

Pulling the Trigger

By Joerg W. Knipprath

In *National Rifle Association v. Chicago*, the 7th Circuit Court of Appeals recently upheld the anti-gun possession ordinances of two Illinois municipalities, Chicago and Oak Park. Both of these laws effectively banned private possession of handguns. The opinion was written by Frank Easterbrook, a noted conservative, and was joined by Richard Posner, a libertarian, as well as by the third judge on the panel. The laws at issue are similar to the D.C. statute struck down in *D.C. v. Heller* as violating the Second Amendment. The 7th Circuit concluded, correctly, that the *Heller* court had not resolved the question whether or not the 14th Amendment protects private gun possession against state infringement either under the privileges and immunities clause or by "incorporating" the Second Amendment through the due process clause.

But the 7th Circuit went further. It relied on a trio of 19th century cases, *U.S. v. Cruikshank*, 1876; *Presser v. Illinois*, 1886; and *Miller v. Texas*, 1894, to hold that the Second Amendment in fact does not apply to the states. In that conclusion, it agrees with the 2nd Circuit's recent decision in *Maloney v. Cuomo*, 554 F.3d 56 (2009), for which Judge Sonia Sotomayor, who was on the *Maloney* panel, has received considerable criticism. In addition, the 7th Circuit declined to find an independent right to gun possession through the 14th Amendment's privileges or immunities clause, which argument the court found foreclosed by *The Slaughterhouse Cases*, (1873). Again, the appellate court found itself incompetent to overrule either *The Slaughterhouse Cases* or the other three 19th century Supreme Court precedents that the 7th Circuit held also to have rejected a privileges or immunities clause argument.

The 7th Circuit's decision con-

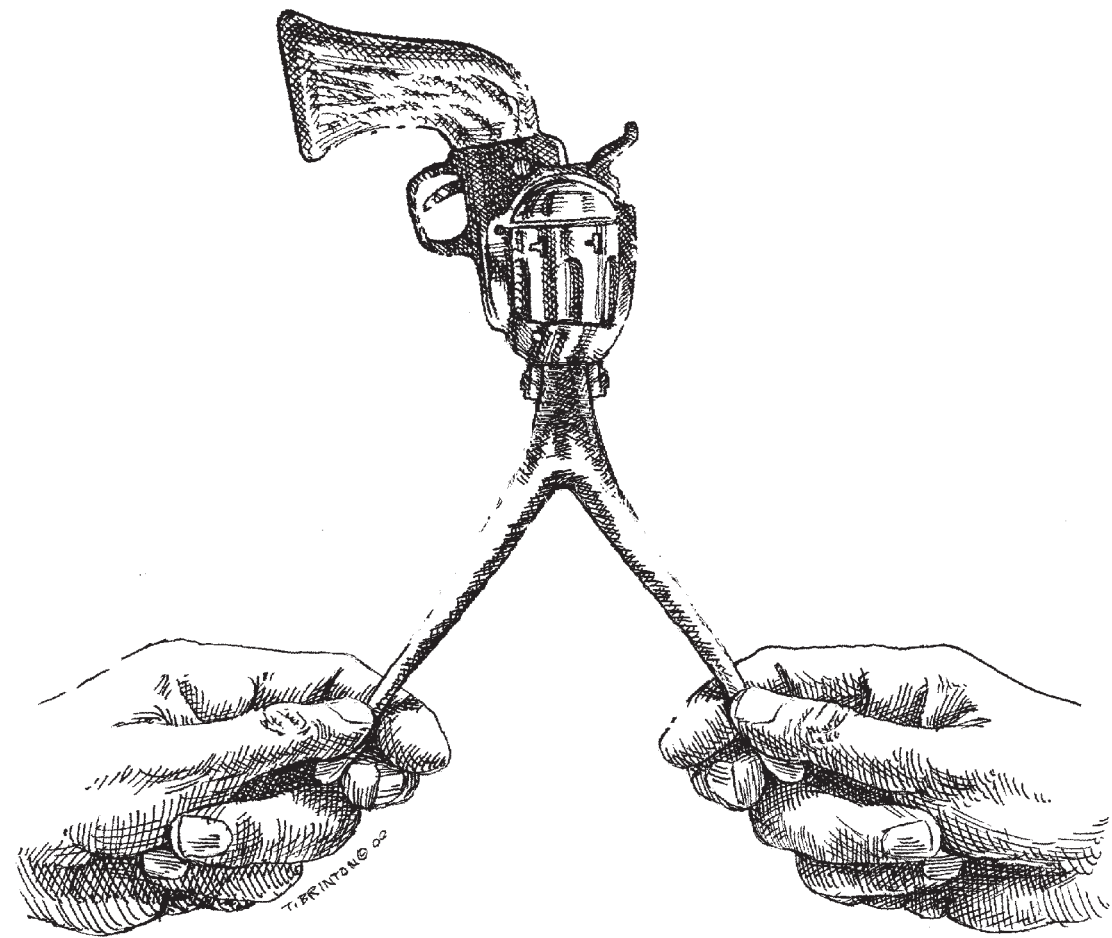
licts with the 9th Circuit's recent opinion in *Nordyke v. King*, which saw the 19th century cases as inoperative or overtaken by more recent developments in constitutional law that had fatally undercut their reasoning. Those developments are, first, the Supreme Court's adoption of selective incorporation of most clauses of the Bill of Rights into the "liberty" protection of the due process clause of the 14th Amendment and applying them to the states ("no state shall deprive any person of life, liberty, or property without due process of law"). The second development is the *Heller* court's emphasis on the right of gun ownership being deeply rooted in our legal tradition, which is also connected to the fundamental nature of the right of self-defense.

