

***First Wednesday — A Monthly Discussion of Employment Law  
Issues and Other Hot Topics for Management***

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**CAUTION: Letters to New Employer or Customers**

What are the boundaries of good faith and law when lawyers are asked, or believe it is a good idea, to write a letter to an ex-employee's new employer or even to customers about that ex-employee's theft of trade secrets, violation of a confidentiality or non-solicitation agreement or other wrongful acts?

It has been the case for some time that *Herzog v. "A" Company, Inc.* (1982) 138 Cal.App.3d 656 (*Herzog*) was the best guidance. *Herzog* involved bad faith conduct and accusations made in a letter to the new employer, and cautioned that the individual should not be hired. Now another case, this time involving a letter to customers, provides further guidance on the boundaries. The new case is *Neville v. Chudacoff* (3/12/08, Cal.Ct.App. 2<sup>nd</sup> Appellate District). In this case, a lawyer sent a very direct letter to his client's, Maxsecurity's, customers warning them not to do business with Neville because Neville was bound by agreements and was believed to have stolen Maxsecurity's trade secrets.

The letter stated:

"Please be advised that this office represents Maxsecurity in the above-matter [sic]. It has recently come to our attention that a former employee of Maxsecurity may have been in

contact with you, or may attempt to contact you. The name of the former employee is Mark Neville, and he may be representing himself as ABD Audio and Video.

“Mr. Neville is in direct violation of an employment and confidentiality agreement he had with Maxsecurity. Mr. Neville’s relationship with Maxsecurity ended at the end of last year. Contact and/or communication with Maxsecurity customers was, and is, specifically prohibited under his employment contract. We have notified Mr. Neville of his breach and shall be aggressively pursue [sic] all available remedies.

“Any work contracted with Mr. Neville or his company would be in violation of our agreement with him. In order to avoid any involvement in litigation that my [sic] arise between us and Mr. Neville (as a material witness, or otherwise), we suggest that you have no further dealings with Mr. Neville or his company. You should know that any monies paid to him or his company properly belong to Maxsecurity, and we shall, if necessary, seek an accounting of all monies paid out.”

Maxsecurity develops and installs high-end audio and security systems. Neville was terminated some five months earlier for misappropriating customer lists and soliciting customers so he could start a competing business. Litigation ensued.

### ***Neville’s Case against Maxsecurity’s Lawyer gets SLAPPED Down***

The context of the *Neville* decision was an appeal of the lawyer’s anti-SLAPP motion to dismiss the ex-employee’s defamation suit against Maxsecurity’s lawyer. The motion was granted and affirmed on appeal.

Briefly, an anti-SLAPP motion is an attempt to have a SLAPP lawsuit dismissed summarily. A SLAPP lawsuit is short for a “strategic lawsuit against public participation.” A SLAPP suit is one seeking to chill or punish a party’s exercise of constitutional rights to free speech and to petition the government for a redress of grievances. In this case, the lawyer, Chudacoff wisely used the anti-SLAPP procedure to have the case dismissed as a SLAPP suit, since the lawyer’s letter to customers was directly related to the employer’s claims against the ex-employee, and the employer was seriously and in good faith contemplating litigation against the ex-employee.

Chudacoff won the case. The Court's opinion provides much guidance on the contents, logistics and style of such letters.

### ***Practical and Tactical Guidance***

The legal question was whether the test of protected activity under the SLAPP statute was met (it was) and how this test is distinguished from the litigation privilege of Civil Code section 47. Beyond the legalities, here are some practical tips taken from the Court's analysis:

1. The letter did not include any extraneous, irrelevant accusations about the ex-employee. It stuck to the issues – all comments were “directly related” to the claims. The Court said the letter was “in connection with” the issues in the ultimately-filed lawsuit against Neville. This is very important. The *Neville* opinion cites a case in which egregious, false, irrelevant assertions were made and were thus not legally protected in that case.
2. The courts will take a reasonably expansive view of what is “in connection with” pending litigation. Maxsecurity's lawsuit was filed four months after the letter. Neville argued that litigation must be more “imminent” but this was rejected. Even though the lawyer submitted no direct evidence of his or his client's state of mind regarding the intent to file a lawsuit, the Court thought the objective circumstances were consistent with that – thus “pending litigation.” Thus, the style, content and form of the letter, as well as the surrounding circumstances, are very important.
3. The letter's style, format and syntax all appeared “litigation related” (the letter's reference line read “*Maxsecurity v. Mark Neville, dba ABD Audio*”, rather than a more neutral, business-like reference).
4. The letter was sent to the current and former customers of the company – not just a laundry list. The court found these to be “persons whom Maxsecurity reasonably could believe had an interest in the dispute as potential witnesses to, or unwitting participants in” the alleged misconduct. Thus, consider the audience.

5. CAUTION: the ex-employee, Neville, in opposing the motion, produced no evidence on any issues, so one needs to carefully assess the surrounding circumstances, the timing and the contents of the letter, particularly if such a letter is being directed to customers, or the employer desires a broad interpretation of who should be a recipient, or has very little to back up the threats if and when a reply letter asks for specifics.

### ***Final Note on the Employer's Arsenal***

There are several varieties of letters that might be sent: (i) the standard, non-accusatory notice to a new employer, describing an ex-employee's obligations under a confidentiality or non-solicit agreement; (ii) the intermediate threat letter to an ex-employee, with a version also sent to the new employer about awareness of conduct that may be violating the ex-employer's rights; (iii) a more direct and detailed accusation about specific conduct, with copies to both the ex-employee and new employer, and, rarely; (iv) a letter to a customer or client.

In all of these, *Herzog* and *Neville* must be considered. Keep it highly relevant and true – avoid assertions or contents designed to serve some short-term tactic. Tactical actions generated by a desire to abuse, punish or disparage should be avoided.

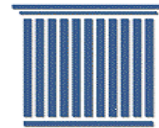
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