and NABS, proceeds will be distributed to children's charities, making it the SKATE FOR KIDS.

Mandrake Management Consultants is excited to be organizing this charity event again. Over the past 5 years, more than \$130,000.00 has been raised, and we are committed to making this the best year yet. SKATE FOR KIDS gives the community a chance to give back to the young children who need it the most, while having a great time playing hockey.

Essentially, the event involves icing a company team for a game, supplemented with former NHL pros; the likes of Sittler, Mahovlich, Henderson, Pelyk, Napier, Seiling and the like. The event is being held on May 9, 1998 at St. Michael's arena. There will be prizes, food, and a great time as we bring together amateurs and pros, all the while raising money for charities. For more information about this great event, contact Tanya Gowling or Leslie Strong, at Mandrake (922-5400).

## A Checklist for Non-Compete and Non-Solicitation Agreements

The following is an informal checklist of things to consider when incorporating a Non-Competition clause into an offer of employment. Mandrake advises that you seek legal counsel for both Non-Compete and Non-Solicitation agreements. To be legal and enforceable, the covenant must be:

1. In writing and signed by the employee.
2. Made part of the initial offer of employment.
3. Based on valuable consideration (if not incorporated at the time of offer, it must be accompanied by a bonus, pay raise, promotion or the like).
4. Reasonable as to time period detailed.
5. Reasonable as to scope of territory detailed.
6. Designed to protect the legitimate business interest of the company, no more, no less.

For further advice, contact Norman Grosman of Grosman, Grosman & Gale or David Harris, of Kuretzky Vassos, both of whom are prominent employment lawyers in Toronto.

CUT OUT

## Montréal Opening Puts a Spark in Ice Storm

Mandrake is pleased to announce the opening of our Québec office, headed by Normand Lebeau in Montréal. Formerly in executive search with Tremblay & Associés, Mr. Lebeau also previously co-founded and was a partner in Techno-POS, a leading Canadian point-of-sale merchandising company.

"The evolution of the Québec executive search market has created a significant opportunity for a partnership-oriented search firm like ours. We believe that we at Mandrake are now in a position to help our national clients build stronger businesses in Quebec through this expansion," said Stéfan Danis, managing

partner of Mandrake Management Consultants in Toronto.

Mr. Lebeau is "... thrilled to join a firm of Mandrake's magnitude. The fact that our firm has national coverage also brings a lot of added value to Québec-based clients."

Though the opening coincided with the worst snow storm in recent history, Mr. Lebeau, an avid snow boarder, was still able to make it to the office. We are thrilled to welcome him to our team. You can contact Mandrake Groupe Conseil directly at 514-878-4224 for more information about our Québec services.



**Mandrake Management Consultants**  
We build better businesses

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Edited by: Tanya Gowling, Mandrake Management Consultants

# INTERVIEWS

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## Exit Interviews

*Proper Closure Brings Rewards.*

"Exit Interviews are one part PR, and two parts survey."

A key person within your organization has tendered their resignation. As the surprise wears off, reality (and maybe a touch of panic) sets in. Before you ponder the dilemma of filling the soon-to-be vacant position, there's something you should do first: the Exit Interview. More and more corporations are conducting them, and for good reason. What follows is a rough outline of the questions you should ask when conducting one, but first, a brief discussion of their purpose.

On the PR end of the spectrum, Exit interviews promote good public relations by making the Employee feel that his or her opinion is important to the Employer. As a form of corporate survey, the Exit Interview has the potential to yield candid insights into what your company is doing right and wrong, and where problems exist.

If you're still reeling from the news and feel compromised, don't let it show. The manner in which

you conduct the Exit Interview and the final days of the Employer/Employee relationship can never be underestimated. A properly conducted Exit Interview, designed to garner constructive feedback from the departing employee, can also help maintain cordial relations well into the future.

When in the final interview, never discount any remark. File everything for future reference and look for correlations and corroboration from other sources. When appropriate, act on the information obtained, but always respect the confidentiality of the Interview.