That raises the fascinating question of why two conservative/libertarian judges would go along with Illinois's liberal politicians, who want to restrict such an essential attribute of individual autonomy and privacy. One explanation is that, despite whatever ideological sympathy they may have for gun owners, the judges are mindful of their appropriate role. The opinion is a study in carefully crafted judicial modesty. The court refers to the *Heller* court's declaration in a footnote that the 19th century Supreme Court precedents held that the Second Amendment does not apply to the states. Moreover, the 7th Circuit expressly addresses the issue of how appellate courts should approach "outdated" Supreme Court precedents. It refers to an earlier case, an antitrust matter, from its circuit that applied a Supreme Court case in that area, even while pointing out the Supreme Court precedent's weaknesses. The Supreme Court then reviewed the appellate court's holding and unanimously overruled its own precedent, adding that it also approved of the circuit court's handling of the matter, as it was "this Court's prerogative alone to over-

rule one of its precedents." The 7th Circuit also notes that the Supreme Court has repeatedly told the lower courts to apply Supreme Court precedent, even if later Supreme Court opinions have undermined the particular precedent. By that reasoning, the 7th Circuit was bound to apply the earlier cases, whose holdings it saw as having "direct application" to the issue it was addressing.

A second explanation, which dove-tails with the first, is that the judges are intentionally providing the strongest possible vehicle for Supreme Court review. For one thing, the case emphasizes the weight of the old cases, and its invitation to the Supreme Court to overturn or at least to clarify them is a palpable undercurrent to the opinion. For another, the facts, a ban on private handgun possession, parallel *Heller* and also present the strongest possible "rights" argument for the Supreme Court to recognize 14th Amendment protection. In addition, the challenger is likely to pursue Supreme Court review: The lawyers also argued *Heller*, and the plaintiff has a strong interest in challenging the ban.

The 7th Circuit has set up a circuit split with the 9th Circuit in *Nordyke* on a much more favorable (for the challenger) fact pattern than the 2nd Circuit nunchuk possession case in *Maloney*. The court is most likely to grant review if there is a split in the circuits based on clearly analyzed and thoroughly litigated doctrine, in which case the split is likely to persist. The 2nd Circuit's per curiam opinion is, to be charitable, leaner in its analysis. Easterbrook's opinion in *NRA* carefully disputes the specific points made in *Nordyke*, so as to present the clearest possible conflict. Without *NRA*, and especially if the Supreme Court justices favor the right of private gun possession, certiorari in *Nordyke* is less likely. In the latter case, a thorough opinion by Judge Diarmuid O'Scannlain, the



challengers won on the due process clause incorporation theory, but lost on the facts. The 7th Circuit has masterfully presented the Supreme Court with a much fatter target to make a statement here than either *Nordyke* or *Maloney*.

On the substance, the 9th Circuit in *Nordyke* has the better argument. Regarding *Cruikshank* and *Presser*, neither of those cases squarely addressed the issue of due process incorporation. As to *The Slaughterhouse Cases*' rejection of the privileges and immunities protected under the 14th Amendment extending to all those mentioned in the Bill of Rights, there was clear evidence in congressional debates that gun possession was to be among the protected privileges and immunities, even if the entire Bill of Rights was not.

