

Preface

For an attorney tasked with preparing a restrictive covenant, finding drafting tips by sorting through hundreds of cases or by plowing through lengthy treatises on unfair competition and antitrust law, which often approach the subject from theoretical or high-level public policy-oriented perspectives, can be daunting and time consuming. Our goal with this book is to alleviate the need for such an exercise by focusing directly and efficiently on particular substantive choices, language options, and supporting authority for such alternatives, organized by the type of contract clause at issue. At the same time, our goal is to provide useful guidance for enforcement planning. For this reason, the book is organized in a sequence that follows the contract drafting process and associated steps in enforcement:

- The discussion starts with a general analysis of how to identify the restrictive covenants that should apply. This includes contemplation of protectable interests, level of employee, and the various goals and risks attendant to different options.
- The focus then shifts to foundational issues such as choice of law, venue, contract formation, and consideration that must be analyzed and addressed before serious drafting begins.
- The book then progresses in sequence through an ordinary contract format, from opening recitations, through the substantive provisions (i.e., nondisclosure, nonsolicitation, and noncompete clauses), to the closing clauses and signature.
- At the stage of evaluating substantive provisions, the discussion turns to different types of contractual arrangements that can be used as a substitute for or a complement to traditional noncompete provisions, such as “garden leave,” ERISA-covered plans, forfeiture, clawback, and severance agreements, among others. The final chapter focuses on international contracts and highlights the differences faced in a number of major countries.

Occasionally, a chapter on one clause may cover some of the same subject matter already covered in another chapter because two types of clauses implicate some of the same issues and analysis. In such situations, rather than referring the reader to another chapter in the book for a case cite or discussion of a subject area, the book covers duplicate material, though not word for word. This is done intentionally in order to improve the general utility of the chapters and enhance the speed with which a drafting attorney can find guidance on a narrow subject area or type of clause without having to read the entire book or spend lots of time flipping back and forth between different chapters. However, where a full discussion of a related subject can be found elsewhere in the book, a cross-reference is made as well, so that the reader can move to another part of the book to review additional discussion if desired.

This book is also filled with sample language for various types of provisions—both wording from actual contracts covered in cases and wording that is developed as suggested model language. On occasion, potentially problematic language is also identified in order to provide concrete illustrations of the principles and choices being discussed. This book is not intended to be a definitive statement of the law for any particular state. Although state law variations are often addressed in a general way, the goal here is to provide all-purpose guidance that can help improve contract drafting and enforcement planning efforts. In so doing, we hope to help add some structure and organization to the discourse in an area of law that can often appear to be quite disorganized and inconsistent.

The drafting suggestions in this book are just that—“suggestions.” In this area of law, significant room for differences of opinion exists. It would be a direct contradiction of our intent for anyone to characterize a contract language suggestion we have made here as the equivalent of a rule or the only proper or legal way to address a particular drafting goal. The opinions expressed in this book are those of the authors only, and not those of Littler Mendelson P.C. Nothing in this book is intended as legal advice. Individual facts and circumstances will often change the outcome of the analysis in any area of law, but nowhere is this more true than in an area like unfair competition law, where equitable remedies are employed and highly discretionary fact-based balancing tests often apply.

It should be noted that this volume’s purpose is not to substitute for a comprehensive, state-by-state survey or treatise like the four, state-by-state surveys in the ABA/Malsberger treatise series published

by BNA Books (COVENANTS NOT TO COMPETE; EMPLOYEE DUTY OF LOYALTY; TORTIOUS INTERFERENCE IN THE EMPLOYMENT CONTEXT; and TRADE SECRETS). Instead, this book is designed to be a companion to the existing ABA/Malsberger books. Significant cross-referencing and borrowing from those books is employed to help facilitate their use. It is hoped that the approach taken here will make the book a useful companion to all of the treatises noted above and referred to throughout the book.

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