

How to Change Jobs and Embrace Inefficiency

May 20, 2018 by James Pooley

In the wake of Uber's blockbuster trade secrets lawsuit, prompted by its hiring of the manager of a competitor's self-driving car program, one of the company's lawyers published an article complaining about the law that protects "negative information" stored in a person's head. It was crazy, he argued, to force employees to feign amnesia and to deliberately repeat mistakes made in their last job, in the name of protecting confidential information.

As you may recall, a few months ago I wrote positively about negative trade secrets, invoking Edison's string of failed experiments that led him to a working light bulb. That kind of information in the hands of a competitor would allow it to catch up without the effort, investment and risk faced by the original innovator. So it makes a lot of sense that the law protects against disclosure of the failures, mistakes and dead ends of research.

But how can we provide that protection in fast-growing industries where employees often leave to work for the competition? How can they be expected to apply their well-earned skill but to remain silent when they see their new team going down what they know is a hopeless path? And even if they are careful never to signal with an eye roll or grimace, won't the former employer sue them anyway once it sees a competing product? Wouldn't it be more fair – and more efficient – to just allow them to use whatever "negative" information they remember, so long as they don't take records with them?

I don't think so. Protecting knowledge of failed experiments encourages companies to invest in deep, long-term and risky research, since they know others can't easily catch up. And there is other social value in the "inefficiency" of requiring competitors to do their own homework. That's because they probably won't follow the same path. What the first company considered a "failure," when encountered by the second company, may provoke a new and unique insight. Indeed, this is how a lot of innovation happens, and it's why some organizations deliberately set up competing teams to pursue identical objectives.

The same principle that recognizes value in redundancy of effort can apply to individuals as well as companies. Rather than lamenting the prospect of wasted re-work, departing employees can look forward to a new environment to apply their skills. They can challenge the assumption of past “failures” by taking a fresh look at the process of discovery, searching for new ways to tackle old problems.

But while that sounds fine in the abstract, the practical challenge remains: how does someone take his or her accumulated experience to a competitor without getting sued? And from another perspective, how do you hire someone with experience and skill, to make sure that’s all you’re getting? Here are a few suggestions.

First, recognize the risk that is wrapped inside the opportunity. Is this new position likely to put the employee in an ethical hot seat? If everyone has asked the right questions in the interviews and has been honest about what challenges the new company is facing, you can also identify the risk of having addressed the same or similar problems for the competitor. If so, are these issues critical to the expected work assignment, or merely incidental?

Second, discuss the nature of the risk at a high level, without getting into the specifics of the previous assignment, but identifying the areas where there may be some concern about applying prior knowledge of what doesn’t work. You should both agree that no one will ask for, or provide direction from, that learning. But if the discussion leads to real anxiety about whether confidentiality can be managed this way, it may make sense to temporarily steer clear of any project that looks like it will cover the same ground as the previous job. In any event, you should establish an understanding that all of the work to be done will be firmly grounded on general knowledge and skill.

Third, you should directly address what is that knowledge and skill, and how you expect it to add value in the new position. To be especially safe, the employee might also want to prepare by brushing up on the state of the art in the relevant field of work, so that they can think, speak and act comfortably from that platform.

Even in highly competitive industries we can enjoy the benefits of labor mobility while still respecting the value of “negative” trade secrets. All it

takes is a healthy respect for risk and a willingness to start over in the pursuit of something better.

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