Watch for subtle hints that suggest unrest among others. The departing Employee may seek to "improve conditions" for the co-workers he or she is leaving behind.

In preparation, sharpen your intuition and expect the unexpected. Be watchful that the employee may be posturing for a positive future reference, hence

affecting their honesty. The stress of leaving can result in a gamut of emotional responses in a departing employee, ranging from gratitude to bitterness, emotional spattering and even a loss of composure. But don't worry. The benefits far outweigh the drawbacks.

### 15 Questions to ask in an Exit Interview

1. What made you decide to leave?
2. If you have accepted another job, please describe it.
3. Was salary a factor?
4. Did you receive adequate job training while you were here?
5. What parts of your job did you like?
6. What parts of your job did you dislike?
7. Was your workload manageable?
8. Did you receive recognition for your efforts?
9. How valuable was your Performance evaluation?
10. Did you encounter any problems with any employee?
11. If you were to make any changes, what would they be?
12. How would you describe the culture, values and mission of our firm?
13. What are you planning to say to people on the streets about our firm?
14. Would you consider employment with this company in the future?
15. Do you have any additional comments?

At the conclusion of the Interview, thank the Employee for their candor, wish them success in their future endeavors. It's often been said that people remember you better by the way you leave, than the way you start. The same holds true for Employers. For more information, please contact Mandrake.

"The departing Employee is a barometric indicator of attitudes and personnel issues."

### The Exit Interview

A properly conducted exit interview can help maintain relations.

### Restrictive Covenants

Employees are not property, but at what point can an employer protect their intangible assets?

### Skate for Kids

- Mandrake Montreal Opening
- Non-Compete Checklist

# Restrictive Covenants: The Straight Goods on the Ties that Bind.

Manufacturing technologies. Trade secrets. Customer lists. Financial data. Marketing information. Software programs. If any of these properties are intrinsic to the well-being of your business, the Non-Compete agreement can be a powerful tool for protecting your intangible investments. Following is a brief discussion about the intricacies of drafting restrictive covenants, and the differences between Non-Compete and Non-Solicitation agreements.

It's little wonder that more and more corporations are turning to the Non-Compete clause, as a basis for any necessary future legal action, and to discourage costly defections entirely. For many employers, more than half of the value of these agreements tend to be psychological, because Non-Compete clauses can be difficult to enforce and expensive to pursue. Therefore, this type of restrictive agreement is often used to send a powerful message to all employees that defections of any sort will not be tolerated.

**“Employees are not property, but at what point can an employer protect their intangible assets?”**

Often the perceived risk of being prosecuted makes employees thinking of jumping ship with valuable files less likely to do so. According to Norman Grosman of Grosman, Grosman & Gale, this may be the major value of drafting Non-Compete agreements. “Many of these cases settle before the covenant’s enforceability is determined. Their major purpose,

then, may be to disrupt the departing employee and the subsequent employer, run up costs, send a message to the remaining employees, and generally to cause grief.”

In fact, many lawyers concur that the primary motivation for Non-Compete lawsuits is to provide a deterrent, by sending the message loud and clear that threats to the firm will not be permitted. Few corporations do not fear the prospect of a lawsuit, and this is even more so with individuals.

The Dunlop law text cites, “It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master.”

The common Non-Compete clause prohibits the employee from competing against the former company for a set period of time after termination of employment, and within set geographic boundaries. Its sole purpose is to protect the best interests of the employer. The courts will not enforce a Non-Compete covenant unless it meets various legal criteria. Here is an informal checklist of what the courts will look for:

1. Are the suggested restrictions no greater than required for the protection of the employer?
2. Would they pose undue hardship to the employee?
3. Are the duration and geographic area reasonable?



4. Does the employee possess trade secrets or have access to confidential data?
5. Is there a hidden agenda on the part of the employer designed to harm the employee (i.e. revenge)?
6. Did the employee already possess the skills in question when he or she joined the employer?
7. Would the covenant prevent the employee's sole means of support?