The 7th Circuit's criticism of the challengers' citation of William Blackstone about the "deeply

rooted" nature of the right to keep and bear arms ignores the Supreme Court's own use of Blackstone in *Heller*. When Easterbrook added that "Federalism is an older and more deeply rooted tradition than is the right to carry any particular weapon," he was just wrong, certainly if "any particular weapon" is understood as the *Heller* court did. The right to keep and bear arms predates both the federal and the state constitutions and is not dependent on it, as *Cruikshank* and *Presser* affirmed. Blackstone's (and others') treatment of the right to keep and bear arms as a deeply rooted right of Englishmen (or humans generally) traceable at least to the Declaration of Rights of 1688, means just that. On the other hand, federalism as an American tradition arose with the Articles of Confederation or, if one wants to be even more charitable, with such earlier proposals as Benjamin Franklin's and Thomas Hutchinson's failed Albany Plan of Union

of 1754. By definition, federalism is a structural ordering of political power within the polity. Rights as understood by the framers of our system, pre-existed our polity and, under Lockean social contract speculations, all polity.

I expect that the Supreme Court will accept the gift given it by the 7th Circuit. From the language of the *Heller* case, the history of the 14th Amendment, and the court's own precedents under either the incorporation of the Bill of Rights theory or under the unenumerated fundamental liberty theory that found constitutional rights to privacy, contraceptives and abortion, the court must then recognize a fundamental right to private gun possession for self-defense protected against state invasion.

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Best Kept Secrets: Handling Confidential Employee Information

By Rebecca Edelson

An employee owes the employer a duty to protect the employer's confidential information, even after the employment is terminated.

Book Excerpt

The law protects the employer's trade secrets from misappropriation by an employee, not only where the employer discloses pre-existing trade secrets to an employee, but also where the employee participates in the development of trade secret or confidential information. An employee is obligated to provide full and forthright disclosure to the employer of all trade secrets which the employee has developed on behalf of the employer and is not permitted to secretly develop trade secrets which are employer property within the meaning of the

California Labor Code.

The use of written employment agreements provides an opportunity to notify employees of the existence and nature of trade secrets which exist or may be developed during the course of employment and to establish other terms which can strengthen a company's ability to protect its trade secrets. An understanding of what should be included in such agreements becomes important in attempting to ensure that an adequate and enforceable agreement is obtained. Care must be taken to ensure that all terms of the employment agreement comply with applicable law. Danger areas include noncompete or nonsolicitation provisions, and mandatory assignment of inventions provisions.

In order to buttress the ability to enforce employers' rights in trade secrets developed by employees, it is a common practice to include an assignment of rights provision

in the employment agreement. An employer can require the employee to assign inventions that relate at the time of conception or reduction to practice of the invention to the employer's business, or actual or demonstrably anticipated research or development of the employer. The California Labor Code, however, prohibits an employer from requiring an employee to assign an invention that the employee developed entirely on his or her own time without using the employer's equipment, supplies, facilities, or trade secret information.

In addition, an employer has no right to claim as its trade secrets information that employees acquired prior to the employment. If the employer wants to acquire such matter, it needs to negotiate an express agreement to that effect with the employee. Accordingly, a requirement that, in the course of contract negotiations, the incoming employee document for the employer his or her general skills and knowledge, or identify pre-existing trade secrets, inventions, or inventions that do not qualify as the employer's property under the California Labor Code, is not unusual, particularly in the technology sector. The purpose is to create an audit trail under which issues concerning ownership can be resolved without litigation.

Express written promises not to use or disclose trade secrets are often included in employment agreements. If properly drafted, such provisions are enforceable.

The failure to update a nondisclosure agreement may result in loss of later acquired properties. Thus, the terms describing the protected matter must not only be carefully drafted so that all matters claimed to be trade secrets are included, but also the agreements themselves should be reviewed and revised periodically, as appropriate.

The following is a checklist of items to be considered when drafting a nondisclosure agreement:

- Define the parties bound by the agreement. Make sure they each sign the agreement that purports to bind them.
- Define the trade secrets or confidential information carefully.
 - (1) Include the categories of confidential information or trade secrets to be protected.
 - (2) How specific or general the categories are identified in the nondisclosure agreement depends on the circumstances, but avoid inad-

vertent disclosure of the substance of the trade secrets through overly detailed description of the matters to be protected.

(3) Avoid including matters not reasonably or properly protectable (such as the employee's general knowledge or information in the public domain).

- Define express exclusions carefully.

(1) Avoid over-inclusion, which may serve to defeat a later claim for protection.

(2) Consider excluding information created or discovered by the receiving party prior to or independent of the relationship.

(3) Consider excluding information that is generally known.

- Define the obligations of the receiving party.

(1) Include affirmative promises not to use or disclose the protected matter outside the limitations set by the agreement.

(2) Include affirmative promises not to induce others to use or disclose protected matter outside the limitations set by the agreement.

- Considering specifying a time frame for protection.

- Include an affirmative obligation to continue to protect the information even after the relationship is terminated.

