TO COMPETE OR NOT TO COMPETE

The Definitive Insider's Guide to Non-Compete Agreements in New York

INCLUDING:

- WHEN A NON-COMPETE AGREEMENT IS ENFORCEABLE UNDER NY LAW
- HOW A FIDUCIARY CAN PERMISSIBLY SOLICIT HIS OLD CLIENTS
- WHAT AN EMPLOYER CAN DO WHEN AN EMPLOYEE – OR FORMER EMPLOYEE – VIOLATES HIS NON-COMPETE

AND,

- THE MOST POWERFUL WAY TO DEFEAT A NON-COMPETE AGREEMENT IN NEW YORK

JONATHAN M. COOPER, ESQ.

TO COMPETE OR NOT TO COMPETE

The Definitive Insider's Guide to Non-Compete Agreements in New York

TO COMPETE OR NOT TO COMPETE

The Definitive Insider's Guide to Non-Compete Agreements in New York

Jonathan M. Cooper, Esq.

WORD ASSOCIATION PUBLISHERS
www.wordassociation.com
1.800.827.7903

Printed in the United States of America.

ISBN: 978-1-59571-923-2

Designed and published by
Word Association Publishers
205 Fifth Avenue
Tarentum, Pennsylvania 15084

www.wordassociation.com

1.800.827.7903

TABLE OF CONTENTS

WHY NOT KNOWING WHETHER YOUR NON-COMPETE AGREEMENT IS ENFORCEABLE IS DANGEROUS

Over the last several years, I've been privileged to help many good, well-intentioned people who faced litigation over a non-compete agreement.

In many instances, I have witnessed people who were either untrained in a particular area of the law or made wholly unaware of certain laws made mistakes. And that is certainly understandable.

But for some reason, in the realm of non-compete agreements, the mistakes seem more frequent, and the misconceptions more pronounced than in other areas of the law. And this is true from both the vantage of employers as well as employees.

Some employers will stand idly by as their key clients and employees are poached by a disloyal former employee because they (mistakenly) believe that a court will inherently disregard the employee's non-compete agreement. Conversely, there are some (overly) bold executives or employees who mistakenly assume that their agreement is unenforceable, and proceed to render themselves (and their new employers) vulnerable to significant legal fees and potential damages.

Granted, the realm of non-compete agreements is heavily fact-driven, and perhaps more so than almost any other branch of law in New York. Nevertheless, I decided to commit to writing some of the basic principles that New York's courts use to analyze these agreements.

I hope you will find this book educational and helpful. And here's the best part: You can hopefully find answers to your question(s)

from the privacy of your office or home – *even before you consult an attorney.*

This Book Is Not Legal Advice

It is also important that you understand the limitations of this book. Although I believe this book is extremely valuable as a resource, every case is unique, and presents its own particular facts and legal issues. Consequently, please do not construe anything in this book to be legal advice about your case until we have mutually agreed in writing that I have accepted your case.

So, where to begin?

I think the best place to start is by de-bunking some myths about non-compete agreements in New York.

Fact #1: **Prosecuting or defending a lawsuit over a non-compete agreement is inherently complicated.**

New York's laws regarding breach of contract in general, and non-competes specifically, can be highly technical. Aside from the nature of the relief that each side will from the Court - which will often include a restraining order - non-compete disputes pit several competing legal doctrines against each other.

As a case in point, non-competes is one of those rare areas of the law where cases are often decided shortly after inception (and frequently based on the pleadings alone), it is essential that you plead your claims wisely.

Thus, while there are many types of cases which do not require an attorney's assistance, you would be ill-advised to try that in the non-compete realm.

Fact #2: **Since the world of business litigation in general, and breach of non-compete agreements in particular, is intricate (see Fact #1), there are relatively few "nuisance value" non-compete dispute cases that are worth pursuing in New York.**

Myth #1: **If an Employee Signs a Non-Compete Agreement and then Breaks the Agreement, the Employer Has an 'Open and Shut' Case for Breach of Contract.**

This is just plain wrong.

While New York's Court of Appeals (New York State's highest court) has upheld non-compete agreements in order to protect a former employer's legitimate business interests (this will be discussed in further detail below), they have also expressed their general disfavor for non-compete agreements.

On the other hand …

Myth #2: If the Non-Compete Agreement is Overly Broad, a New York Court Will Automatically Invalidate the Entire Agreement – Right?

Wrong.

But if you didn't know this, you shouldn't feel bad; Most of the attorneys I've come up against in non-compete cases didn't know this either.

New York's highest court has stated unequivocally that in certain cases, the court can "blue-line" the agreement to modify the overbroad clauses, and thereby bring it into line with New York law.

Before we get to these finer details of how New York's courts have dealt with non-compete and non-solicitation agreements (or, in legalese, "restrictive covenants"), however, we first need to establish the following:

WHAT IS A NON-SOLICITATION, OR NON-COMPETE PROVISION?

Employment agreements often contain non-solicitation clauses to protect the company after employees leave the business. The risk to the business is that the former employee will "steal" the employees or customers of the business when they are no longer employed by the company. Clearly, companies have a significant financial interest in preventing the employees in whom they invested time, money and effort training and educating from jumping ship. Similarly, businesses stand to lose a great deal if their former employees are able to draw customers away from the business with impunity.

To minimize these risks, many companies (wisely) require their employees and consultants to sign non-solicitation agreements restricting them from soliciting the company's employees or customers either during or after the employment ends.

In other words, non-compete agreements are designed to keep parties who are working closely together from wrongfully taking advantage of the knowledge they gain from the relationship, *breaching their fiduciary duty*.

HOW FIDUCIARY DUTY RELATES TO NON-COMPETE AGREEMENTS

There are few legal phrases that are more misunderstood or misapplied than "fiduciary duty." Albeit in a limited context, non-compete agreements clarify this concept rather nicely.

But before we can identify a fiduciary's obligations, we must first define what a fiduciary is – and what it is not. By definition, fiduciary relationships inherently require much greater trust and confidence between two parties than typically exists in arms' length transactions. Common examples of this heightened and expected degree of trust include the relationships between employee and employer, agent and principal, partners or co-venturers, and officers/ directors and the corporation.

Generally, the existence (or lack) of a fiduciary relationship is a fact-specific inquiry. That said, New York's courts have held some relationships too attenuated to be considered "fiduciary," such as the relationship between a property owner and his contractor, as well as the relationship between a condominium seller and purchaser.

Since the relationship between fiduciaries is based on heightened trust, there are correspondingly greater responsibilities to act in the best interests of that fiduciary. Stated differently, *the fiduciaries' mutual responsibilities are directly proportional to the level of expected trust between them.*

But when it comes to an employee who seeks to start a competing business, it gets very tricky.

Generally, an employee may not actively solicit or divert his employer's clients (or proprietary information) while still employed. HOWEVER, he may form a competing business *even before* leaving his job so long as he does so on his own time, in his own place and on his own nickel. And, strange as it sounds, that will **not** constitute a breach of fiduciary duty.

There is one important caveat this rule, though: *The employee cannot start a competing business if he was bound by an enforceable non-compete agreement.*