

**Defending Private D&O  
Non-Compete Disputes**

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**INTRODUCTION**

**NON-COMPETE AS "THE PLACE  
WHERE THREE ROADS MEET":**

1. Commercial Litigation
2. Employment Law
3. Intellectual Property

Overlapping claims, policies and insureds.



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**I.  
COVERAGE AND CONFLICTS**



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**COVERAGE & CONFLICTS**

**POTENTIAL DEFENDANTS:**

- ✓ The Company
- ✓ Executive Team
- ✓ New Executive / Employee



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**COVERAGE & CONFLICTS**

**POTENTIAL CLAIMS:**

- ✓ Breach of Contract
- ✓ Breach of Fiduciary Duty
- ✓ Interference/Usurpation
- ✓ Fraud
- ✓ Deceptive Trade Practices
- ✓ Infringement
- ✓ Defamation
- ✓ More!



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**COVERAGE & CONFLICTS**

- Who is covered for what
- What counsel will cover which defendant(s) for which claims
- Dealing with non-panel counsel
- Exhausting Conflicts



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**COVERAGE & CONFLICTS**

Reservations of Rights

- ✓ Notifying litigation counsel of ROR
- ✓ The tyranny of “I can’t get involved in coverage”



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**COVERAGE & CONFLICTS**

LITIGATING NON-COVERED CLAIMS

- ✓ Fraud
- ✓ Infringement
- ✓ Others



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**COVERAGE & CONFLICTS**

POLICY LIMITS &  
DEPLETING POLICIES

versus

THE COSTS OF LITIGATION &  
SCOPE OF ADVERSE VERDICTS



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**COVERAGE & CONFLICTS**

**WHO PAYS WHAT?**

**COVERAGE ISSUES &**

- ✓ SPECIAL VERDICT FORMS
- ✓ REASONED DECISIONS
- ✓ ATTORNEY FEES
- ✓ THE "PREVAILING PARTY"

  
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**II.**

**HANDLING THE CLAIM**

  
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**HANDLING THE CLAIM**

**RESPONSE TO DEMAND:**

- a. Discourage CEO from "handling it" without counsel;
- b. Encourage immediate touch-base with opposing counsel;
- c. Ex Parte TROs get granted where demand letters ignored.

  
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HANDLING THE CLAIM

CHOICE OF COUNSEL



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HANDLING THE CLAIM

STRENGTH OF CONTRACTS

- ✓ Statutory Compliance
- ✓ Blue Pencil Law
- ✓ Merger and Integration Clause
- ✓ Threatened Breach
- ✓ Liquidated Damages
- ✓ Fee Shifting



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HANDLING THE CLAIM

Injunction (“TRO”) laws of the jurisdiction:

- ✓ Bond and Security
- ✓ Threatened versus Actual Infringement
- ✓ Strength of the Agreement



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**HANDLING THE CLAIM**

Competition Analysis:

- ✓ Are the businesses in competition with each other?
- ✓ Are there contracts between these companies?

  
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**HANDLING THE CLAIM**

Policies, Procedures at Issue:

- ✓ Response plan for such claims?
- ✓ On Notice: Now What?
  - ✓ Suspend People
  - ✓ Terminate People
  - ✓ Isolate Data/Information
  - ✓ New Contracts, renewals, opportunities

  
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**HANDLING THE CLAIM**

Interview new employee immediately

  
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**HANDLING THE CLAIM**

Contextual Analysis:

- ✓ Arising from a RIF, termination, or voluntary quit?
- ✓ Employment History – Job Description
- ✓ Bonus/Compensation Analysis

  
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**HANDLING THE CLAIM**

State Law Analysis Considerations

- ✓ Non-Compete Statute
- ✓ Fiduciary Duty Analysis
- ✓ Uniform Trade Secrets Act
- ✓ Fiduciary Duty Analysis & Damages

  
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**HANDLING THE CLAIM**

Trade Secret Considerations:

- ✓ Who can access what information
- ✓ Putting trade secrets “in play” for discovery

  
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**HANDLING THE CLAIM**

Trade Secret Considerations:

- ✓ Forensic evaluation of servers, computers, and memory devices
- ✓ *Everything and Nothing* is a trade secret in the litigants' eyes

  
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**HANDLING THE CLAIM**

- ✓ Remain vigilant of conflicts arising through the course of discovery
- ✓ Remain aware of costs going forward
- ✓ Negotiating a “separate peace”

  
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**QUESTIONS**

  
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