If it sounds simple, it's not. Many Non-Compete clauses are too vast and unreasonable in scope, and are at risk of being declared unenforceable by the courts as a result of this. As stated in his book, “A Practical Guide to the Law of Hiring in Ontario”, Grosman advises that clauses of this nature be carefully drafted because restraining someone from using their skills and experience to find a job is generally contrary to public policy. The courts are generally loathe to keep someone from earning a living, though they will uphold a reasonable agreement if it can be proven that the employer will suffer irreparable harm if the action continues. Therefore, less is more when drafting any sort of restrictive covenant.

In assessing enforceability, courts generally review the legitimate interest of the employer, the duration and the geographic area of restriction. Smart advice: ensure that your Non-Compete clause is reasonable based on the unique circumstances applicable to your business. Also, it is necessary that restrictive covenants be introduced

**“Upper level ‘pirating’ by rival corporations is commonplace.”**

as part of the hiring process, or if introduced during the existing employment relationship, that it accompanies a raise, promotion, or consequential restructuring of the hiring agreement.

A case in point is the recent lawsuit between two major Canadian retailers, covered in the Globe & Mail. The suit involves the complicated defection of the president of one company to the other. Though this is not uncommon, the plaintiff asserted that the defendant also lured away key employees and misused confidential information after accepting a retirement package within days before joining the competitor.

Perhaps most noteworthy is the fact that the departing president did not have a Non-Compete provision in his retirement package. While the employee mentioned continues to draw on the \$1 million a year retirement settlement, many question the previous employer's failure to insert a Non-Compete clause into the retirement package.

In an increasingly litigious area, this sensational case has significant implications. High ranking personnel who defect to rival organizations are not immune to prosecution. All in all, a formidable arsenal of legal recourse is at the disposal of companies at serious risk.

The lawsuit also focuses on a secondary Non-Compete issue, that of Non-Solicitation clauses. For example, “...in the event that your

employment with Company X is terminated, you agree that you shall not for a period of 24 months following termination of employment, solicit or attempt to solicit any of the clients or customers of Company X, for your own benefit, or that of any third party or organization, nor shall you attempt, directly or indirectly, to obtain the withdrawal of any of Company X's employees....”.

**“When drafting a restrictive covenant, less is generally more.”**

Typically, the Non-Solicitation clause prohibits the departing employee from soliciting customers, suppliers and employees of the former employer's for a clearly defined period of time. According to Grosman, many employers make the mistake of requiring the employee to agree to a Non-Compete covenant when what they really want is a Non-Solicitation agreement. Employees tend to be more willing to agree to Non-Solicitation covenants, as long as the two parties can agree on who constitutes a customer of the employer or supplier of the employer. Clauses of this nature can go a long way towards providing psychological and legal protection from employees intent on causing financial havoc.

Once again, the more specific and limited the covenant, the more likely it is to be enforced by the courts, provided the stipulations are both reasonable and necessary. As with Non-Compete clauses, the absence of a written covenant does not necessarily preclude legal action.

Corporate “raiding” does happen. Though many companies will tolerate the luring away of one senior staffer, when the numbers climb, the tolerance sinks. When one, two, three and even more key personnel are whisked away by rival corporations it is considered a pirate action. If a significant threat is posed to the well-being of the employer, even in the absence of a Non-Solicitation agreement, a basis for legal action may exist, providing there is a solid case.

Mandrake's advice: know your rights, stay informed. Use both Non-Compete and Non-Solicitation covenants judiciously. Seek the counsel of an employment lawyer who will take the time to get to know and understand your business. Cut and keep Mandrake's Non-Compete Checklist on the back page. For further advice, contact Norman Grosman of Grosman, Grosman & Gale or David Harris, of Kuretzky Vassos, both of whom specialize in providing advice and representation in employment matters to corporations and executives.

**“Many employers make the mistake of requiring the employee to agree to a non-competition covenant when what they really want is a non-solicitation agreement.”**