- Define the mechanism for identifying protected matter.

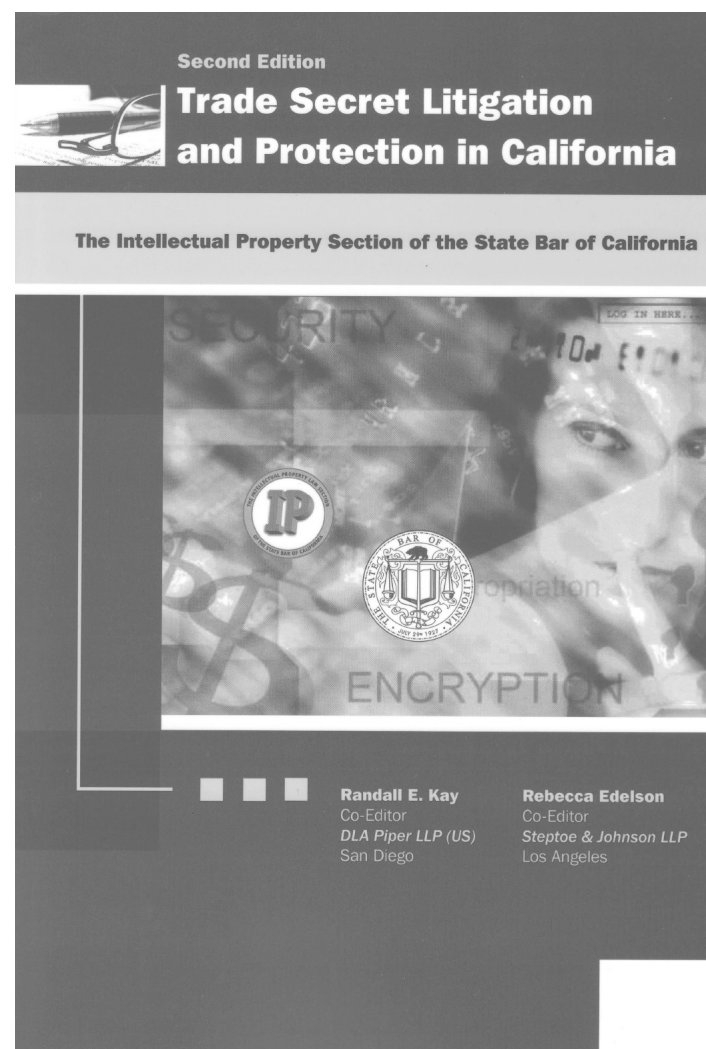
Some nondisclosure agreements include provisions stating that all matters to be protected will be labeled clearly. Note, however, that labeling requirements can be cumbersome to enforce and there is a danger that something will fall through the cracks. In addition, information may be exchanged orally. Alternatively, include a provision that all information will be presumed confidential unless otherwise agreed upon in writing. The danger is that such all-inclusive provisions may later be challenged as overly broad and not constituting reasonable measures to maintain secrecy.

- Define the security measures for maintenance of confidentiality.

(1) The receiving party should affirmatively promise to use security measures which are at least as good as the methods he or she uses to protect his or her own information.

(2) In addition, specify the exact security measure expected to be maintained.

- Define procedures for treatment of protected information upon termination of the relationship.



(1) Upon termination, all information should be returned to the disclosing party and all copies destroyed. Address the disposition of work product created using the other party's confidential information and of work product created using both parties' confidential information.

(2) Define procedures for returning information and destroying copies, and specify who is to receive the information and where is it to be shipped.

(3) Consider addressing in the agreement the disposition of the confidential information where one party breaches. Depending on the circumstances, the nonbreaching party may or may not be entitled to continue using the breaching party's confidential information.

- Establish procedures to handle all potential audit and compliance issues.

(1) Include provisions allowing for inspection rights at any facility where the receiving party may house the trade secrets. Other auditing methods may also be necessary.

(2) Include provisions to account for the receipt of trade secrets by employees and independent contractors of the recipient. If the recipient is an organization that will employ its own employees and independent contractors in performance of the contract, the nondisclosure agreement needs to contain specific contractual obligations to inform such persons of the existence of the nondisclosure agreement and a requirement that such persons independently sign nondisclosure agreements. A procedure should be in place to audit compliance of such provisions. At the very least, the disclosing party may want to receive copies of the signed nondisclosure agreement as well as other records useful in verifying compliance.

Rebecca Edelson is a partner in the Century City office of Steptoe & Johnson and leads the firm's trade secret practice. Excerpted from: "Trade Secret Litigation and Protection in California," Rebecca Edelson and Randall E. Kay, editors, Chapter 4 (State Bar of California 2009).

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